



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

Protection of the rights of the child in the context of migration

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Information provided by the Australian Human Rights Commission to the OHCHR study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration

April 2010

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1 Introduction

1. The Australian Human Rights Commission (the Commission) is Australia's national human rights institution, established by the *Australian Human Rights Commission Act 1986* (Cth).
2. The Commission provides the enclosed information to the Office of the United Nations High Commissioner for Human Rights (OHCHR) in order to contribute to its study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration.
3. The Commission provides this information in response to the request received from the OHCHR in February 2010 for relevant information for the preparation of this study, including on:
 - Challenges in the implementation of the international framework for the protection of the rights of the child in the context of migration, including in relation to:
 - The situation of separated and unaccompanied migrant children.
 - Access to social services (ensuring, inter alia, protection of the right to health, housing, education, water and access to sanitation), including for migrant children in an irregular situation.
 - Legislative framework and practice in the context of detention and repatriation, including mechanisms to ensure protection from *refoulement* and to ensure family unity.
 - Criminalisation of irregular migration.
 - Access to the right to identity, including birth registration.
 - Protection of children left behind in countries of origin.
 - Examples of best practice in the implementation of the international framework for the protection of the rights of the child in the context of migration, with particular regard to:
 - National legislation, policies and practice, including mechanisms to assess and address the challenges in the implementation of the international framework for the protection of the rights of the child in the context of migration.
 - Joint efforts and strategies available at the bilateral, regional and international levels to assess and address challenges in the implementation of the international framework for the protection of the rights of the child in the context of migration.
 - The work of national human rights institutions and other relevant stakeholders.

2 Summary

4. The Commission welcomes the opportunity to contribute information for the preparation of this study. The Commission's comments focus on the situation in Australia, and are generally limited to those specific areas on which the Commission has undertaken direct work.
5. The Commission's comments focus on the following areas:
 - the legislative framework and practice relating to the immigration detention of children (accompanied and unaccompanied)
 - mechanisms to ensure protection from *refoulement*
 - human trafficking.
6. Where relevant, the Commission's comments raise concerns about key challenges, and refer to examples of positive practices or developments. References are also provided to relevant work carried out by the Commission, as Australia's national human rights institution.

3 Immigration detention of children

3.1 Background: Mandatory immigration detention

7. Australia has a legislative system of mandatory immigration detention. Under the *Migration Act 1958* (Cth), it is mandatory for any non-citizen in Australia (other than in an excised offshore place¹) without a valid visa to be detained.² These persons, called 'unlawful non-citizens' under the Migration Act, may only be released from detention if they are granted a visa or removed from Australia.³
8. The Commission has long opposed Australia's system of mandatory immigration detention because it leads to breaches of Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR) to ensure that no one is arbitrarily detained, and to breaches of Australia's obligations under the *Convention on the Rights of the Child* (CRC).⁴

¹ In 2001, the *Migration Act 1958* (Cth) was amended to designate a number of islands as 'excised offshore places'. A person who becomes an unlawful non-citizen (a non-citizen without a valid visa) by entering Australia at such a place is referred to as an 'offshore entry person'. The purpose of these amendments was to bar offshore entry persons from being able to apply for a visa, unless the Minister for Immigration and Citizenship determines that it is in the public interest to allow them to do so. See *Migration Act 1958* (Cth), ss 5(1), 46A; *Migration Amendment (Excision from the Migration Zone) Act 2001* (Cth); *Migration Amendment Regulations 2005 (No. 6)* (Cth), reg 5.15C.

² *Migration Act 1958* (Cth), ss 189 (1), 189(2).

³ *Migration Act 1958* (Cth), s 196(1).

⁴ *International Covenant on Civil and Political Rights* (ICCPR) (1966), art 9(1), at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 14 April 2010); *Convention on the Rights of the Child* (CRC) (1989), at <http://www2.ohchr.org/english/law/crc.htm> (viewed 14 April 2010).

9. While detention *may* be acceptable for a short period in order to conduct security, identity and health checks, currently Australian law requires detention for unspecified purposes, for an unlimited period of time, and in the absence of judicial review of the need to detain an individual.
10. Because of its significant concerns about the mandatory detention system and its impacts on the human rights of detained persons (in particular children), the Commission has undertaken ongoing work in this area for more than a decade. This work has included:
 - investigating complaints made by individuals regarding alleged breaches of their human rights while in immigration detention⁵
 - conducting two national inquiries, namely *A last resort? National Inquiry into Children in Immigration Detention* (2004)⁶ and *Those who've come across the seas: Detention of unauthorised arrivals* (1998)⁷
 - conducting inspections of immigration detention facilities and issuing public reports of those inspections⁸
 - examining proposed legislation and making submissions to parliamentary inquiries⁹
 - reviewing and providing comments on Australian Government policies related to immigration, when requested to do so
 - developing the *Immigration Detention Guidelines*, based on relevant international standards relating to the treatment and conditions of detained persons.¹⁰
11. Further information about the Commission's work in this area can be found on the Commission's immigration, asylum seekers and refugees [web page](#).¹¹

⁵ For information on the Commission's human rights complaints handling functions, see http://humanrights.gov.au/complaints_information/HREOCA_breaches.html. For Commission reports relating to individual complaints of breaches of human rights in immigration detention, see <http://humanrights.gov.au/legal/humanrightsreports/index.html>.

⁶ Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004). At http://humanrights.gov.au/human_rights/children_detention_report/index.html (viewed 14 March 2010).

