Australian Government
Attorney-General's Department

Secretary

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Date Received

Dr Anna Dacre
Secretary
Joint Standing Committee on Migration
Parliament House
CANBERRA ACT 2600

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BY: MIG

Dear Dr Dacre

Inquiry into Immigration Detention in Australia

Thank you for your letter dated 12 June 2008 inviting the Department to make a submission to the Committee's inquiry into immigration detention in Australia.

My Department assists the Attorney-General in relation to his responsibilities for human rights and international law, including human rights treaties to which Australia is a party. These treaties impose obligations relevant to immigration detention, including the issues being considered by this inquiry. This submission addresses, in part, the first two terms of reference of the inquiry by setting out views previously expressed by the relevant United Nations committee and Australia's responses to those views under international law.

The criteria for determining the period of a person's detention under the *Migration Act 1958* and when a person should be released from detention should be informed by Australia's obligations under international law, specifically the International Covenant on Civil and Political Rights (ICCPR).

Article 9 of the ICCPR provides in part:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law....
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 2 provides relevantly:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The ICCPR establishes a monitoring committee, the Human Rights Committee (HRC). Under the First Optional Protocol to the ICCPR, to which Australia is also a party, the HRC has the function of issuing views on complaints (known as communications) from individuals against States parties to the Covenant. Although not binding, these views are persuasive in States' interpretation of their obligations under the Covenant.

The HRC has expounded the following general principles to be applied to determine whether immigration detention is arbitrary. In its submissions to the HRC Australia has accepted these principles:

1. Everyone has a right to have the legality of their detention reviewed.
2. Mandatory detention is not arbitrary per se – States have a sovereign right to regulate immigration.
3. Immigration detention may be legitimate and necessary for a number of reasons, including the facilitation of visa processing, health and security checks and preparation for removal.
4. The test to ensure that detention is not arbitrary is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all the circumstances of the particular case.
5. Detention should not continue beyond the period for which a State can provide appropriate justification.

However, Australia and the HRC have differed over the detail and interpretation of article 9 rights. The first communication relating to Australia concerning arbitrary detention (*A v Australia*) was decided by the HRC in 1997. In that and subsequent communications considered by the HRC between 1997 and 2007, the HRC has disagreed with Australia's contention that ongoing detention is justified on the grounds that immigration detainees are flight risks, or otherwise on other grounds such as public health or safety. The HRC believes this position takes insufficient account of individual detainees' circumstances.

In all, the HRC has found Australia in violation of article 9 on seven occasions in communications relating to individual former detainees. The periods of detention in these cases ranged from less than two years to more than seven.

In relation to those communications, the HRC has expressed the view that the mandatory detention regime in the *Migration Act 1958* operated so that the individuals were detained arbitrarily. Specifically, it found that detention had continued beyond the period for which justification could be provided. The HRC has also stated that Australia had not demonstrated that other, less intrusive, measures could not have achieved compliance with Australia's immigration policies, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the particular circumstances of individual cases, including the possibility of removal. The HRC has also stated that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.

The HRC has also expressed the view that Australia's system of judicial review of immigration detention is in breach of article 9(4). It considered that article 9(4) requires that a court be able to review the merits of the detention. It stated that arbitrary detention cannot be legal under international law and that the lawfulness of detention includes its lawfulness not only under Australian domestic law but also international law. Australia disagreed, arguing that Article 9(4) requires merely that that a court be able to review whether detention is legal under domestic law, and that Australian law provides avenues for review of decisions to detain under the Migration Act and decisions to refuse or cancel visas.

Australia declined to accept any of the HRC's findings of violations of articles 9(1) or 9(4) in any of the cases referred to and responded to that effect.

The obligation in article 2(3) of the ICCPR referred to above to provide an effective remedy is in addition to the obligation in article 9(4).

This submission outlines international law relevant to immigration detention. The High Court has also considered the constitutional validity of immigration detention under Australian law. I expect that others will provide details of relevant cases to the Committee, but my Department would be happy to do so, should the Committee request it.

The action officer for this matter is Adam Fletcher who can be contacted on (02) 6250 6301.

Yours sincerely

Robert Cornall AO