Does the Australian Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012, Regarding Child Asylum-Seekers Conflict with International Laws?

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Australia's new offshore processing law has been a controversial aspect of recent policy making, as it challenges aspects of human-rights. Encapsulating this debate is transferring asylum-seekers who arrive by boat to offshore detention centres, such as Nauru and Papua New Guinea. Provisions contained in the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth)* (hereafter the Act) are considered by humanitarian advocates to violate numerous international laws, in particular the Convention on the Rights of the Child. The absence of special protections for children in the amendment to the *Migration Act 1958 (Cth)* violates Australia's obligations under the Convention on the Rights of the Child. The implications of legislative changes for child asylum-seekers arriving by boat, in particular, unaccompanied minors raises concerns. This paper argues that the new offshore processing amendments, inserted into the Migration Act, have significantly reduced the rights of children seeking asylum, to such an extent that the Act is ethically deficient, legally flawed and violates Article 37 of Convention on the Rights of the Child.

Australia is a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Therefore, Australia is obligated, under international law, to offer protection and to ensure that a person is not sent back to a country where they risk being persecuted. Clark (2000:185-187) suggests international human-rights laws may affect domestic law by numerous means. The revamped Pacific Solution violates many international laws. Burnside (2007:83) implies Australia's offshore processing of asylum-seekers breaches the Constitution of Nauru and that of Papua New Guinea by effecting expulsion, extradition or removal of asylum-seekers. In this context, the debate over offshore processing centres now operating in Nauru, and Manus Island, can be characterised as a debate over abrogating international obligations. The first step in this debate is addressing legality of detaining asylum-seeking minors offshore.

Previous practices in Nauru, particularly pertaining to children were substandard and breached Article 5 of the Nauruan Constitution (Burnside 2007:84-86). Article 5 states no person shall be deprived of his personal liberty. Nauru is obliged to permit detainees to consult legal representatives of their choice. Historically, Nauru violated basic human rights of child asylum-seekers (Burnside 2007:85). In a further violation of the rights of the child, detained children in medium security offshore detention facilities were unable to access education (Branson 2011). Hence, Branson (2011) raises concerns of past practices being executed under the Act. Former Commonwealth Ombudsman, Allen Asher agrees asylum-seekers will suffer (ABC News:2012). The Australian Human Rights Commission (AHRC) raises grave concerns over the designation of Nauru for offshore processing, reiterating the inconsistency with international obligations (Trigg:2012). Moreover, AHRC remained

unconvinced Nauru will be adequate to deal with the range of contingencies, in particular the needs of children, including those who have experienced torture and trauma (Trigg:2012). Thus, offshore processing of minors continues to violate international laws.

There are many conflicting views regarding the offshore processing of children. Some suggest (O'Byrne & Pobjoy:2012), it breaches the international rights of the child. Whilst those in favour support the notion of treating all irregular maritime arrivals equally; Branson (2011) enforces the need to treat all asylum-seekers in the same manner. Nevertheless, such treatment should respect international obligations. Furthermore, transferring 'boat people' by sending them to a third country for processing or detention significantly undermines the Refugees Convention and the International Covenant on Civil and Political Rights (Branson:2011). Consequently, Article 37 of the Convention on the Rights of the Child clearly states that no child be deprived of their liberty or subjected to torture or other cruel, inhuman or degrading treatment or punishment. Furthermore, child detention is considered a last resort. The government agrees with this notion, however many factors require deliberation. In other instances, McArdle (2011:719) reinforces the importance of Principle 8 of the Declaration of the Rights of the Child; proclaims the protection of children is paramount. While the government agrees that children's needs should be a priority; other factors contribute to asylum or immigration processing. The challenge is to integrate those protections into domestic law. Reflecting the challenges in effectively integrating international laws is clearly evident in the *Migration Act 1958*. International human-rights encapsulate guarantees far beyond what is currently protected by the offshore processing of asylum-seeking minors. A closer examination of the Act reveals a multitude of legislative practices in conflict with the international rights of the child. Janzekovic (2012:8) recapitulates that statutory offshore migration laws operate outside the legal sphere with many unresolved and untested matters to consider. Hence, circumventing the Pacific Solution under the Act is ethically deficient and legally contentious.

