

Submissions to the Parliamentary Joint Committee on Human Rights

from

Grandmothers for Refugees

Concerning: a proposed Commonwealth Human Rights Act

**including a review of the scope and effectiveness of Australia's 2010 Human Rights Framework
and of the National Human Rights Action Plan (2012)**

Concerning a proposed Commonwealth Human Rights Act

Grandmothers for Refugees advocates for compassionate welcome and safe settlement of all people seeking asylum in Australia. Our primary focus is children. We also advocate for those subjected to the physical and psychological damage inflicted by Australia's offshore and onshore processing regime.

We thank you for the opportunity to submit to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework. Our submission considers some aspects of why the Australian Parliament should enact a federal Human Rights Act, and what elements we believe it should include in relation to asylum seekers and refugee children in particular in Australian law.

Submission 1: Grandmothers for Refugees (GfR) recognizes the need for and supports the proposal for the enactment of a Commonwealth Human Rights Act.

GfR submits that such an Act is essential, to protect human rights within Australia as outlined by Professor Gillian Triggsⁱ

Australia's Human Rights Framework 2010 and the National Human Rights Action Plan 2012 have not been sufficiently robust and compelling to ensure legislation protects the human rights of many. Examples include the failure of legislation to protect the rights of children and of refugees and asylum seekers within Australia's jurisdiction.ⁱⁱ In addition key elements of the Framework and Action Plan have not been implemented.ⁱⁱⁱ

Submission 2: GfR supports in particular the Australian Human Rights Commission's Position Paper "Free & Equal" with respect to the proposal for a Commonwealth Human Rights Act.

Australia's human rights record has been tarnished internally and internationally by the failure of successive governments over several decades to implement into our domestic laws its obligations to refugees and asylum seekers under international Conventions and Treaties to which Australia is a signatory.

Further, successive federal governments in those decades have enacted laws contrary to Australia's obligations under those Conventions and Treaties *e.g.* The Migration Act 1958 and the Maritime Powers Act 2013, to name just two.

GfR supports the legislation proposed in "Free and Equal" which extends the protection of human rights in Australia to "include individuals under Australia's 'effective control' overseas"^{iv} and includes those placed offshore when under Australia's control in order to fully implement Australia's international obligations".

GfR makes the following submissions with respect to the rights of children.

Submission 3: No refugee or asylum seeker child, who has not been charged and convicted of an offence under Australian law, shall be mandatorily detained, whether in Australia or its Territories, or in a place “under Australia’s effective control overseas”.

For the purposes of this Submission and Submission 4 below, a child is to be understood to be a person under the age of 18 years.

For the purposes of this Submission and Submissions 4 below, mandatory detention is understood to include locked and also community detention; whether offshore or onshore; in a state or territory of Australia; or in a place “under Australia’s effective control overseas” wheresoever conducted.

No child who has not been charged and convicted of an offence under Australian law, should ever be the subject of mandatory detention. It is a violation of their rights^v which are recognized under international law.

The present system of mandatory detention of refugee and asylum seeker children offends against several Conventions of the United Nations (UN), including the International Covenant on Civil & Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and also the Universal Declaration of Human Rights (UDHR). It also offends against the rights to freedom established in the Magna Carta of 1215 CE.

Submission 4: Every Child has the Right to acquire nationality. No child should be stateless.

The ICCPR clearly states that every child has the right to acquire nationality (Art 24 (3)).

Article 7 of the Convention on the Rights of the Child 1989 (CRC) states:

Article 7.

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and as far as possible, the right to know and be cared for by his or her parents.*
- 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless (emphasis added).*

Australia is a signatory to both of these Conventions.

The international legal definition of a “stateless person” is “a person who is not considered as a national by any state under the operation of its laws” (Stateless Convention 1954).

Australia’s current laws with respect to refugee and asylum seeker children (Schedule 6 of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (MMPLAA)), renders them stateless where the parent/s are themselves stateless or in effect stateless, where the parents are unable to safely return to their country of citizenship. International laws and conventions and some Australian States’ laws addressing the rights of children, proceed from the proposition that the family is the *fundamental unit of society and is entitled to protection by the state* (see UDHR Art 16 (3); Victorian Charter of Human Rights & Responsibilities, S 17).

Children born to refugees or asylum seekers who are: temporarily in Australia (from off-shore detention facilities) for medical treatment or other reason; or who are in Australia subject to visas which bestow limited rights; or who have been in off-shore detention in a facility or facilities of mandatory detention under the effective control of the Australian government are, under present Australian law, denied Australian nationality.

