

The Educational Rights of Asylum Seeking Children: Observing Failure

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Abstract

This article is based on observations of the educational facilities provided for asylum seeking children detained on Christmas Island. The article concludes that these facilities fail to meet Australia's international obligations and political pledges which aim to protect the right to education of asylum seeking children.

Introduction

In February 2010 I visited Christmas Island for one month where I observed the educational facilities for children in detention under Australia's immigration policy.² Australia's international obligations require that children have the right to education in a safe environment with appropriate educational provisions and without discrimination. This visit confirmed that the educational facilities available on Christmas Island, particularly those provided within the detention setting, are ill-equipped to meet these standards.

In this article I detail my observations and situate them within the international, domestic legal and policy framework addressing the educational rights of asylum seeking children. I contend that the educational rights of children seeking asylum cannot be sufficiently satisfied while they are detained on Christmas Island, hampered by a plethora of challenges including the effects of institutionalisation on children and their parents and the absence of a standard education curriculum that provides equitable access to all asylum seeking children. I conclude that Australia is failing to meet its international obligations as a result of a policy framework which privileges border security over the rights of children.

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² See generally *Migration Act 1958* (Cth) s189, s 249.

Overview of detention facilities at Christmas Island from the vantage point of asylum seeking children

Christmas Island is geographically remote from the Australian mainland, located 2650km from Perth and approximately 300km from Java, Indonesia. In 2001, the *Migration Act 1958* (Cth) (Migration Act) was amended to exclude Christmas Island from Australia's 'migration zone' (s5(1)).³ This means that people who seek asylum by boat are intercepted by the Australian Navy in the excised zone and classified as Irregular Maritime Arrivals (IMA). While the High Court struck down aspects of the current system for processing refugee claims of asylum seekers detained on Christmas Island, on November 11 2010,⁴ it confirmed that immigration detention on Christmas Island remains legal under s 46A of the Migration Act.⁵

The Christmas Island Immigration Detention Centre is operated by Serco Pty Ltd (Serco). Serco was established in the United Kingdom and works in many sectors internationally. They are contracted as the service providers for all the immigration detention centres throughout Australia, replacing G4S Pty Ltd in June 2009.

Upon arrival at Christmas Island asylum seekers (referred to as 'clients' by Serco) are taken into the custody of immigration officials and divided between several compounds at North West Point and Phosphate Hill. Currently there are no adults or children in Community Detention.⁶ Most men over the age of eighteen are detained at the high security detention centre with heavy surveillance at North West Point which cost over \$400 million to construct.⁷ Children and families, including unaccompanied minors (UAMs) are detained at Phosphate Hill.⁸ UAMs fall under the care of the Minister, responsible for their detention and guardianship. They are more at risk than any other group of children in Australia.⁹

The primary centre at Phosphate Hill is called 'Construction Camp.' Some male asylum seekers detained next to Construction Camp have their movements restricted to 'Alpha Compound'. This area is under constant surveillance and they are separated from families, women and unaccompanied minors who are detained in the adjacent lower security detention centre, known as 'Construction Camp'. At the time of my visit, one block ('K Block') inside Construction Camp, housed Indonesian boat drivers who were engaged by people smugglers to navigate the boats. While children were able to pass through the block, the Indonesian crews are separated from the rest of Construction Camp.

³ *Migration Act 1958* (Cth) s5(1).

⁴ *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41.

⁵ *Migration Act 1958* (Cth) s494AA(3) which allows for judicial review by the High Court.

⁶ Department of Immigration and Citizenship (DIAC), *Immigration Detention Statistics Summary* (2010) <http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20100827.pdf> at 29 October 2010.

⁷ Neumann K, *Strange days on Christmas Island* (2010) Inside Story <<http://inside.org.au/strange-days-on-christmas-island/>> at 25 September 2010.

⁸ *Immigration (Guardianship of Children) Act 1946* (Cth).

⁹ Curr P, *Why Australia Needs a national commissioner for children* (2010) ABC Online <<http://abc.net.au/unleashed/41352.html>> at 22 November 2010.