⁷ Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998). At http://humanrights.gov.au/human_rights/immigration/seas.html (viewed 14 March 2010).

⁸ Information about the Commission's inspections and reports of the inspections are available at http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3.

⁹ The Commission's submissions on immigration issues are available at file:///files/share/web_drafts/HreocWeb/legal/submissions/index.html#refugees.

¹⁰ Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (2000). At http://humanrights.gov.au/human_rights/immigration/idc_guidelines2000.html.

¹¹ See http://www.humanrights.gov.au/human_rights/immigration/index.html.

3.2 A last resort? National Inquiry into Children in Immigration Detention

12. Prior to 2005, hundreds of children and their family members were detained in immigration detention centres in Australia, many of which were located in remote locations. These numbers reached a peak in 1999-2000 when as many as 1923 children were detained. Most of these children had arrived by boat with their family members and were seeking asylum. Some of the children had arrived unaccompanied.
13. The Commission was gravely concerned about the human rights of these children. In 2002 and 2003, the Commission undertook a national inquiry into the situation of children in immigration detention. This culminated in the 2004 release of *A last resort?*, the report of the National Inquiry into Children in Immigration Detention.¹²
14. The inquiry found that Australia's immigration detention system was fundamentally inconsistent with the CRC.¹³ In particular, the system failed to ensure that:
 - detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review¹⁴
 - the best interests of the child are a primary consideration in all actions concerning children¹⁵
 - children are treated with humanity and respect for their inherent dignity¹⁶
 - children seeking asylum receive appropriate assistance to enjoy, to the maximum extent possible, their right to development and their right to live in an environment which fosters the health, self-respect and dignity of children in order to ensure recovery from past torture and trauma.¹⁷
15. In addition, the inquiry found that:
 - children in immigration detention for long periods of time were at high risk of serious mental harm
 - the failure of the Australian Government (of the time) to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents

¹² A last resort, note 6.

¹³ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations, Major Finding 1.

¹⁴ CRC, note 4, art 37(b), 37(d).

¹⁵ CRC, note 4, art 3(1).

¹⁶ CRC, note 4, art 37(c).

¹⁷ CRC, note 4, art 22(1), 6(2), 39.

amounted to cruel, inhumane and degrading treatment of those children.¹⁸

16. Further, the inquiry found that, at various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the following rights:¹⁹
- the right to be protected from all forms of physical or mental violence²⁰
 - the right to enjoy the highest attainable standard of physical and mental health²¹
 - the right of children with disabilities to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community²²
 - the right to an appropriate education on the basis of equal opportunity²³
 - the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC.²⁴
17. In *A last resort?*, the Commission recommended that children in immigration detention centres and immigration residential housing projects should be released with their parents as soon as possible through transfer into the community (home-based detention); the exercise of Ministerial discretion to grant humanitarian visas; or the grant of bridging visas.²⁵
18. Further, the Commission recommended that Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the CRC. In particular, the new laws should incorporate the following minimum features:
- There should be a presumption against the detention of children for immigration purposes.
 - A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example, for the purposes of health, identity or security checks).
 - There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.

¹⁸ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations, Major Finding 2.

¹⁹ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations, Major Finding 3.

²⁰ CRC, note 4, art 19(1).

²¹ CRC, note 4, art 24(1).

²² CRC, note 4, art 23(1).

²³ CRC, note 4, art 28(1).

²⁴ CRC, note 4, art 20(1).

²⁵ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations, recommendation 1.

- All courts and independent tribunals should be guided by the following principles:
 - detention of children must be a measure of last resort and for the shortest appropriate period of time
 - the best interests of the child must be a primary consideration
 - the preservation of family unity
 - special protection and assistance for unaccompanied children.
- Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.²⁶

19. In addition, the Commission recommended that an independent guardian should be appointed for unaccompanied children and they should receive appropriate support; minimum standards of treatment for children in immigration detention should be codified in legislation; and there should be a review of the impact on children of legislation that created 'excised offshore places' and the 'Pacific Solution'.²⁷

3.3 Positive changes since *A last resort*

20. Since the release of *A last resort?*, the report of the National Inquiry into Children in Immigration Detention, there have been significant improvements in relation to the treatment of children in Australia's immigration detention system.
21. In 2005, most children and their family members were released from Australia's immigration detention centres, and the Migration Act was amended to affirm 'as a principle' that a minor should only be detained as a measure of last resort.²⁸
22. Also in 2005, the Minister for Immigration was granted the power to issue a 'residence determination' permitting an immigration detainee to live at a specified residence in the community instead of in an immigration detention facility.²⁹ This is known as 'community detention'. People in community detention are still immigration detainees in a legal sense, but they are not under physical supervision. They are generally free to come and go, subject to meeting conditions such as living at a specified address, reporting to the

²⁶ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations, recommendation 2.

²⁷ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations, recommendations 3, 4, 5.

²⁸ *Migration Act 1958* (Cth), s4AA.

²⁹ *Migration Act 1958* (Cth), s 197AB.

