4. Australia's Human Rights Obligations

The purpose of this chapter is to explain the relevance of international human rights law to children in Australia's immigration detention centres and to provide a quick reference point on the fundamental human rights principles that have influenced the approach of this Inquiry. This chapter also explains the role of United Nations (UN) guidelines in the Inquiry's analysis of Australia's human rights treaty obligations.

More specifically, the Inquiry addresses the following questions:

4.1 Does international human rights law threaten Australia's sovereignty?
4.2 How does international law become part of Australian law?
4.3 What are the rights of children in immigration detention in Australia?
4.4 What tools assist in the interpretation of treaty obligations?

A more detailed analysis of the human rights principles relevant to children in immigration detention can be found in the topic-specific chapters in the remainder of this report.

4.1 Does international human rights law threaten Australia's sovereignty?

Public debate in recent years has increasingly linked the concept of border protection with the arrival of asylum seekers to Australian shores. The Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) has stated on many occasions, in the context of unauthorised boat arrivals, that as a sovereign country Australia has the right to defend the integrity of its borders. Australian courts have also affirmed the right of Australia to determine who does and does not enter and remain in Australia. It is clear that Australia has the right to establish, administer and enforce its immigration policy and maintain national security. Border protection will inevitably be a part of these objectives.

The modern concept of sovereignty, however, is not absolute. Sovereignty does not mean that nations can do whatever they want, whenever they want, to whomever they want. This would inevitably lead to a breakdown in international cooperation. Australia, as a sovereign nation, has recognised the need to respect certain obligations and rights if it wants to maintain its position among the community of nations.

Australia has chosen to participate in the international system of law and enter into agreements - treaties - with other sovereign States. It has thereby agreed to be bound by the international scheme of rights and responsibilities that governs the way in which sovereign States act. As the Department of Immigration and Multicultural and Indigenous Affairs (the Department or DIMIA) states:

In signing up to and ratifying treaties, States may accept qualifications on the exercise of their sovereign powers. This is a sovereign act of the State itself.

The Department of Foreign Affairs and Trade (DFAT) reiterates this point in its Information Kit on treaties:

Ratification of international treaties does not involve a handing over of sovereignty to an international body. Treaties may define the scope of a State's action, and treaties which Australia ratifies may influence the way in which Australia behaves, internationally and domestically. Implicit, however, in any Australian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement.

For the purposes of this Inquiry the most important of the various international rules to which Australia has agreed to be bound are those contained in the Convention on the Rights of the Child (CRC) which imposes obligations on Australia to give all children, including asylum-seeking children, special treatment. Also
relevant to the Inquiry are some of the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR).

Further, the Inquiry refers to the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees* (the Refugee Convention), which specifically requires Australia to apply domestic laws that establish border integrity in such a way that persons fleeing persecution for specific reasons will be protected. Article 22 of the CRC makes the Refugee Convention immediately relevant to a consideration of the human rights of children in detention because it requires that a child who is seeking refugee status receive appropriate protection and humanitarian assistance in the enjoyment of the rights contained in the CRC and in other international human rights or humanitarian instruments to which Australia is a party.

By ratifying the CRC, Refugee Convention and other treaties, Australia has explicitly agreed to ensure that new laws be enacted or existing laws be applied in a manner that gives proper expression to its treaty obligations. Such an act of national will is a positive expression of Australia's independence and an affirmative exercise of sovereignty.

As one leading commentator has stated:

Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration. Since the early part of this century, governments have recognized that if they are to maintain control over immigration in general terms, they must accommodate demands for entry based on particular urgency. To fail to do so is to risk the destruction to those broader policies of control, since laws and institutional arrangements are no match for the desperate creativity of persons in flight from serious harm. By catering for a subset of those who seek freedom of international movement, refugee law legitimates and sustains the viability of the protectionist norm.

Therefore, sovereignty, border protection and human rights can operate as complementary, rather than opposing, concepts. Australia, as a sovereign State, has the right to protect its borders as well as having undertaken a responsibility to achieve this in a manner that accords with human rights and humanitarian treaties. Furthermore, Australia, as a sovereign State guided by the rule of law, has committed to ensuring that those rights and responsibilities are integrated into the practices of the domestic legislature, executive and courts.

### 4.2 How does international law become part of Australian law?

Australia, as a party to the CRC, the ICCPR and the Refugee Convention, has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law. The Department has rightly acknowledged that 'Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction'.

Under Australian law a treaty only becomes a 'direct source of individual rights and obligations' when it is directly incorporated by legislation. This is because under Australia's Constitution the making and ratification of treaties is a function of the Commonwealth Executive, whereas the making and alteration of Commonwealth laws is a function of the Commonwealth Parliament. The Executive would be usurping the role of Parliament if the treaties it made and ratified automatically became sources of new rights and obligations.

While the CRC, ICCPR and the Refugee Convention have not been directly incorporated into Australian law in their entirety, certain provisions of those treaties are reflected in domestic legislation. For instance, the
Migration Act 1958 (Cth) (Migration Act) makes reference to the protection obligations under the Refugee Convention in defining the criteria for a 'protection visa' under that Act. Other domestic legislation, much of it State legislation, can be said to mirror the intent of international conventions without referring directly to them. For instance, all States have child protection laws which reflect the obligation to protect children from abuse in article 19 of the CRC, but do not necessarily refer specifically to the CRC. The provisions of the Family Law Act 1975 (Cth) relating to children also mirror rights and principles established by the CRC.

The Commonwealth Parliament has also enacted the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOC Act) which specifically empowers this Commission to examine Commonwealth legislation and the acts and practices of the Commonwealth in order to determine their consistency with 'human rights'.

'Human rights' is defined by the legislation to include the CRC and the ICCPR. However, this legislation falls short of direct incorporation.

Nevertheless, even when treaties have not been directly incorporated by legislation, they are an indirect source of rights. In particular, treaties ratified by Australia have relevance in the common law of Australia which is enforced by courts.

The High Court of Australia's decision in 1995, in Minister for Immigration and Ethnic Affairs v Ah Hin Teoh, confirmed that legislative provisions should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of Australia's international obligations:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute ...

But the fact that the Convention [on the Rights of the Child] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

The High Court also held that ratification of a treaty raised a legitimate expectation that an executive decision-maker will act consistently with its terms:

... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.