

# **Submission to the Australian Human Rights Commission on New Zealanders being held in Australian Immigration Detention**

**November 2015**

## Introduction, Request and Summary

This submission relates to the detention of some of the approximately 200 New Zealand citizens, resident in Australia, who are currently held in both on-shore and off-shore Australian immigration detention centres. They have been detained pending deportation pursuant to visa cancellations under s501 of the *Migration Act 1958* (Cth).

We respectfully request that the Australian Human Rights Commission exercise its powers pursuant to s11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) and establish an inquiry into the treatment of those New Zealand citizens who are detainees in immigration detention as a consequence of cancellation of visas pursuant to section 501 (3) of the *Migration Act 1958* (Cth). We further request that should the Commission find that the below listed practices are inconsistent with or contrary to human rights, it exercises its powers pursuant to any or all of ss 11(1)(f)(ii), 11(1)(j), 11(1)(k) and 11(1)(m) of the same Act, and reports its findings, along with any recommendations, to the Minister.

The manner in which these detainees being treated appears to be inconsistent with the human rights obligations under several international treaties to which Australia is a signatory, as well as several international guidelines. In addition, the treatment is inconsistent with the *Australian Human Rights Commission Standards for Immigration Detention*.

These detainees are, *inter alia*, experiencing arbitrary detention, a breach of their right to family, insufficient access to legal counsel, and a lack of adequate medical care. The conditions in many of these detention centres are now widely understood to be inadequate, particularly in relation to medical care, communication with those outside the detention centre, and access to the centres for visitors (most notably for those centres in remote locations such as the Christmas Island and Wickham Point IDCs). Further, this group of detainees has been given no timeframe for resolution of this issue, and in some cases are unable to communicate with the Department of Immigration or properly instruct their lawyers regarding their case.

## Breaches of Human Rights of Detainees

We submit that the detainees' human rights are being breached as follows:

- International Standards

### **International Covenant on Civil and Political Rights (ICCPR)**

#### **Article 9**

*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.*

#### Detainee PC

PC has been in immigration detention since October 2015. He has been informed that he may wait up to 15 months for a decision to be made by the Minister for Immigration in relation to his case, as the Department of Immigration has a long backlog of cases.

We submit that this constitutes arbitrary detention as there has been no reasonable time frame given for the end of such deprivation of PC's liberty.

#### **Article 17**

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks.*

#### **Article 23**

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

#### Detainees AR RF WR PLU RK

- AR has two children aged 4 and 16 years. She has been detained at Wickham Point IDC, NT since April 2015, when she was moved from Brisbane. It is now very difficult for her children to visit her.
- RF is currently detained in Villawood IDC. His partner of ten years has terminal lung cancer and he was her carer before he was sent to prison.
- WR is currently detained in Yongah Hill IDC, WA. His two children live in Australia.
- PLU is currently detained in Villawood IDC. He has been in immigration for 3 years. PLU has six young children who live in Sydney.
- RK has been detained at Villawood IDC and at Christmas Island IDC. He has 3 children living in New South Wales.

We submit that in all of these cases in which the detainees have been separated from their families geographically and for a non-disclosed period of time, breaches of Articles 17 and 23 of the ICCPR

have occurred. The detainees' family relationships have been arbitrarily and significantly interfered with, and their family units have not been protected.

## **The Convention on the Rights of the Child (CRC)**

### **Article 3**

*(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

### **Article 9 (1) and (3)**

*(1) State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*

*(3) State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*

### **Article 16**

*(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*

### **Article 18**

*(1) State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.*

AR, as noted above, has two children, aged 4 and 16 years. WR has two children, PLU has six young children and RK three children. All of these children are separated from one of their parents due to the detention of that parent.

We submit that in these cases, the best interests of the child have not been considered and therefore, the children's rights under Article 3 have been breached.

Further, we submit that Article 9 (1) has been contravened as the children have been separated from their parents against their will in a situation where separation is not necessary.

Detention in an IDC is not the only option for detention available to the Minister in these cases. The children's right under Article 9 (3) has also been breached as it is impossible for the child to maintain personal relations and direct contact on a regular basis with a parent who has been detained in immigration detention, particularly in the case of remote centres (as for AR, detained in Wickham Point IDC, NT and RK detained on Christmas Islands IDC).

The child's right to not have their family interfered under Article 16 has clearly been breached in these cases.

Finally, we submit that the child's right to be raised by both parents under Article 18 has been breached in these cases.

## **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**

### **Article 16**

1. *Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

#### Detainees BH, PLU, PC

- BH was initially detained in Villawood Detention Centre following the completion of a custodial sentence for a parole breach. He was then transferred to Christmas Island IDC, despite being declared unfit to travel. While in prison, BH had an MRI scan to investigate a suspected brain tumour. He has not been provided with the results of this scan and is only given Panadol to manage his pain. He has also contracted tuberculosis whilst in detention and has difficulty breathing.

We submit that this treatment is cruel, inhuman and degrading. BH has consistently been denied adequate medical attention and treatment and is being treated with inhumanity. These acts have been committed with the consent or acquiescence of the Australian Government, being the institution that controls the IDCs.

- PLU has spent the last three years in Villawood IDC while appealing a decision in court. He has six young children living in Sydney.

We submit that continuing to detain PLU in an IDC and not an alternative manner which would not separate he and his family from each other (i.e.: community detention) for this length of time is cruel and inhuman treatment.

- PC has been in immigration detention since June 2015. He has been informed by the Department of Immigration that he could be detained for up to 15 months.

We submit that it is cruel and inhuman to arbitrarily detain PC in this manner.