Department of Immigration and Citizenship (DIAC) on a regular basis, and refraining from engaging in paid work or a formal course of study.³⁰

23. Since these changes, children and their family members have generally not been detained in Australia's immigration detention centres.³¹ The current Australian Government has made a firm policy commitment that children, and where possible, their families will not be detained in an immigration detention centre. Having witnessed the serious impacts on children and their families of prolonged detention in immigration detention centres, the Commission has welcomed these developments.
24. Now, some children are either issued with a bridging visa to reside in the community while their immigration status is resolved, or they are placed in community detention. In the Commission's view, children should be issued with bridging visas. However, in the event that a child is taken into immigration detention, the Commission believes that community detention is the most appropriate arrangement. It is highly preferable to being held in an immigration detention centre.
25. The Commission has welcomed other positive reforms since the current Australian Government came into power in late 2007. In early 2008, the Commission commended the government for ending the so-called 'Pacific Solution' by closing the offshore immigration detention centres on Nauru and Manus Island. Since then, the government has initiated further reforms, in particular the July 2008 announcement of 'New Directions' for Australia's immigration detention system.³²
26. The New Directions include seven key immigration values, as follows:
 1. Mandatory detention is an essential component of strong border control.
 2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
 - a. all unauthorised arrivals, for management of health, identity and security risks to the community
 - b. unlawful non-citizens who present unacceptable risks to the community and

³⁰ For further information, see Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2009), section 12.3. At http://humanrights.gov.au/human_rights/immigration/idc2008.html (viewed 14 April 2010).

³¹ Note, however, that some children and their family members are detained in other types of immigration detention facilities, as discussed in section 3.4 of this paper.

³² C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 14 April 2010).

- c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
 3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
 4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
 5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
 6. People in detention will be treated fairly and reasonably within the law.
 7. Conditions of detention will ensure the inherent dignity of the human person.
27. The Commission welcomed the statement of values 3 to 7, and expressed the need for those values to be translated into policy, practice and legislative change as soon as possible. Since then, a range of policy changes have been made to begin implementation of the New Directions, including the values. However, there remains significant progress to be made.
28. In particular, the values have not yet been implemented in legislation. In June 2009 the Australian Government introduced the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) into Parliament. The stated purpose of the Bill was to 'give legislative effect to the Government's New Directions in Detention policy'.³³
29. The Commission welcomed the Bill as a positive step, but expressed concern that the Bill did not go far enough towards implementing the New Directions, including some of the values.³⁴ In particular, the Commission expressed concerns that the Bill did not include sufficient protections to ensure that:
- where possible, children's family members will not be held in immigration detention centres
 - children will only be detained in immigration detention facilities (other than immigration detention centres, where they should not be held at all) as a measure of last resort and for the shortest appropriate period of time.³⁵
30. As of April 2010, the Bill had not been passed.

³³ Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, p 4264 (The Hon Penny Wong MP, Minister for Climate Change and Water).

³⁴ Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Migration Amendment (Immigration Detention Reform) Bill 2009* (2009). At http://humanrights.gov.au/legal/submissions/2009/20090731_migration.html (viewed 14 April 2010).

³⁵ As above, section 7.

3.4 Ongoing challenges

31. Despite positive reforms over the past five years, the Commission has significant ongoing concerns about the treatment of children under Australia's immigration detention system. The Commission's key concerns are summarised briefly below. The Commission's concerns are set out in further detail in recent reports and submissions.³⁶
- (a) *Detention of children in facilities on mainland Australia*
32. As noted above, children are no longer held in Australia's high security immigration detention centres. However, some children are held in other types of immigration detention facilities. These include immigration residential housing in Sydney and Perth, and immigration transit accommodation in Melbourne and Brisbane.³⁷
33. Generally, these facilities provide a much higher standard of accommodation than the immigration detention centres. They are much newer and have been purpose-built. They also have less intrusive security measures. The atmosphere tends to be less tense than in the immigration detention centres, and detainees are provided with a greater degree of privacy and autonomy.
34. However, immigration residential housing and immigration transit accommodation are still closed immigration detention facilities. People in these facilities remain in immigration detention; they are not free to come and go.
35. As of 12 March 2010, there were 44 children in immigration transit accommodation and eight children in immigration residential housing on the Australian mainland.³⁸
36. The Commission has significant concerns about the ongoing practice of holding families with children and unaccompanied minors in these types of immigration detention facilities.³⁹ While the physical environment is highly preferable to the immigration detention centres, the effects of depriving children of their liberty can nevertheless be similar.

³⁶ See, for example Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009), at [\\files.sharepoint.com/Files/Files.aspx?lib=HreocWeb\human_rights\immigration\dc2009_xmas_island.html](http://files.sharepoint.com/Files/Files.aspx?lib=HreocWeb%2Fhuman_rights%2Fimmigration%2Fdc2009_xmas_island.html) (viewed 14 April 2010); Australian Human Rights Commission, *2008 Immigration detention report*, note 30; Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Migration Amendment (Immigration Detention Reform) Bill 2009*, note 34.

³⁷ For further details, see Australian Human Rights Commission, *2008 Immigration detention report*, note 30, section 12.

³⁸ Department of Immigration and Citizenship, Community and Detention Services Division, *Immigration Detention Statistics Summary* (12 March 2010). At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 14 April 2010).

³⁹ See further Australian Human Rights Commission, *2008 Immigration detention report*, note 30, section 14.3.

37. In the Commission's view, families with children and unaccompanied minors should not be held in these detention facilities for anything other than the briefest of periods. Rather, they should be issued with bridging visas to reside in the community while their immigration status is resolved, or placed in community detention.

(b) *Detention of children on Christmas Island*

38. The Commission is particularly concerned about the detention of child asylum seekers on Christmas Island, a remote territory of Australia located in the Indian Ocean.

