



Ending Indefinite and Arbitrary Immigration Detention Bill 2021

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Voices of Influence Australia

Joint Standing Committee on Migration

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Voices of Influence Australia makes the following submission in response to the Ending Indefinite and Arbitrary Immigration Detention Bill 2021.

Voices of Influence Australia

Voices of Influence Australia is a youth-led organisation that functions to move and encourage the masses who are passive, individual consciences into active, collective voices for human rights globally.

As an organisation, Voices of Influence Australia recognise and assert the need for the voices of young people to be heard across the complexity of human rights, immigration, and asylum seeker issues – particularly in regard to ending indefinite and arbitrary detention in Australia.

Introduction

Voices of Influence Australia unequivocally supports the Ending Indefinite and Arbitrary Immigration Detention Bill 2021 in its objectives and have made recommendations and comments on selected parts in this submission. Voices of Influence Australia has outlined considerations they recommend the Joint Standing Committee on Migration ('Committee') take into account when considering the Bill, further amendments and its implementation. We hope that our recommendations provide helpful consult and greater insight to the Committee regarding ending indefinite and arbitrary immigration detention in Australia.

Summary of Recommendations

Voices of Influence Australia recommends the Australian Government commit to the following actions:



1. Voices of Influence Australia strongly recommend the Bill introduce an independent body to oversee the legal guardianship of unaccompanied children seeking asylum in Australia and afford special protection and assistance in accordance with Article 20(1) of the Convention of the Rights of the Child (CRC).
2. That the legal guardian of unaccompanied minors is resourced with the necessary expertise to ensure that the best interests of the child are safeguarded and that the child's legal, social, health, psychological, education and material needs are appropriately provided for.
3. That the current Bill ensure that agencies or individuals whose interests are in conflict with those of the child's should not be eligible for guardianship.
4. That the Bill ensures appropriate assistance to asylum-seeking children to enjoy the maximum possible recovery from past trauma in accordance with Article 39 of the Convention of the Rights of the Child.
5. That the Bill overrides Australia's current reservation to Article 37 (c) of the Convention on the Rights of the Child, which requires children to be detained separately from adults, as previously recommended in the third cycle of Australia's Universal Periodic Review.
6. That the Bill adopt the Third Optional Protocol to the Convention on the Rights of the Child Communications Procedure (Part II) in order to appropriately monitor and evaluate systemic and individual violations of the rights of children seeking asylum in Australia.
7. That Clause 12 include the protection of individual liberty, proportionality and parsimony when determining alternatives to immigration detention.
8. That Clause 12 ensure dignity and respect for other fundamental rights whilst placed in the community.
9. That Clause 12 ensure that alternatives to immigration detention never amount to deprivation of liberty or arbitrary restrictions on liberty of movement.
10. That Clause 12 ensure that alternatives to immigration detention must rely upon the least restrictive measure possible.
11. That Clause 12 extend alternative forms of detention to include the general population of those seeking asylum rather than exclusively vulnerable detainees.



12. In addition to Subclause 13(1)(b) confirming the right for non-citizens and refugees to work as specified under Article 17 of the Refugees Convention, Voices of Influence Australia request that the Bill adopt Articles 7, Article 10, Article 11, Article 21, Article 25, Article 54, Article 55, Article 64 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).
13. That the Bill comply with Australia's international human rights obligations by providing for a decision to detain a person, or a decision to continue a person's detention, to be subject to prompt review by a court.

Principle of the Rights and Best Interests of the Child (Clause 9)

Recommendation 1: Voices of Influence Australia strongly recommend the Bill introduce an independent body to oversee the legal guardianship of unaccompanied children seeking asylum in Australia and afford special protection and assistance in accordance with Article 20(1) of the Convention of the Rights of the Child (CRC).

