



'A last resort?'

Report of the National Inquiry into Children in Immigration Detention

INTERNATIONAL LAW AND DETENTION

As a sovereign country, Australia has a right to decide who is allowed to enter and stay in the country. However, with this right comes a set of legal responsibilities.

Sovereignty doesn't mean that nations can do whatever they like. Over the past 50 years, the nations of the world have worked together to develop a system of international human rights law based on agreed standards and principles.

By ratifying a treaty or convention, a country agrees to take on the rights and responsibilities of the treaty and uphold its principles in the policies and practices of the government.

The fact that Australia has ratified a treaty does not mean that it automatically becomes part of Australian law – it needs to be specifically written into domestic law before there are enforceable rights. However, this does not mean that ratifying a treaty has no significance for Australia. As the High Court has said in the *Teoh* case, 'ratification of a convention is a positive statement ... that the executive government and its agencies will act in accordance with the Convention.'

Australia has, as a sovereign country, freely entered into a range of human rights treaties and, therefore, has an obligation to put the principles of these treaties into practice in how it carries out its immigration policies.

THE CONVENTION ON THE RIGHTS OF THE CHILD

The Inquiry has taken the rights set out in the *Convention on the Rights of the Child*, which Australia ratified in 1990, as the basis for its investigations. One of the key principles of the Convention is that the **best interests of the child** should be a primary consideration in all decisions that affect them.

The Convention also sets out specific requirements to protect the liberty of children including:

- detention of children must be a **measure of last resort**
- detention of children must be for the **shortest appropriate period of time**
- children in detention have the right to **challenge the legality of their detention** before a court or another independent body
- children should not be detained **unlawfully or arbitrarily**.

Other key rights in the Convention are that:

- children seeking asylum have a right to appropriate protection and assistance – because they are an especially vulnerable group of children
- children separated from their parents (unaccompanied children) have a right to special assistance
- children in detention should be treated with respect and humanity and they have the right to healthy development and to be able to recover from past trauma

- children seeking asylum, like all children, have rights to the highest attainable standards of physical and mental health; education; culture, language and religion; rest and play; protection from violence; and to remain with their parents.

The Inquiry also drew on other important human rights treaties, including the 1951 *Convention relating to the Status of Refugees* and its 1967 Protocol, which requires Australia to offer protection to people fleeing persecution because of their race, religion, nationality, membership of a particular social group or political opinion.