39. In 2001, the Migration Act was amended to designate a number of islands, including Christmas Island, as 'excised offshore places'.⁴⁰ A person who becomes an unlawful non-citizen (a non-citizen without a valid visa) by entering Australia at such a place is referred to as an 'offshore entry person'.⁴¹

40. The purpose of these amendments was to bar offshore entry persons from being able to apply for a visa, unless the Minister for Immigration and Citizenship (the Minister) determines that it is in the public interest to allow them to do so.⁴² The Migration Act also purports to bar them from taking certain legal proceedings in the Australian courts, including in relation to the lawfulness of their detention.⁴³

41. Under the Migration Act, unlawful non-citizens in excised offshore places *may* be detained.⁴⁴ The current policy of the Australian Government is that all 'unauthorised boat arrivals' in excised offshore places will be subject to mandatory detention on Christmas Island. This includes families with children and unaccompanied minors.

42. As of 12 March 2010, there were 1870 people in immigration detention on Christmas Island, including 155 children.⁴⁵

43. Most unaccompanied minors and families with children in immigration detention on Christmas Island are held in a detention facility called the 'construction camp'.⁴⁶ The construction camp is not included among the facilities classified by DIAC as immigration detention centres. It has a much

⁴⁰ *Migration Act 1958* (Cth), s 5(1). The amendments were made pursuant to the *Migration Amendment (Excision from the Migration Zone) Act 2001* (Cth). Further islands were excised by the *Migration Amendment Regulations 2005 (No. 6)* (Cth), reg 5.15C.

⁴¹ *Migration Act 1958* (Cth), s 5(1).

⁴² *Migration Act 1958* (Cth), s 46A. See section 4.1 of this paper for further discussion of the Minister's discretionary power under this provision.

⁴³ *Migration Act 1958* (Cth), s 494AA(1)(c).

⁴⁴ *Migration Act 1958* (Cth), ss 189(3), 189(4).

⁴⁵ Department of Immigration and Citizenship, Community and Detention Services Division, *Immigration Detention Statistics Summary* (12 March 2010). At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 14 April 2010).

⁴⁶ The facility is informally referred to as the 'construction camp' because it was formerly used as accommodation for construction workers who were temporarily based on Christmas Island.

lower level of security than an immigration detention centre, which the Commission welcomes. However, people detained in the camp are not free to come and go; they are only permitted to leave under escort. Thus, while they are in a low security facility, their liberty is severely restricted.⁴⁷

44. In the Commission's view, the detention of families with children and unaccompanied minors in a closed detention facility on Christmas Island represents a concerning regression from the 2005 changes to the Migration Act which affirmed the principle that children should only be detained as a measure of last resort.⁴⁸
45. The Commission has recommended that the Australian Government cease the practice of holding people in immigration detention on Christmas Island, and repeal the provisions of the Migration Act relating to excised offshore places.⁴⁹

(c) *The need for further legal reforms to protect children's rights*

46. The Commission remains concerned that Australia's laws do not provide adequate protection for children subject to the immigration detention system. In particular:
 - the Migration Act provides insufficient protection against breaches of a child's right to be detained only as a measure of last resort and for the shortest appropriate period of time
 - child detainees are not able to challenge their detention in a court or other independent authority
 - there are no legislated minimum standards for conditions and treatment of children in immigration detention
 - there is a conflict of interest created by having the Minister for Immigration act as the legal guardian of unaccompanied minors in immigration detention.⁵⁰
47. The Commission continues to encourage the Australian Government to address these concerns by implementing the outstanding recommendations of *A last resort?*⁵¹

⁴⁷ See further Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009), section 11.3. At \\fileshare\web_drafts\HreocWeb\human_rights\immigration\dc2009_xmas_island.html (viewed 14 April 2010).

⁴⁸ *Migration Act 1958* (Cth), s4AA.

⁴⁹ See Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 47, section 3; Australian Human Rights Commission, *2008 Immigration detention report*, note 30, section 13.

⁵⁰ See further Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 47, section 11; Australian Human Rights Commission, *2008 Immigration detention report*, note 30, section 14.

3.5 New developments

48. On 9 April 2010, the Australian Government announced that it was suspending processing of new refugee claims by asylum seekers from Sri Lanka and Afghanistan.⁵² The suspension came into effect on the same day. It will impact any asylum seeker from Sri Lanka or Afghanistan who is intercepted at sea or who arrives in an excised offshore place (including Christmas Island) on or after that date, and any asylum seeker from Sri Lanka or Afghanistan who applies for refugee status on the Australian mainland on or after that date.⁵³
49. Asylum seekers from Sri Lanka or Afghanistan who arrive by boat on or after 9 April 2010 will be subjected to mandatory immigration detention for the duration of the suspension. This includes unaccompanied minors and families with children.
50. The Australian Government has indicated that it will review the suspension in three months time in the case of asylum seekers from Sri Lanka, and in six months time in the case of asylum seekers from Afghanistan. However, there is no guarantee that the suspension will be lifted at those reviews.
51. The Commission has expressed serious concerns about the suspension decision.⁵⁴ In particular, the Commission is concerned that it could lead to the prolonged or indefinite detention of asylum seekers. This is a particular concern in the case of unaccompanied minors and families with children.
52. The Commission will monitor this situation closely and will encourage the Australian Government to lift the suspension.

4 Mechanisms to ensure protection from *refoulement*

4.1 Non-refoulement obligations under the Refugee Convention

53. The Australian Government seeks to implement its *non-refoulement* obligations under the Refugee Convention through a legislated refugee status

⁵¹ A last resort, note 6, Executive Summary, Part A: Major Findings and Recommendations. The major recommendations made by the Commission in A last resort are summarised in section 3.2 of this paper.