Under the *Immigration (Guardianship of Children) Act 1946*)¹, unaccompanied children seeking asylum in Australia are appointed the Minister for Immigration as their guardian, creating a conflict of interest and leaving them without someone invested in their individual, personal affairs and therefore, without a voice to advocate for their best interests. The legal guardian duties come into conflict with the Minister's obligations under the Migration Act 1958 (Cth) to determine the visa status of non-citizens and to make a range of other decisions that affect their rights and liberties. The conflict between these legal duties and powers gives rise to a risk that Australia's approach to the guardianship of unaccompanied non-citizen children will fall short of the relevant international standards contained in Conventions to which Australia is party. Australia has obligations to ensure that unaccompanied minors seeking asylum in Australia receive special protection and

¹ Immigration (Guardianship of Children) Act 1946 (Cth), s 6(1). See also Department of Immigration and Border Protection, *Fact Sheet 69 – Caring for Unaccompanied Minors* at <http://www.immi.gov.au/media/fact-sheets/69unaccompanied.htm> (viewed 13 Jan 2022)



assistance.² Article 20 of the *Convention of the Rights of the Child* requires Australia to ensure alternative care for these children. Voices of Influence Australia puts to the Committee that an essential element of the care of unaccompanied minors is effective guardianship.³ In the absence of a child's parents, the legal guardian of an unaccompanied child has the primary responsibility for the upbringing and development of the child, and is obligated under the *Convention on the Rights of the Child* to act in the best interests of the child.⁴

Voices of Influence Australia puts to the Committee that the Minister of Immigration and Border Protection does not meet the criteria set out by the Committee on the Rights of the Child to effectively perform the role of guardian for unaccompanied minors. Specifically, the conflict between their obligations as guardian and their role and function as Minister under the Migration Act, and the lack of expertise in the field of childcare, render the Minister an inappropriate and ineffective guardian.

Voices of Influence Australia request that the Australian Government take affirmative action to establish an independent body to oversee the legal guardianship of unaccompanied minors seeking asylum in Australia in order to protect the rights and best interest of the child. The current Bill cannot effectively promote nor protect the best interests of the child without this amendment.

Recommendation 2: Voices of Influence Australia recommends the legal guardian of unaccompanied minors is resourced with the necessary expertise to ensure that the best interests of the child are safeguarded and that the child's legal, social, health, psychological, education and material needs are appropriately provided for.

² Convention on the Rights of the Child, Articles 20 and 22. At <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> (viewed 13 Jan 2022).

³ Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside of their Country of Origin*, UN Doc CRC/GC/2005/6 (2005), para 33. At <http://www.refworld.org/docid/42dd174b4.html> (viewed 12 Jan 2022).

⁴ Article 18(1) of the CRC states that 'the best interests of the child will be the legal guardian's basic concern'. See also Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* UN Doc CRC/GC/2005/6 (2005), para 33.



Voices of Influence Australia puts forward to the Committee that the current Bill must also adopt the necessary measures to ensure that the legal guardian of unaccompanied minors is appropriately resourced and holds the necessary means for protecting the rights and best interests of the child.

Voices of Influence Australia recommend the current Bill adopt measures to ensure that an appropriate independent party oversee the reception, processing, settlement, and transition of unaccompanied minors seeking asylum in Australia. This must include preventing the minor from being detained, as well as ensuring that all activities relating to the protection and assistance of the child(ren) are conducted without discrimination, in the best interests of the child, in a child-sensitive manner and with due process of law.

Recommendation 3: Voices of Influence Australia recommend that the current Bill ensure that agencies or individuals whose interests are in conflict with those of the child's should not be eligible for guardianship.⁵

As explained above, the Minister of Immigration and Border Protection does not meet the criteria set out by the Committee on the Rights of the Child to effectively perform the guardian role of unaccompanied minors. Specifically, the conflict between their obligations as guardian and their role and function as Minister under the Migration Act, and the lack of expertise in the field of childcare, render the Minister an inappropriate and ineffective guardian.

In order to promote, attain and protect the best interests of the child it is essential that the current Bill ensure that agencies or individuals whose interests are in conflict with those of the child's should not be eligible for guardianship.