Currently, under Australian law, these children, who have known no other “home” than Australia, have no “rights”, other than whatever limited rights might attach to any visa that the parent/s might have. The 2023 changes for those on Temporary Protection Visas (TPV) or Safe Haven Enterprise Visas (SHEV) allow them to apply for permanent Resolution of Status (RoS) Visas giving their children the prospect of rights formerly denied them. For other visa holders their children’s rights limit their right to an Australian nationality or possibly any nationality.^{vi}

While acknowledging that there are provisions of the Australian Citizenship Act 2007 (Com) section 21 (8), that provide a pathway for a child born in Australia to non-citizen parents, for such a child (who might otherwise be deemed stateless) to claim citizenship, these provisions are obscure, not well known or accessed and can also be exceedingly expensive to access.

A condition precedent to any claim to citizenship under this provision is that the child applicant has been resident in Australia for 10 years.

In our Submission, these provisions do not satisfy the obligations under the ICCPR or the CRC.

In addition, these provisions apply *only to the child* and not to their family members who were not born in Australia.

This means that, even supposing that such a child were to seek and to obtain Australian citizenship, in the absence of such citizenship being bestowed on the other family members, the child must choose between foregoing their newly acquired Australian citizenship and stay with their family and depart from Australia, or forgo their family and stay in Australia.

This situation is no choice at all, and it is commonly referred to as “Hobson’s choice”.

Should a Hobson’s choice be forced on a child, it would be in breach of numerous Conventions to which Australia is signatory, which place the family as the basic unit of human society, and which oblige governments to provide every assistance to ensure the maintenance of the family.

Australia’s actions with respect to these children should be unequivocally condemned.

The legislative framework which implemented and which supports these breaches of our international obligations should be dismantled and a Human Rights Act, as proposed in Free and Equal^{vii} and by Professor Gillian Triggs^{viii} should be enacted.

This Human Rights Act (Com) should include provisions to ensure:

- (i) That the Act enshrines that all children born in Australia have the right to citizenship, irrespective of the status of their parents.
- (ii) That this right applies to all children whether born on mainland Australia or in one of its states or territories and also to any child born in any facility, such as an offshore mandatory detention centre^{ix}, which is under the effective control of the Australian government.

- (iii) All children, whether citizens or not, have the right to protection. Protection includes: the right of the child to live in a family; the right to remain with their parents or parent; the right to be reunited with their parents or parent in the event of forced separation, howsoever this occurred; the right to receive all appropriate assistance to support a dignified life, including provision of access to housing, basic health care (both physical and mental), education, integration into community, the right to freedom of person and movement, the right to association.

Conclusion

As the 2010 Human Rights Framework and the National Human Rights Action Plan (2012) together with the Australian Constitution and common law have not resulted in binding Federal Governments to the International Treaties on human rights to which Australia is a signatory, a Human Rights Act is essential.

ⁱ Chapter 10 “Speaking Up” MUP 2018 by former President of the Australian Human Rights Commission 2012-2017 and current Assistant Secretary-General of the United Nations High Commissioner for Protection, Professor Gillian Triggs.

ⁱⁱ 2012 National Human Rights Action Plan

- i. P5 The Action Plan is designed to mirror the following priority areas and specific groups that emerged from the Baseline Study This specifies children and young people dot point 13 and refugees and asylum seekers dot point 19.
- ii. P73 subsection 312 refers to children and 317 says they are entitled to care equal to that of the Australian community. Refugee and asylum seeker children have not been accorded this status.

ⁱⁱⁱ 2010 Australia’s Human Rights Framework

- i. P3 Framework in Action – Protect, states ‘The Government will introduce legislation requiring that each new Bill introduced into Parliament, and delegated legislation subject to disallowance, be accompanied by a statement which assesses its compatibility with the seven core UN human rights treaties to which Australia is a party’. This has not prevented legislation in contradiction to some of the seven core UN human rights treaties to which Australia is a signatory.
- ii. P5 Reaffirm column 1 states: The Government reaffirms its commitment to promoting awareness and understanding of human rights in the Australian community and respecting the seven core UN human rights treaties to which Australia is a party. As in ii (i) legislation relating to asylum seekers and refugees is in contravention of at least two of these treaties: The Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and The Convention on the Rights of the Child.

^{iv} Australian Human Rights Commission’s Position Paper “Free & Equal P23

^v Convention on the Rights of the Child (CRC)

^{vi} See: “Australian Migration Law Amendments: What this means for asylum seeker children” Human Rights Law Centre 2015 and MMPLAA.

^{vii} Australian Human Rights Commission’s Position Paper “Free & Equal

^{viii} See footnote i

^{ix} Immigration Detention Centres (IDCs), Immigration Transit Accommodation (ITAs), and Alternative Places of Detention (APODs).