⁵² Minister for Immigration and Citizenship, 'Changes to Australia's Immigration Processing System' (Joint Media Release with Minister for Foreign Affairs and Minister for Home Affairs, 9 April 2010). At <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm> (viewed 15 April 2010).

⁵³ According to information provided by the Department of Immigration and Citizenship on 12 April 2010, the suspension will be applied as follows. In the case of asylum seekers from Sri Lanka or Afghanistan who are intercepted at sea or who arrive in an excised offshore place on or after 9 April 2010, all processing relating to their asylum claims will be suspended. In the case of asylum seekers from Sri Lanka or Afghanistan who apply for refugee status on the Australian mainland on or after 9 April 2010, the processing of their applications will be accorded the lowest processing priority.

⁵⁴ Australian Human Rights Commission, 'Suspension of processing asylum seekers raises serious concerns' (Media Release, 9 April 2010). At http://humanrights.gov.au/about/media/media_releases/2010/29_10.html (viewed 15 April 2010).

determination system under the Migration Act. Under this system, asylum seekers who are found to be owed Australia's protection under the Refugee Convention, and who satisfy health, character and security requirements, are granted a permanent protection visa.⁵⁵

54. This system can be accessed by asylum seekers who arrive on the Australian mainland or in any other non-excised part of Australia.⁵⁶ These asylum seekers:
- are able to submit a valid application for a protection visa⁵⁷
 - have access to independent merits review by the Refugee Review Tribunal (RRT), or in some circumstances the Administrative Appeals Tribunal (AAT), if they are refused a protection visa⁵⁸
 - have limited access to judicial review by the Federal Magistrates Court and the Federal Court of decisions made by the RRT or the AAT.⁵⁹
55. However, asylum seekers who arrive in excised offshore places are barred from accessing the refugee status determination system under the Migration Act.⁶⁰ Instead, they go through a non-statutory refugee status assessment process. This is an administrative process governed by policy guidelines.⁶¹
56. As offshore entry persons, these asylum seekers:
- are barred by the Migration Act from submitting a valid application for any visa, including a protection visa – this only becomes possible if the Minister exercises his or her personal discretion to allow an application to be submitted⁶²
 - do not have access to independent merits review by the RRT or the AAT – instead they have access to an Independent Reviewer who conducts a review of the initial decision and makes a non-binding recommendation to the Minister

⁵⁵ For further information, see Department of Immigration and Citizenship, Visas, Immigration and Refugees web page at http://www.immi.gov.au/refugee/seeking_protection.htm (viewed 15 April 2010).

⁵⁶ In 2001, the Migration Act was amended to designate a number of islands as 'excised offshore places'. See *Migration Act 1958* (Cth), s 5(1).

⁵⁷ *Migration Act 1958* (Cth), s 46.

⁵⁸ *Migration Act 1958* (Cth), ss 411(1)(c), 500(1)(b), 500(1)(c), 501(1).

⁵⁹ *Migration Act 1958* (Cth), ss 476, 476A. The High Court has held that the privative clause in section 474(1) of the Migration Act does not preclude judicial review of decisions affected by jurisdictional error: *Plaintiff S157/2002 v Godwin* (2003) 211 CLR 476 at 506.

⁶⁰ As discussed in section 3.4(b) of this paper, the Migration Act was amended in 2001 to designate a number of islands as excised offshore places. A person who becomes an unlawful non-citizen by entering Australia at such a place is referred to as an offshore entry person. The purpose of these amendments was to bar offshore entry persons from being able to apply for a visa (including a protection visa) unless the Minister determines that it is in the public interest to allow them to do so. See *Migration Act 1958* (Cth), ss 5(1), 46A.

⁶¹ See further Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 47, section 7.

⁶² *Migration Act 1958* (Cth), ss 46A(1), 46A(2).

- have very limited access, if any, to judicial review of a decision made by a DIAC officer or an Independent Reviewer that the person is not a refugee.⁶³
57. The Commission has raised significant concerns about processing the refugee claims of asylum seekers who arrive in excised offshore places (including unaccompanied minors and families with children) through a separate non-statutory process.⁶⁴
58. The current Australian Government has made significant improvements to this process, including by providing asylum seekers on Christmas Island with access to publicly funded migration advice under the Immigration Advice and Application Assistance Scheme, and access to independent review of negative refugee status assessment decisions.
59. The Commission has welcomed these reforms, and considers them indispensable. However, even with these reforms, the Commission has significant concerns about the non-statutory refugee status assessment process. These primarily relate to the lack of transparent and enforceable procedures for decision-making, and the failure to provide sufficient legal safeguards for asylum seekers.⁶⁵
60. In particular, because asylum seekers who arrive in excised offshore places are barred from applying for a protection visa, they must rely on the Minister exercising his or her personal discretion to lift that bar.⁶⁶ This discretion is non-compellable and non-reviewable. Even if a DIAC officer or an Independent Reviewer assesses that a person is a refugee, the Minister is under no obligation to consider exercising their discretion to allow the person to apply for a protection visa.
61. In November 2009 the Commission was advised that the current Minister had, until that date, exercised his discretion to lift the bar in accordance with the recommendations made to him by DIAC officers and Independent Reviewers. The Commission welcomes this.
62. However, in the Commission's view, a system based on the exercise of a non-compellable and non-reviewable Ministerial discretion does not provide

⁶³ No provision is made in the non-statutory refugee status assessment process for judicial review of a decision made by a DIAC officer or an Independent Reviewer. The High Court's original jurisdiction in section 75(v) of the Australian Constitution, however, remains available to compel compliance by officers of the Commonwealth with their statutory or common law duties. An asylum seeker who arrived in an excised offshore place may seek a remedy of mandamus, prohibition or injunction in the High Court pursuant to section 75(v) of the Constitution, but would have to establish that the Commonwealth officer had a relevant statutory or common law duty.