⁵ Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside of their Country of Origin*, UN Doc CRC/GC/2005/6 (2005), para 33. At <http://www.refworld.org/docid/42dd174b4.html> (viewed 12 Jan 2022). See also Separated Children in Europe Programme, *Statement of Good Practice* (4th ed, 2009), D3.3 (P.22). At <http://scep.sitespirit.nl/images/18/219.pdf> (viewed 12 Jan 2022)



Voices of Influence Australia recommends that Australia mirror international best practice guardianship through the appointment of: child protection or youth services government agencies; non-government bodies; creating hybrid models (child protection departments and NGOs); or citizens of good standing as appropriate guardians of unaccompanied minors seeking asylum. Alternatively, principles of appointment by a court or independent body have been adopted by Belgium (Guardianship Service) and Sweden (Chief Guardian), and could also be used as a model for the Australian system.

Recommendation 4: Voices of Influence Australia recommend the Bill be amended to include and ensure appropriate assistance to asylum-seeking children to enjoy the maximum possible recovery from past trauma in accordance with Article 39 of the Convention of the Rights of the Child.

Article 39 of the CRC⁶ ensures that State Parties shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim: of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhumane or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

General Comment No 6(47)⁷ outlines that States must assess and address the particular plight and vulnerabilities of such children. Additionally, the profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation.

It goes without saying that the particular vulnerabilities of unaccompanied children cannot be addressed in the detention environment, which exacerbates the effects of previous

⁶ UN General Assembly, *International Convention on the Rights of the Child*, Article 39, 2 September 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]

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trauma, rather than fostering the health, self-respect and dignity of children seeking asylum. In this regard, Voices of Influence Australia commend the Committee for outlawing children in detention within the current Bill. It would be negligent, however, to not also ensure appropriate assistance to asylum-seeking children to enjoy the maximum possible development and recovery from past trauma within community detention or other alternatives to immigration detention.

Recommendation 5: Voices of Influence Australia recommend the Bill be amended to override Australia’s current reservation to article 37 (c) of the Convention on the Rights of the Child, which requires children to be detained separately from adults, as previously recommended in the third cycle of Australia’s Universal Periodic Review.

The Australian Government has previously defended the reservation to article 37(c), claiming that Australia’s geography and demography make it difficult to always detain children in juvenile facilities and simultaneously allow children to maintain contact with their families.⁸ The Committee on the Rights of the Child, however, has pointed out that the Australian Government’s concerns are taken into account by article 37 (c), which states that detention with adults is prohibited unless it is considered in the best interest not to do so. The Committee has also stated that a child shall have the right to maintain contact with his or her family.

Voices of Influence Australia echo the Committee on the Rights of the Child’s response to Australia’s reservation and strongly encourage the current Bill to adopt Article 37(c) in order to protect the rights and best interests of the child.

Recommendation 6: Voices of Influence Australia recommend the Bill adopt the Third Optional Protocol to the Convention on the Rights of the Child Communications Procedure (Part II) in order to appropriately monitor and evaluate systemic and individual violations of the rights of children seeking asylum in Australia.

⁸ Australian Government, *Australia’s combined Second and Third Reports under the Convention on the Rights of the Child*, (2003), para 467.



Voices of Influence Australia supports the development of the Third Optional Protocol to the Convention on the Rights of the Child Communications Procedure (Part II), which, if adopted by the General Assembly, will establish an individual communications mechanism for children, and their representatives, for violations under the Convention of the Rights of the Child.

Communications under the Optional Protocol will be a valuable mechanism for identifying both systemic and individual violations of the Convention in Australia and will assist in persuading the Australian Government to address the human rights violations of children seeking asylum and protect the best interests of the child.

Alternatives to Immigration Detention (Clause 12)

In order to develop a robust, defensible, humane and effective system of alternatives to immigration detention (ATDs), it is necessary to be clearer about their principles and goals and their basis in law. In this, Voices of Influence Australia assert that three simple concepts are pertinent: liberty, proportionality and parsimony. When they work best, alternatives to detention restate our commitment to the right to liberty. In so doing, they remind us that detention is always the alternative.