Construction Camp comprises rows of demountable rooms, called ‘dongas’. These small rooms house several people in each and are linked by a timber boardwalk with a colourbond overhead structure that join the two rows. The infrastructure does not provide adequate protection from the frequent, heavy rain to which Christmas Island is subjected much of the year. Advocates from Amnesty International report that the layout at Construction Camp is inappropriate for children and families:

young families live side by side with groups of teenage boys in cramped demountables behind guarded fences. There is no play area or lawn that can be accessed by children unless they are accompanied outside by a guard. These conditions would be unacceptable on the Australian mainland.¹⁰

During a visit to Christmas Island in 2010, Linda Briskman from Curtin University declared the detention of asylum seeking children ‘a national scandal’.¹¹ She described the conditions of the Construction Camp, initially intended as temporary housing for construction workers building the Detention Centre at North West Point as a

ghetto-like, squalid collection of demountable buildings is perhaps akin to the conditions of a third world refugee camp. Calling this facility an alternative place of detention masks the fact that it is a detention environment where people do not have freedom of movement and where children are denied access to playthings and the taken-for-granted joys of childhood. Although most children and UAMs thankfully attend the local school, this cannot compensate for the loss of liberty and uncertain futures.¹²

In 2000, Immigration Detention Standards (IDS) were established by the Australian Human Rights Commission (AHRC). The IDS provides a framework for the minimum standards for the treatment of detained children. These standards require that Serco ensure that child detainees have access to age and skill appropriate education services.¹³ An international study which conducted a review of education for refugees and asylum seekers in OECD countries affirm that these standards mandate the availability of education programs for children in detention which are suited to their age and abilities. These should include programs for pre-school, primary and secondary school children.¹⁴ The standards call for afterschool activities, for example, sports, art and craft. They also require that unaccompanied minors and children with special needs receive case management. No legally enforceable minimum standards for the conditions of children in immigration detention have been codified into Australian legislation.

Education at Phosphate Hill and Christmas Island District High School

¹⁰ Baird J, *A short stay on Christmas Island* (2009) Amnesty International <<http://www.amnesty.org.au/refugees>> at 15 September 2010.

¹¹ Briskman L, *Asylum Seekers Christmas Island* (2010) <http://www.asylumseekerschristmasisland.com/index.php?p=1_4_ASCI-News> at 15 September 2010.

¹² Ibid.

¹³ APH, *Immigration Detention Standards*, 9.4.1, 160.

<<http://www.aph.gov.au/house/committee/jfadt/idcvisits/IDCAppH.pdf>> at 15 September 2010.

¹⁴ Bourgonie P, ‘Education for Refugee and Asylum Seeking Children in OECD Countries’ *Education International*, 50.

In the decades preceding the construction and expansion of the high security facilities at North West Point, asylum seekers who arrived by boat were accommodated within the local community and children were enrolled at the local public school which caters for years K-12, Christmas Island District High School (the School).¹⁵ In September 2009 there were 67 children seeking asylum detained at Phosphate Hill. They received education either at Christmas Island District School or at Phosphate Hill and were taught by five specialist teachers.¹⁶ Despite Labor's 2007 election promise to release children from immigration detention, as of 15 October 2010, 752 children remained in mandatory detention on the Mainland and Christmas Island in 'alternative places of detention' with 24 hour surveillance.¹⁷ In 2010 there were over 2770 people in immigration detention on Christmas Island, 283 of whom were children under the age of 18.¹⁸ There were 152 unaccompanied minors, aged between 9-17 years.¹⁹

The increase of asylum seekers to Christmas Island raised concerns within the local community. Parents were worried that many of the asylum-seeking students attending the local school appeared to be over 18. In response, a separate school at Phosphate Hill was established for older Afghan boys, mostly aged 16 and 17.²⁰ Most children aged 15 and under attend the School with local children and are taught using the Western Australian school curriculum. The children are transported to and from class under Serco security. Children aged 15 years and under who do not attend school only have access to the volunteer-run English classes which are aimed at adults. The older children who attend classes at Phosphate Hill are taught by a qualified teacher who focus on English. The classes are held in two designated demountables which, during my visit, were located in the area that housed Serco officers, volunteers and officials. In their breaks, the children sat under the nearby trees and were always keen to practice their English as people walked past. There is little dialogue between the school and the volunteers who teach English at Construction Camp. Therefore, it is important that the educational provisions for those children who are unable to attend Christmas Island District High School are subject to Australia's international obligations to provide appropriate education for children seeking asylum.