⁶⁴ See, for example Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 47, Part B; Australian Human Rights Commission, *2008 Immigration detention report*, note 30, section 13.

⁶⁵ The Commission's concerns are set out in its 2009 Christmas Island report, note 47, section 8.2.

⁶⁶ *Migration Act 1958* (Cth), s 46A.

adequate legal safeguards for asylum seekers, including those who are children.

63. The Commission has raised concerns that the lack of legal safeguards in the non-statutory refugee status assessment process undermines Australia's *non-refoulement* obligations under the Refugee Convention by increasing the risk of a refugee being returned to a place where their life or freedom would be threatened.⁶⁷
64. The Commission has recommended that the Australian Government repeal the provisions of the Migration Act relating to excised offshore places and abandon the policy of processing some asylum claims through a non-statutory refugee status assessment process. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.⁶⁸

4.2 Other non-refoulement obligations

65. The Commission has raised concerns in parliamentary submissions and consultations with Australian Government representatives regarding the lack of adequate legal protections for people who may not fall within the definition of 'refugee' under the Refugee Convention, but who nonetheless must be protected from *refoulement* under the ICCPR, the CRC or the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).⁶⁹
66. Australia does not have a legislated system of protection for such people, some of whom may be children. Instead, their claims can only be considered after they have been rejected at each stage of the refugee status determination process. They can then request that the Minister exercise his or her power to grant them a visa on public interest grounds.⁷⁰
67. The Minister may consider Australia's *non-refoulement* obligations under international treaties in making decisions based on such requests. However, the Minister is not required to consider or decide upon these requests – the Minister's power is discretionary and non-compellable.⁷¹ In addition, the Minister is not obliged to give reasons for his or her decisions and the

⁶⁷ See, for example Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 47, Part B.

⁶⁸ See, for example Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 47, sections 3, 8.

⁶⁹ See, for example Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), paras 69-75, at http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html (viewed 15 April 2010); Human Rights and Equal Opportunity Commission, *Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters* (2003), at http://www.hreoc.gov.au/legal/submissions/migration_matters.html (viewed 15 April 2010).

⁷⁰ *Migration Act 1958* (Cth), s 417(1).

⁷¹ *Migration Act 1958* (Cth), s 417(7).

decisions are not reviewable. This can result in decisions lacking transparency, accountability and consistency.

68. The Commission has previously recommended that a legislated system of complementary protection be adopted by the Australian Government in order to implement Australia's *non-refoulement* obligations under the ICCPR, CRC and CAT.⁷²
69. In September 2009, the Australian Government introduced into Parliament the Migration Amendment (Complementary Protection) Bill 2009 (Cth). The Commission welcomed the introduction of the Bill. If passed, it would enact a complementary protection system in the Migration Act, under which a person entitled to complementary protection would be granted a visa with the same conditions and entitlements as visas granted to refugees.
70. However, the Commission expressed some concerns about the scope of the statutory complementary protection system proposed by the Bill, including that:
- it will not apply to asylum seekers who arrive in excised offshore places
 - it will not offer adequate protection for people who are stateless
 - it should be broadened to provide that Australia has protection obligations where a child would suffer serious harm because of a breach of his or her rights under the CRC
 - it should be broadened to provide that Australia has protection obligations where a non-citizen would suffer serious harm because of a breach of his or her rights under the ICCPR.⁷³
71. As of April 2010, the Bill had not been passed.

5 Human trafficking

72. There is only limited anecdotal evidence of trafficking of children in Australia. As such, it is not possible to estimate the extent of child trafficking in Australia.
73. The Commission has worked in the past to promote the better protection of all trafficking victims, but to date has not conducted specific research or policy work on the issue of child trafficking.
74. The sub-sections below provide a brief summary of:

⁷² See, for example Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, note 69, paras 69-75.

⁷³ Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Complementary Protection) Bill 2009* (2009). At http://www.humanrights.gov.au/legal/submissions/2009/20090930_migration_complementary.html (viewed 15 April 2010).

- positive developments in Australia’s implementation of the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Crime* (Trafficking Protocol)
- challenges in implementing the Trafficking Protocol in Australia
- the Commission’s work on human trafficking issues.

75. The Commission’s comments below highlight areas of concern particularly relevant for the protection of the human rights of children.

5.1 Australia’s criminal law

76. The *Criminal Code 1995* (Cth) (the Criminal Code) contains Australia’s trafficking in persons offences.

77. As set out below, section 271.4 of the Criminal Code provides for the offence of trafficking in children:

271.4 Offence of trafficking in children

(1) A person (the first person) commits an offence of trafficking in children if:

- a. the first person organises or facilitates the entry or proposed entry into Australia, or the receipt in Australia, of another person; and
- b. the other person is under the age of 18; and
- c. in organising or facilitating that entry or proposed entry, or that receipt, the first person:
 - i. intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt; or
 - ii. is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt.

Penalty: Imprisonment for 25 years.

(2) A person (the first person) commits an offence of trafficking in children if:

- a. the first person organises or facilitates the exit or proposed exit from Australia of another person; and
- b. the other person is under the age of 18; and
- c. in organising or facilitating that exit or proposed exit, the first person:
 - i. intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit; or
 - ii. is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit.