Voices of Influence Australia submits that the current Bill should adopt the following recommendations within Clause 12 in order to promote, protect and attain the rights of those seeking asylum through alternatives to immigration detention.

Recommendation 7: Voices of Influence Australia recommend that Clause 12 include the protection of individual liberty, proportionality and parsimony when determining alternatives to immigration detention.

Recommendation 8: Voices of Influence Australia recommend that Clause 12 ensure dignity and respect for other fundamental rights whilst placed in the community.



Recommendation 9: Voices of Influence Australia recommend that Clause 12 ensure that alternatives to immigration detention never amount to deprivation of liberty or arbitrary restrictions on liberty of movement.

Recommendation 10: Voices of Influence Australia recommend that Clause 12 ensure that alternatives to immigration detention must rely upon the least restrictive measure possible.

Recommendation 11: Voices of Influence Australia recommend that Clause 12 extend alternative forms of detention to include the general population of those seeking asylum rather than exclusively vulnerable detainees.

Access to assistance in alternatives to immigration detention (Clause 13)

Recommendation 12: In addition to subclause 13(1)(b) confirming the right for non-citizens and refugees to work as specified under Article 17 of the Refugees Convention, Voices of Influence Australia recommend that the Bill adopt Articles 7, Article 10, Article 11, Article 21, Article 25, Article 54, Article 55, and Article 64 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

Article 7 of the ICRMW⁹ would ensure that the Australian Government acts, in accordance with the international instruments concerning human rights, to respect and to ensure that all migrant workers and members of their families within their territory or subject to their jurisdiction are granted the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other

⁹ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 7, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]



opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 10 of the ICRMW ¹⁰ would ensure that no migrant worker or member of his or her family shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.

Article 11 of the ICRMW ¹¹ would ensure that no migrant worker or member of his or her family shall be held in slavery or servitude. It also ensures that no migrant worker or member of his family shall be required to perform forced or compulsory labour.

Article 21 of the ICRMW ¹² would ensure that it shall be unlawful for anyone, other than a public official duly authorised by the law, to confiscate, destroy or attempt to destroy identity documents, documents authorising entry to or stay, residence or establishment in the national territory of work permits. No authorised confiscation of such documents shall take

¹⁰ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 10, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]

¹¹ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 11, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]

¹² UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 21, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]



place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

Article 25 of the ICRMW ¹³ would ensure that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration, other conditions of work and employment.

Article 54 of the ICRMW ¹⁴ would ensure that migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of protection against dismissal, unemployment benefits, access to public work schemes intended to combat unemployment, and access to alternative employment in the event of loss of work or termination of other remunerated activity.

Article 55 of the ICRMW ¹⁵ ensures that migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity.

Article 64 of the ICRMW ¹⁶ would ensure that without prejudice of article 79 of the present Convention, the States Parties concerned shall act as appropriate consult and co-operate with a view to promoting sound, equitable, and humane conditions in connection with international migration of workers. In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant

¹³ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 25, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]

¹⁴ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 54, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]

¹⁵ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 55, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]

¹⁶ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 64, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 13 January 2022]



workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

Reasons for Immigration Detention (Clause 16)

Recommendation 13: Voices of Influence Australia strongly urge that the Bill be amended to comply with Australia’s international human rights obligations, by providing for a decision to detain a person, or a decision to continue a person’s detention, to be subject to prompt review by a court in accordance with Article 9(4) of the International Convention on Civil and Political Rights (ICCPR).

Voices of Influence Australia recognises the need for the current Bill to adopt the appropriate measures to ensure Australia is compliant with ICCPR. To comply with Article 9(4) of the ICCPR, the court must have the power to order a person’s release if their detention is not lawful.

It is also important to reiterate that the lawfulness of their detention should not be limited to domestic legality. The review of the court must also include whether the detention is compatible with the requirements of the ICCPR, which affirms the right to liberty and prohibits arbitrary detention.



Concluding Comments

Voices of Influence Australia thank you for the opportunity to make this submission. Should you have any queries or require further submissions, please contact the undersigned at your convenience.

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