In Construction Camp, the one hour English language lessons were taught by unqualified volunteers. The classes were generally informal and taught from 1.00 pm to 3.00 pm six days a week.²¹ Although the classes were established for adults, children were able to attend regardless of whether they attended school. The children who attended spent most of their time assisting their parents and translating for volunteers and adult arrivals. While volunteers held daily one hour 'Australia Classes' for adults which focused on Australian history, current affairs and culture, the English lessons were the only on-site language classes offered during my stay.

¹⁵ Christmas Island District High School (2010) <<http://cidhs.cx/>> at 15 September 2010.

¹⁶ Taylor P, 'No visas, boys? Welcome to Australia' *The Australian*, 2009.

<<http://www.theaustralian.com.au/national-affairs/defence/no-visas-boys-welcome-to-australia/story-e6fmg8yx-1225768990200>> at 29 October 2010.

¹⁷ Above n 13. See also ABC Television, *Lateline* (2010).

<<http://abc.net.au/lateleine/content/2010/s3035511.htm>> at 29 October 2010.

¹⁸ Above n 5.

¹⁹ Australian Human Rights Commission, *Immigration detention on Christmas Island* (2010).

²⁰ Taylor P, *Detainees shunted from school* (2010) *The Australian* <<http://theaustralian.news.com.au>> at 14 October 2010.

²¹ According to the Department of Immigration and Citizenship, English classes are currently held daily from 9am - 12 noon. See Department of Immigration and Citizenship, *Response to the 2010 Australian Human Rights Commission Report on Immigration Detention on Christmas Island* (2010).

Classes were usually held in the 'English Room' which was locked when unmonitored. Each class was attended by approximately 25 people and recorded with sign-on sheets. The room was adjacent to a basic computer room with internet access and frequent disruptions from people walking in and out. The room contained minimal resources including a white board, several rows of desks, chairs and some cushions in the corner. While exercise books were available from Serco, they were not always provided. People often needed to share the pens provided by the volunteers and on several occasions, there were not enough seats for everyone.

Overcrowding at Construction Camp meant that when boats arrived, the English Room, Wet Mess and Canteen Area were needed by officials for processing new arrivals. During these times classes were sometimes held in a block between the client's rooms or in the table tennis room. Neither of these spaces had chairs and classes were therefore held on the floor.

It was encouraging to see the English Room benefit from an influx of English resources towards the end of March when the room was converted into a basic library. However, it is possible that this may have occurred only to coincide with a visit by the Commonwealth Ombudsman's Office. In response to recommendations contained in the AHRC's 2010 report, the Department of Immigration and Citizenship (DIAC) stated that the library at Construction Camp is freely accessible to clients with 'information in many formats and from many sources...with a free and open access environment...'²²

While many children had good English conversational skills, certain children, particularly those who did not attend school, lacked basic skills expected for their age group, for example maths. Yet there were some outstanding students despite the trauma they had experienced. One child who stands out in my mind wrote beautiful stories articulated with metaphor and imagery. However there were vast differences in students' English skill level. This made it difficult to achieve any real educational goals in the volunteer-run English classes.

Evaluating the quality of education provided for asylum seeker children on Christmas Island, Dr Graham Thom from Amnesty International commended Christmas Island District High School for their integrated classrooms that cater for up to 120 asylum seeking children:

...all the children take classes together, as well as the English acceleration classrooms for the asylum seeker children. The school has developed its own comprehensive language program - they avoid the use of interpreters as it has proven to slow down the learning process....We were invited to talk to a group of boys...unaccompanied minors who were forced to escape Afghanistan to avoid being forcibly recruited by the Taliban. Despite the horrors they had seen and the fact that they had to leave their families behind, these kids were able to laugh and joke with us about their favourite classes, (English, not maths!), and the opportunities to play sport with their friends.²³

²² Department of Immigration and Citizenship, *Response to the 2010 Australian Human Rights Commission Report on Immigration Detention on Christmas Island* (2010) Recommendation 22.

²³ Dr Thom G, *Not your average classroom* (2009) Amnesty International <http://www.amnesty.org.au/refugees/comments/22316_24/12/2009> at 20 September 2010; Graham Thom, Baird J and Allen L, *Crowded Christmas Island* (2009) Amnesty International <<http://www.amnesty.org.au/refugees/comments/22732/>> at 15 September 2010.