A consistent theme in offshore processing is the lack of ensuring the rights of children. This precursor of section 198AB, as a legislative instrument to designate offshore processing reflects s198AD (the Act). In contrast to the provision of section 9, whereby the best interests of child detainees and their rights are envisaged by the relevant officer's opinion, a further requirement is an application to the Minister to determine suitability for onshore processing. Furthermore, Chris Bowen's behaviour suggests the continuing oppression of the child's rights and interests, indicating child detainees are subject to the same processing requirements as adults (Vasek & Massola 2011). Sourander (1998:724) determined that unaccompanied children are highly vulnerable to emotional and behavioural symptoms, exacerbated by asylum-seeking. Rudic et al. (1993:85-89) validates that minors in processing centres are subjected to increased risk for psychological dysfunction. According to s6, reflecting s198AA-AE resolutions, the discretionary ministerial powers are not applied until guidelines of s9 and s10 have been complied with (Bowen 2012:8). These guidelines contrast markedly with section 5 which says public interest comes first. Offshore processing of minors, encompassing their best interests, are evaluated and arbitrated at the discretion of the government. Nonetheless, such discretion has not resulted in the child's best interests.

Offshore detention of minors with limited rights clearly violates Article 37 of the Convention on the Rights of the Child. Roth (2010:8-9) states the core obligations of governments contained in international laws often differ from domestic statutes. Therefore, compliance is not necessarily an intuitive concept. Roth (2010:9) recommends and supports the enforcement of international laws. Compliance may be enhanced by exposure of government misconduct. The truth of these arguments and fulfilment of the expectations under Article 37 will, nevertheless, only be borne out of individual court cases obtaining justice. However, this relies on child detainees, or their advocates, understanding the fundamental principles and protocols to successfully challenge the judiciary. In other words, child detainees may have limited knowledge or understanding of their legal rights. Friedrichs (2012:18-19) points out that age has been a criterion for certain legal rights, responsibilities and restrictions. At the other end of the spectrum, Ali et al. (2007:5), acknowledges that adopting the Convention on the Rights of the Child, has had some influence in some domestic legal systems.

The first, rather sporadic efforts to promote international laws are contained in the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). The AHRC Act contains the specific international instruments that are scheduled to or declared under the Act, such as the Covenant on Civil and Political Rights, Convention on the Rights of the Child and the Declaration of the Rights of the Child. Repeatedly disavowed and officially condemned by the Refugee Council of Australia (RCOA) and the AHRC, the offshore processing of minors nonetheless, breaches numerous international laws. RCOA (2012:2) regards the Act as punitive legislation. A report into children in detention concluded that the treatment of such asylum-seeking children detained by Australia was considered inhumane, degrading and cruel (HRC:2004). The Minister did not repute the report, nor claims of violations against minors, but has consistently maintained, mandatory detention is necessary (HRC:2004; Attorney-General's Department 2011:147). Asylum-seeking children are vulnerable to the effects of immigration processing, most notably exposure to trauma (Ajdukovic & Ajdukovic 1998:189-193). Indeed, anecdotal evidence of child detainees convincingly displays that mandatory child detention constitutes systematic child abuse. In the case of *A Child v Department of Immigration and Citizenship*, a child detainee developed depression, attempting suicide on several occasions. Evidence revealed the environment significantly contributed to psychological damage of the child. Continuing child detention remains inconsistent with medical report recommendations. Moreover, remaining in a restrictive setting imposes psychological risk to minors constituting systematic abuse, as indicated above. Hence, Australia's position to process asylum-seekers offshore should be limited by the exclusion of minors in detention with due consideration to the family situation.

Australia remains unapologetic towards offshore processing. Persistently unwavering, offshore processing is considered by the Australian Government equivalently as a deterrent and means of addressing influxes of asylum-seekers (DIAC:2012). Focus on the offshore processing of children, under the new Act, raises concerns as to the legislative measures. These measures strike an imbalance between competing aims of governmental efficiency, cost and humanistic fairness. Legitimate, but conflicting requirements of security and

humanity remain contentious with mandatory detention of child asylum-seekers in offshore centres. For years, governments have demonised asylum-seekers, portraying unauthorised marine arrivals as 'queue-jumpers' or 'sub-humans' throwing their children overboard (Magner 2004:60). However, apparent discrepancies remain between the Act and international laws.

Unaccompanied or separated children seeking asylum constitute higher psychological risk than others, namely those with extended immigration processing experiences. Enactment of the Act fails to reflect the core principles of International law pertaining to children. The correlation of international laws and statutory legislations needs to be effective in collateral rights of the child. No plausible humanitarian excuses exist for transacting other states, like Nauru and Papua New Guinea to ameliorate Australia's responsibility in addressing asylum-seekers. Attention to the rights of a child, in one view, should be counterbalanced with the application of international laws pertaining to refugees. Issues relating to the protection of the rights of minors pertaining to offshore processing of irregular maritime arrivals are quite certain to be major sources of concern and controversy. As demonstrated, the current amending of the Migration Act is ethically deficient, legally flawed and constitutes violations of international laws.

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