



2005 Policy document

Children in Custody

Australia is the only country in the world with a national mandatory detention policy, which cannot be reviewed by a court. Detention of asylum-seekers is automatic. From the outset, asylum seekers are classified as non-citizens with unlawful status because they have tried to enter the country without a visa or travel authorisation. In fact, Australian law prohibits the release of detained asylum seekers while their refugee status is being determined. Mandatory detention therefore applies until they are either granted a visa, or are deported.

The Australian Lawyers Alliance opposes mandatory detention. Detention is undesirable for vulnerable people including children who have already suffered great hardship and who should not be imprisoned in any event like convicted criminals. While opinions as to the legitimacy and justification of our migration policy are polarised, our obligations in relation to children in particular, are clear.

Australia's ratification of the United Nations Convention on the Rights of the Child (CROC) in 1990 obliges it to maintain standards to protect children's rights, upholding the 'best interests of the child' as paramount and providing them with humanitarian assistance. Detaining children is strongly discouraged under the CROC. Article 37(b) of the Convention provides that detention should be used only as a measure of last resort and for the shortest appropriate period of time. Any detention of children must be subject to periodic judicial review. This provision was not intended to be used to endorse the mandatory non-reviewable detention of unauthorised child arrivals for prolonged periods in Australia.

The Australian Government argues that a major factor contributing to prolonged asylum-detention is the typically lengthy process when asylum-seekers lodge appeals with the Refugee Review tribunal and courts. Reforms invariably aim at allowing courts to dispose of matters summarily and prohibit lawyers, migration agents and others from encouraging 'unmeritorious' migration litigation, which will involve the risk of a personal cost order against lawyers. These measures are claimed to facilitate quicker handling of migration cases by deterring unmeritorious cases. However, they greatly reduce the ability of refugees to exercise their legal rights to redress. Australia not only uses the CROC provisions to justify the detention of children, but also continues to restrict access to judicial review required by CROC.

Limiting access to judicial review for asylum-seekers, including children, not only violates CROC, but denies detainees equal access to justice before a truly independent judiciary. Such access is fundamental to satisfy the 'well-founded fear' test required for refugee status.

The current mandatory system effectively condemns children to live in a confined depressing environment with inadequate facilities and services, and deprived of an appropriate standard of education. Not only does the Government deny that such violation of the rights of children are endemic in the current system of mandatory detention, but any 'lapses' are justified on the basis of necessary 'border control'.

The Australian Lawyers Alliance believes that all children must be released from detention immediately and that the system of mandatory detention in general should be reviewed. An alternative system must be developed with a revision in policy with the primary consideration being the best interests of the child.