Coupled with the trauma associated with their pre-migratory experiences, the detention centre environment disadvantages the children and their educational potential. For example, all clients receive an identification number upon arrival at Christmas Island. Prior to and for the duration of my visit, attendance at all programs and recreational activities were recorded on a sign-on sheet which required clients' signatures and identification numbers. While children were not required to note their attendance they often did, using the numbers that had been assigned to them. DIAC now agrees that clients should be referred to by their name and that their identification numbers should only be used when clarification is necessary.²⁴ It is therefore unclear why the practice of requiring identification numbers, especially from children, persists. Additionally, the detention centre environment is likely to impact on parents' mental health, impairing their ability to monitor their child's academic progress and ensure children's attendance and progress at school.²⁵

Further, there is an apparent lack of consistency of educational aims and outcomes. While the School's inclusive philosophy has been commended by organisations such as Amnesty International and the AHRC, there is no standard curriculum for children in immigration detention. I observed that while some children were provided with school uniforms and could attend school in the mornings, others, including recent arrivals, did not. I understood that they were on a school waiting list. According to the AHRC, children in immigration detention are faced with a constant cycle of changing teachers which decreases trust and the bond between a child and their teacher. Teachers involved in the education of children in detention complain of the lack of resources and other matters. Several factors, including a high turn-over of ESL (English as a Second Language) teachers on Christmas Island meant there were no qualified teachers, either volunteer or paid, at Construction Camp in the month before, during, and after my stay.

Recreational facilities and opportunities for informal education

All children have a right to engage in play and access to appropriate recreational activities under the *Convention on the Rights of the Child* (CRC).²⁶ This is vital for alleviating stress and trauma and promoting the mental development of children in detention.²⁷ However, only a limited range of recreational activities were available for children at Construction Camp. Six days per week, volunteers ran children's activities in the Canteen adjacent to an undercover area called the 'Wet Mess'. The activities included crafts, sport and games. Cooking classes were run by volunteers six days per week and while directed at adults these were most popular with the children. The Wet Mess was the only outdoor undercover area and during the frequent rain there is very little space for sheltered play. The Wet Mess became particularly crowded at these times with conflicting user groups, including children, who use the space for afternoon activities run by volunteers, and adults who watch television.

Whenever possible, a Serco officer and four volunteers accompanied adults and children to the public oval adjacent to the Construction Camp for activities from 3.00 pm to 5.00 pm. However, the oval was not available if the local community was using it and at these times the basketball court was the only facility available to asylum seekers at Construction Camp. Clients were permitted to use a fenced

²⁴ Above n 18, Recommendation 13.

²⁵ Above n 18, 30-36.

²⁶ *Convention on the Rights of the Child* 1989 art 31.

²⁷ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 77, guideline 6.

basketball court for a large part of the day, although inadequate shelter failed to provide protection from the elements. During lock-down events, this area became unavailable.

During my stay on the Island I participated in an afterschool recreation program at the Christmas Island Recreation Centre (Rec Centre) which was located outside the detention centre adjacent to Construction Camp. The program was run by volunteers and a case worker from the Red Cross in conjunction with the local School. The program gave the asylum seeker children an opportunity to leave the Detention Centre and to mix with local children outside of the school environment. The asylum-seeking children who participated were generally shy, reserved and well behaved. The Rec Centre ran a range of recreational activities including swimming at the pool. Serco also facilitated regular excursions outside the detention centre including fortnightly visits to the local outdoor cinema and women's outings to various locations on the Island such as Lily Beach. Other recreational activities provided by volunteers included children's and adults' movie nights, bingo, beading activities, men's table tennis, women's dance and beauty nights (also attended by girls) held within Construction Camp.

Outcomes/Conclusions

I made the following observations regarding the educational provisions for children seeking asylum on Christmas Island:

- a. not all children attended either the local school or the on-site school for Afghani boys;
- b. while classes were offered at Construction Camp, they were ad hoc and run by untrained volunteers;
- c. educational services were not provided in a systematic manner and were hindered by changes to accommodation due to overcrowding;
- d. the resources that were provided were insufficient. They did not adequately cater for separate English classes which were required to satisfy the range of abilities and age groups;
- e. inadequate facilities for the children combined with a lack of natural shade and undercover areas provide a challenge and;
- f. there are insufficient recreational items, such as toys, necessary for children's play and development.