Penalty: Imprisonment for 25 years.

(3) In this section:

"sexual service" means the use or display of the body of the person providing the service for the sexual gratification of others.

78. Consistent with the definition of 'trafficking' in Article 3 of the Trafficking Protocol, the movement of persons under the age of 18 for the purpose of exploitation is considered 'trafficking' even if the traffickers do not use force, coercion, or other means to achieve the consent of the child to go with the traffickers.
79. The Commission is concerned that reported case law on trafficking in Australia is still very limited.⁷⁴ The Commission further notes that a considerable number of cases have been dismissed due to lack of evidence or have been appealed to higher courts.⁷⁵
80. It is widely accepted that in Australia the known cases of human trafficking for sexual purposes have not been straight forward and do not necessarily conform to traditional stereotypes.⁷⁶ The Commission intervened in the High Court case of *The Queen v Tang* to assist the court in interpreting the meaning of 'slavery' in the Criminal Code to reflect the reality of trafficking in contemporary Australia.⁷⁷
81. In its intervention, the Commission submitted that the definition of 'slavery' in the Criminal Code should be read with reference to the relevant international covenants, namely the 1926 Slavery Convention and the Supplementary Convention.⁷⁸
82. The Commission has also called for a full review of Australian trafficking laws in 2010. This would mark five years after the introduction of the trafficking in persons offences into Australia's Criminal Code and Australia's ratification of the Trafficking Protocol. The Commission is concerned that Australia's trafficking in persons offences may not comprehensively reflect the full suite of Australia's international legal obligations in this area.⁷⁹ For example,

⁷⁴ A Scholenhardt, G Beirne and T Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009), 32(1) *UNSW Law Journal*, 27.

⁷⁵ A Scholenhardt, G Beirne and T Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009), 32(1) *UNSW Law Journal*, 27, 39.

⁷⁶ See Department of Families, Housing, Community Services and Indigenous Affairs, 'Trafficking of women for sexual purposes: Research and Public Policy Series - No. 95' (8 April 2009) at http://www.fahcsia.gov.au/sa/women/pubs/violence/traffic_women/Pages/default.aspx (viewed 28 October 2009). See also Anne Gallagher, *Prosecuting and Adjudicating Trafficking in Persons Cases in Australia: Obstacles and Opportunities* (Speech delivered at the National Judicial College of Australia Twilight Seminar on Human Trafficking, Sydney, 15 June 2009); Fiona David, 'Trafficking for Sexual Purposes', Australian Institute of Criminology, *Research and Public Policy Series*, no 95, 39; Fiona David, 'Prosecuting trafficking in persons: known issues, emerging response', Australian Institute for Criminology, *Trends and Issues in Criminal Justice*, no.358, June 2008.

⁷⁷ *Queen v Tang* (2008) 237 CLR 1.

⁷⁸ See Australian Human Rights Commission, *Submissions in support of the Application for Leave to Intervene and Submissions on the Appeal - Commonwealth Director of Public Prosecutions v Wei Tang*, 5 May 2008. At http://www.humanrights.gov.au/legal/submissions_court/intervention/tang.html (viewed 24 November 2009).

⁷⁹ E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?* (Speech delivered at Workshop on Legal and

consideration should be given to including a separate offence of ‘forced labour’ in the Criminal Code.

83. The Commission’s view is that the trafficking in persons offences in the Criminal Code should comprehensively cover all aspects of the definition of ‘trafficking’ in the Trafficking Protocol.⁸⁰ This is because definitional differences in the Criminal Code may pose obstacles in prosecuting and judging cases that fall within the definition of ‘trafficking’ in the Trafficking Protocol, and may have the potential to limit international cooperation critical to gathering evidence to prosecute trafficking cases.⁸¹

5.2 Witness protection and information

84. The Commission is of the view that more work could be done to set out the rights of trafficking victims during court proceedings. For example, it would be useful to develop a comprehensive code on possible witness protection measures suitable for use in trafficking trials. This code could then be referred to judges hearing trafficking trials so they can be guided in the exercise of their discretion to control court proceedings. This code should have an emphasis on the special needs of children.
85. A positive development in a related context is the 2008 publication of *Guidelines for NGOs working with trafficked people* and an accompanying two-page *Know Your Rights* fact sheet,⁸² which gives trafficked people information about how they can get advice about their visa status, contact police and access support services. It has been translated into Thai, Vietnamese, Korean, Chinese and Tagalog.
86. The Commission chaired the National Roundtable on People Trafficking working group that developed the Guidelines. The working group consisted of representatives from government and non-government organisations working in the area of people trafficking.
87. Chapter 10 of the Guidelines deals with the special needs of families and children.

Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009), 72.

⁸⁰ E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia’s human trafficking laws fully reflect Australia’s international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009), 74.

⁸¹ E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia’s human trafficking laws fully reflect Australia’s international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009).

⁸² Available at http://www.hreoc.gov.au/sex_discrimination/publication/traffic_NGO/index.html (viewed 19 April 2010).

