



# Refugee Council of Australia

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

15 June 2009

To the Consultation Committee:

## **Submission to the National Human Rights Consultation**

The Refugee Council of Australia (RCOA) puts forward its submission to the National Human Rights Consultation Committee, chaired by Father Frank Brennan AO, and comprised by Mary Kostakidis, Mick Palmer AO APM and Tammy Williams.

RCOA acknowledges the significance of this consultation process and the human rights policy formation, in particular for refugees, asylum seekers, stateless persons and other humanitarian entrants to Australia.

RCOA's submission is brief. However, if you would like for us to elaborate on any issues presented, please do not hesitate to contact us.

Thank you for your consideration,

Paul Power  
Chief Executive Officer  
Refugee Council of Australia

## **Submission to the National Human Rights Consultation**

The Refugee Council of Australia (RCOA) welcomes the opportunity to contribute to this inquiry into the establishment of a National Human Rights Charter in Australia. RCOA is an umbrella organisation providing information on and representation of refugees and humanitarian entrants in Australia on behalf of its more than 130 organisational and 250 individual members. We work to develop and implement policies to improve refugee and humanitarian migration and settlement outcomes and ensure that they are consistent with Australia's international obligations.

While RCOA's submission is a schematic overview of human rights issues with regard to refugees, asylum seekers, stateless persons and all other humanitarian entrants, we note the extensive scope of submissions that the Committee has already received, including substantial input from the RCOA membership base.

While welcoming this consultation process and the opportunity to make a submission, we do acknowledge the limitations of consulting only on a charter alone, an issue raised by other individuals and organisations making submissions. RCOA does not have the legal expertise in relation to advising on best practice on a constitutional bill of rights versus a legislative bill of rights. The statutory bill of rights — or 'dialogue' bill of rights — provides all three arms of government, the executive, the parliament and the judiciary, with a special role to play in the protection of human rights. The argument for the dialogue bill of rights is set out in Zifcak and King's *Wrongs, Rights and Remedies* (2009) and other related reports.

RCOA is particularly interested in highlighting the significance of this consultation on the matter of Australia's treatment of refugees, asylum seekers, stateless persons and all other humanitarian entrants, including those people located within Australian territories and those in immigration detention settings.

### **Human rights that need to be protected**

The human rights that need to be protected for this at-risk group include all of the civil and political rights, and the economic and social rights, to which all Australians will be entitled. All rights set out in the international charters and treaties to which Australia is a signatory — including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child — to ensure that Australia adheres to its international obligations with rights violations have due recourse.

As referred to in Zifcak and King (2009), the United Nations Human Rights Committee and the Committee on the Rights of the Child have emphasised the need for human rights protected in the respective international treaties to be enforceable at the national level. As the only Western democracy without a human rights act or legislation, Australia does not provide this certain protection nor an effective remedy for those whose rights have been violated. McAdam and Garcia note that this failure to incorporate human rights into domestic law means that the breach of those rights is not actionable in Australian courts, and this failure to provide an effective remedy for breaches of human rights is itself a further breach of Australia's human rights obligations.

In addition to codifying our international protection obligations, the charter should protect Personal rights, Civil and Political Rights, the Rights of Individuals in Groups, Legal Rights and Social Rights.

### **Human rights not sufficiently protected**

Australia has garnered an unfortunate reputation for serious breaches of human rights, particularly with regards to asylum seekers and stateless persons. These breaches and the legal status (or lack thereof) of asylum seekers and stateless persons means that a human rights charter is particularly necessary for this at-risk group to ensure that they are protected no matter their

residency or citizenship. There have been extensive investigations and documentation of the many serious breaches of the rights of refugees, asylum seekers, stateless persons and other humanitarian entrants. Specific cases of these breaches include (but are not limited to):

- *Re Woolley*, the High Court of Australia decision that held that the *Migration Act* could not be interpreted to provide children with legal immunity from mandatory detention;
- *Al-Kateb v. Godwin*, the High Court of Australia decision that ruled that indefinite detention of a stateless person was lawful; and
- The arbitrary '45-day rule' attached to the Bridging Visa E (BVE), a rule that denies work rights and Medicare access to asylum seekers based on the timing of their application for protection, forces many asylum seekers into destitution, making them reliant on charitable organisations for food and shelter.

These examples, and other instances, demonstrate Australia's various breaches of human rights, including:

- Mandatory detention of asylum seekers, an action that breaches the right to freedom from arbitrary detention where there is no investigation into the individual circumstances of a person's detention;
- The detention of children, or children in detention-like settings, a breach of Australia's human rights obligations under the Convention on the Rights of the Child. These detention practises have been officially sanctioned by the United Nations (UN);
- The use of excised territory for the operation of the *Migration Act 1958* (through offshore processing of protection claims) is a breach of Australia's obligations under the Refugee Convention as well as the fundamental human rights principles of equality and non-discrimination. Excision of territory for migration purposes does not relieve Australia of its obligations towards asylum seekers and refugees as a matter of international law, and this differential treatment of asylum seekers on the basis of their mode of arrival breaches the Refugee Convention itself; and
- Forced destitution of asylum seekers breaching Australia's obligation not to subject people to inhuman or degrading treatment, and the necessity of a person's economic, social and cultural needs to be considered.

### **How to better protect and promote human rights**

Various reports have investigated Australia's violations of the rights of refugees, asylum seekers, stateless persons and other humanitarian entrants and have set out many recommendations on how Australia can better protect and promote human rights. Reports to this effect include but are not limited to:

- Human Rights and Equal Opportunity Commission (2004) *A Last Resort? Report of the National Inquiry into Children in Immigration Detention*. HREOC, Canberra.
- Mick J Palmer (2005) *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report*. DIMIA, Canberra.
- Nigel Comrie (2005) *Inquiry into the Circumstances of the Vivian Alvarez Matter*. Commonwealth Ombudsman, Canberra.
- Joint Standing Committee on Migration (2008) *Inquiry into immigration detention in Australia: Report – Criteria for release from detention*. APH, Canberra.
- Joint Standing Committee on Migration (2009) *Inquiry into immigration detention in Australia: Report 2 – Community-based alternatives to detention*. APH, Canberra.

The United Nations Office of the High Commission for Human Rights (OCHRC) released a report in April of this year (2009) that addressed the OCHRC's concern that the rights to equality and non-discrimination are not comprehensively protected, nor is the principle of *non-refoulement* been fully respected in Australia in federal law. The OCHRC recommends:

- the legislation of comprehensive immigration framework that is compliant with the ICCPR and the consideration of the abolition of the remaining elements of the mandatory detention policy and the closing the Christmas Island detention facility;
- statutory protections against refoulement and stronger protections against extradition or police assistance where the death penalty could be invoked; and

- comprehensive action on human rights education at all levels, including for public officials and for judicial and legal representatives.

### **Further considerations**

The Refugee Council of Australia would like to reiterate that this submission is only a schematic overview of the issues relating to the human rights of refugees, asylum seekers, stateless persons and other humanitarian entrants. As noted above, RCOA endorses the key principles outlined in the cited submissions and also those positions raised both within and outside the parameters of this consultation.