#### - Detention Standards

### **Australian Human Rights Commission Standards for Immigration Detention**

#### **1.2 Visits and other direct contact with people outside the facility**

*Detainees are able to receive regular visits from, and communicate by telephone, mail, email and social media with members of their family, friends, religious leaders, the community, and community-based or non-governmental service providers.*

*On request detainees are, if possible, located in facilities within a reasonable distance from their relatives, friends or communities.*

[...]

*Under no circumstances is the ability to communicate with people outside the detention facility denied for longer than a few days.*

We submit that AR's right to be visited by and correspond with members of her family has been breached. Due to the location of Wickham Point IDC it is very difficult for her young children to visit, and her lawyer has been unable to visit her.

We submit that the detention of persons on Christmas Island is similarly a breach of Standard 1.2 because of its extreme isolation. Further, we are informed that detainees have recently had their mobile phones removed from them and now have to 'earn' credit for phone cards from the IDC managers.

### **1.3 Legal visits, hearings and communication**

*Each detainee has the right to communicate with a lawyer privately and promptly upon arrival in detention. [...]*

*Detainees have adequate time and facilities, including interpreting services, for consultation with their lawyers and other advisers who act for them in legal matters. [...]*

*Transfers do not interfere with detainees' ability to attend hearings or to consult with their lawyers.*

We submit that the rights outlined in Standard 1.3 have been infringed in AR's case. AR has been detained at Wickham Point IDC since April 2015. Her lawyer has been unable to visit her client or obtain any information from the Department of Immigration on AR's situation.

We note also the remarks of Logan J in Stretton v Minister for Immigration and Border Protection (2015) FCA 249 where His Honour observed;

*In short, on the evidence to hand I have a very real concern that it would be possible for Mr Keith Stretton effectively to give instructions in relation to the conduct of his judicial review application were he to be housed on Christmas Island. Transfer decisions are of course in the ordinary course of events matters for the value judgment of the Minister and responsible officers within his department. It is no part of this Court's function to engage in public administration. It is manifestly this court's function to ensure an effective exercise of the jurisdiction consigned to it and an effective ability on the part of those who have sought to invoke that jurisdiction to prosecute their cases. It is that particular concern that arises in this case on the evidence.*

### **1.4 Adequate health care**

*Medical treatment and care is provided:*

- *to a standard commensurate with that provided in the Australian community*
- *[...] which respects the inherent dignity of the human person.*

*Each detainee is provided, free of charge, with remedial medical treatment and care, dental, ophthalmological and mental health care, as determined by the Department in consultation with its nominated health advisors.*

### **1.7 Continuity of care**

*Detainees are able to contact health providers who treated them prior to being detained.*

*Detainees who have appointments and continuing treatment with specialist services are not transferred to different facilities, unless alternative appropriate arrangements have been explored.*

### **1.8 Specialists and medical aids**

*Each detainee has access to the services of specialist medical practitioners as well as psychiatric, dental, optical and radiological diagnostic services, on medical referral.*

BH, discussed above, has been diagnosed with a suspected brain tumour which he underwent an MRI scan to investigate. He has not been provided with the results of this scan and there has been no follow up treatment. He is only given Panadol for the pain. BH has also contracted tuberculosis whilst in detention and has difficulty breathing.

We submit that BH's rights under Standards 1.4, 1.7, and 1.8 have been breached by this treatment.

## **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**

### **Principle 6**

*No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*

As discussed above, we submit that the lack of adequate medical care and attention that BH has received constitutes cruel, inhuman, and degrading treatment.

We also submit that continuing to detain PLU in an IDC and not an alternative manner which would not separate he and his family from each other (i.e.: community detention) for this length of time is cruel and inhuman treatment.

Thirdly, we submit that the arbitrary detention of PC constitutes cruel and inhuman treatment.

### **Principle 15**

*Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.*

### **Principle 17**

*1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.*

### **Principle 18**

*2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.*

*3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances.*

We submit that the rights outlined in Principles 15, 17, and 18 have been infringed in AR's case. AR has been detained at Wickham Point IDC since April 2015. Her lawyer has been unable to visit her client or obtain any information from the Department of Immigration on AR's situation.

We note again the comments of Logan J in Stretton.

### **Principle 19**

*A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world.*

We submit that AR's right to be visited by and correspond with members of her family has been breached. Due to the location of Wickham Point IDC it is very difficult for her young children to visit.

### **Principle 24**

*A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.*

BH, discussed above, has been diagnosed with a suspected brain tumour which is not being treated, and has contracted tuberculosis whilst in detention. It is clear that BH has had his right to necessary medical treatment breached.

## **Standard Minimum Rules for the Treatment of Prisoners (UN)**

### **Medical services**

*22. (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.*

*24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.*

*25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.*

*(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.*

*26. (2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.*

As discussed above, BH has significant medical issues. We submit that his rights have been breached in the following ways:

- Rule 22(2) would require that BH receives specialist treatment for the suspected tumour and for the tuberculosis. BH has neither received this treatment in on-site medical facilities, nor been transferred to a specialised institution to receive it, as this rule requires;

- As per rule 24, ‘the taking of all necessary measures’ must have been taken following an initial medical examination upon BH arriving into detention. BH has still not received the results of his MRI and is therefore unable to be adequately treated; and
- The rights afforded to BH by rules 25 and 26(2) appear to have been breached. It is apparent, from his continuing medical situation, that either BH has not been examined properly by the medical examiner, and/or that the medical examiner has not reported BH’s medical condition to the director, and/or that the director has chosen not to action the report of BH’s condition.

### **Contact with the outside world**

*37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.*

As above, we submit that AR’s right to be regularly visited by and correspond with members of her family has been breached. The remoteness of the location of Wickham Point IDC means it is very difficult for her young children to visit. Those detainees on Christmas Island are similarly prejudiced.