5.3 Compensation

88. The Commission is only aware of one award of compensation to a person who was trafficked to Australia.⁸³ There are significant practical obstacles that may prevent a trafficked person from making compensation claims, including obstacles to obtaining legal advice about claiming compensation, a lack of visa options to stay in Australia to pursue compensation claims, and the limited legal avenues to pursue compensation claims.
89. The Commission has urged the Australian Government to explore a variety of legal options to improve the ability of people who have been trafficked into sex and non-sex industries to access compensation.⁸⁴ These could include:
- establishing a federal compensation scheme for victims of crime
 - exploring the potential of the *Proceeds of Crime Act 2002* to enable the forfeiture of an offender's assets to provide compensation to the victim of trafficking or a related offence⁸⁵ and pursuing reparations orders under section 21B of the *Crimes Act 1914* (Cth)
 - improving the access of trafficked people to information and legal advice about their existing avenues for making compensation claims, including claims for the recovery of unpaid wages.
90. The Commission notes that in early 2010, the Australian Government distributed to the people trafficking working group a discussion paper exploring possible options for a communication awareness strategy targeting people who have been trafficked into industries other than the sex industry. The strategy was aimed at empowering trafficking victims to access their legal rights under Australian laws – including workplace relations laws and occupational health and safety laws.

5.4 Reforms to the People Trafficking Visa Framework

91. Last year, the Commission welcomed changes the Australian Government made to the People Trafficking Visa Framework and the Support for Victims of People Trafficking Program, effective from 1 July 2009.
92. The most important changes to the people trafficking visa framework simplify and speed up the process for granting permanent witness protection visas to

⁸³ In May 2007, The Age newspaper reported that '[a] former child sex slave has become the first person in Australia to be compensated as a victim of sex trafficking'. The award was actually made under the *Victims Support and Rehabilitation Act 1996* (NSW) and the woman, who was trafficked to Australia in 1995 when she was 13, claimed compensation as a victim of sexual assault, not a victim of trafficking. See Natalie Craig, 'Sex slave victim wins abuse claim', The Age, 29 May 2007. For discussion of another effort to obtain compensation in a trafficking case see Julie Lewis, 'Out of the Shadows', Law Society Journal 17, February 2007.

⁸⁴ See further Elizabeth Broderick, 'Slavery in the 21st Century, A Human Rights Challenge' (Speech presented at the Australian Human Rights Commission, 16 October 2008).

⁸⁵ *Crimes Act 1914* (Cth), s 21(1)(c).

trafficked people who have contributed⁸⁶ to a criminal investigation, as well as their immediate family members.⁸⁷

93. The meaning of 'contribute' is unclear and may pose problems for child trafficking victims who are too scared or distressed to contribute to a criminal investigation, or who may not wish to testify against their parents.
94. Significantly, for the children of trafficking victims, the invitation to apply for a permanent witness protection visa will extend to immediate family members outside of Australia and not just those family members already in Australia.⁸⁸
95. The changes implement recommendations made by the Commission and non-government organisations at the 2008 National Round Table on People Trafficking, and are a positive development for the protection of children left behind in their country of origin when their parents are trafficked into Australia.
96. A remaining concern is ensuring that any children left behind in their country of origin are adequately protected until such time as they are able to apply for and obtain a permanent visa under this regime.

5.5 Support for child trafficking victims

97. As of July 2009, all victims of trafficking identified by the Australian Federal Police have access to the Australian Government's Victim Support Program for up to 90 days, regardless of whether they have contributed to the investigation and prosecution of a criminal offence.⁸⁹
98. The types of support services provided by the government through this program (via non-government contractors) to identified trafficking victims include:
 - accommodation
 - a living allowance
 - a food allowance
 - an amount of money for the purchase of essentials such as clothing and toiletries
 - access to health care, including counselling

⁸⁶ Previously, trafficking victims were only eligible for a permanent witness protection visa if they made a 'significant' contribution to a criminal investigation.

⁸⁷ See Sex Discrimination Commissioner, Elizabeth Broderick, 'For trafficked people, Government changes put human rights first' (Media release, 17 June 2009). At http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html (viewed 21 April 2010).

⁸⁸ For further information, see <http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx> (viewed 19 April 2010).

⁸⁹ For further information, see <http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx> (viewed 19 April 2010).

- access to interpreters
- access to legal services
- an individual case manager responsible for ensuring the appropriate delivery of support services to meet clients' individual needs.⁹⁰

99. Child trafficking victims who come to the attention of the Australian Federal Police may be supported by the Victim Support Program until the child can be transferred to the care of the relevant state or territory authority. It is also likely that a guardian would be appointed.⁹¹
100. A child trafficking victim who has been identified as an unaccompanied minor will generally have access to the same range of government services as all Australians – including education or language classes.⁹² The Commission is aware that there is a concern regarding whether all child trafficking victims who enter Australia without their parents are systematically identified by immigration authorities as being unaccompanied minors. If a child trafficking victim is not officially identified as an unaccompanied minor, he or she may not have access to the same level of government services.
101. One final challenge is protecting child trafficking victims who remain in Australia from their traffickers or from being re-trafficked – particularly where parents have been involved with the child's initial trafficking into Australia. The various state and territory agencies that provide guardianship, child protection and foster care support services may not be experienced in meeting these types of security needs.

⁹⁰ For further information, see <http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/peopletrafficking.aspx#3> (viewed 19 April 2010).

⁹¹ See *Guidelines for NGOs working with trafficked people*, Chapter 10. At http://www.hreoc.gov.au/sex_discrimination/publication/traffic_NGO/index.html, (viewed 19 April 2010).

⁹² For further information about services available to unaccompanied minors, see Department of Immigration and Citizenship, 'Fact Sheet 69 - Caring for Unaccompanied Minors', <http://www.immi.gov.au/media/fact-sheets/69unaccompanied.htm> (viewed 19 April 2010).