Reconciling Australia's international obligations with domestic legislation

In this section I outline international legal principles which regulate the detention of and delivery of education for asylum seeking children in Australia. In particular, I compare the observations and recommendations by human rights advocates, which highlight the importance of education as an essential human right, with the domestic policy responses in this area by government.

Detention of asylum seeker children

Article 37(b) of the CRC provides that children should only be detained as a measure of last resort and for the shortest appropriate period of time.²⁸

²⁸ Above n 9, art 37(b).

In July 2008, the Government announced its ‘New Directions in Detention’ values which committed government to detention only as ‘a last resort’.²⁹ The impact of the values is questionable, however, since these are expressed through policy documents only and sit within a legal framework which still reinforces mandatory detention as central to strong border protection. While a 2009 *Migration Amendment (Immigration Detention Reform) Bill* (Cth) (the Bill) has been applauded by the AHRC because of its implementation of these values, the Bill has not yet been implemented.³⁰

The right to enter Australia is regulated by the *Migration Act (Cth)*. This act restricts entry to people who have valid entry documents and requires the filtration of everybody else, including children.³¹ People who claim to be refugees may enter the country but until they establish through prescribed methods their status as a refugee, they are mandatorily detained until their claims are processed.³² The *Migration Act* upholds a two-tiered system whereby asylum seekers detained off shore only have access to judicial review by the High Court, whereas onshore asylum seekers have access to appeal their decision through the Refugee Review Tribunal and the Migration Review Tribunal.³³ This is unusual; no one else does it and as Mary Crock has argued, the ‘political and legal responses to immigration have distorted and continue to distort notions of human rights [in Australia]’.³⁴ In her study of unaccompanied and separated children seeking asylum in Australia, Crock notes that no other state party to the CRC mandatorily detains children arriving without a valid visa.³⁵ The Castan Centre for Human Rights Law highlights that the educational rights of the children cannot be met under the Government’s current mandatory detention practices which lack transparency. It argues that the current system

lacks a coherent overarching policy; is unsupported by clear legislative guidelines; has been implemented in such a way as to breach basic human rights; and requires an urgent and comprehensive overhaul to bring it in line with basic principles and international ‘best practice’.³⁶

Since its report, *Those who’ve come across the seas: Detention of unauthorised arrival*, in 1998, the AHRC has argued against Australia’s policy of mandatory detention on the basis that it breaches the [International Covenant on Civil and Political Rights](#) (ICCPR) and the CRC. This policy disempowers asylum seeking children and compounds the barriers they encounter by virtue of their detention in remote places, such as Christmas Island.

²⁹ Evans C, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia’s Immigration System*, Seminar – Centre for International and Public Law, The Australian National University, 29 July 2008 <<http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>> at 15 September.

³⁰ Australian Human Rights Commission, *Protection of the Rights of the Child in the Context of Migration* (2010) 10 <http://www.hreoc.gov.au/201004_OHCHR_child_migration.html> at 15 September 2010.

³¹ *Migration Act 1958* (Cth) s189.

³² Above n 30, s196.

³³ Department of Immigration and Citizenship, *2009 Response to the Australian Human Rights Commission’s 2009 Immigration Detention and Offshore Processing on Christmas Island Report; Convention on the Rights of the Child* (1989) art 10.

³⁴ Crock M, *Defining Strangers: The Foundations for a Just Society* (2007) 1055.

³⁵ Bhahba J and Crock M, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the USA: A Comparative Study* (2007) (Sydney: Themis Press 2006) 70-1.

³⁶ Castan Centre for Human Rights Law, Submission to the Commonwealth Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia* (2008)14-16.

The Government has announced plans to release most children into community detention by June 2011.³⁷ Community Detention is preferred by refugee advocates, especially in the case of children, as asylum seekers are not required to be accompanied by a designated person. Recommendation 5 of the AHRC 2010 report states that community detention is not utilised on Christmas Island.³⁸ DIAC noted in its response to the report that community detention was always intended where possible with preference given to vulnerable clients. DIAC argue that there is insufficient infrastructure on Christmas Island to support community detention. It is therefore not used as an option, despite the Government's undertaking that detaining children should be an option of 'last resort'.³⁹

Media publicity has focused on children who have been transferred from Christmas Island to other locations such as Darwin and Leonora. While this is certainly an improvement as these children are able to attend school, they are still housed in 'alternative places of detention' and escorted on all excursions.⁴⁰ The Minister for Immigration, Chris Bowen, stated on 20 September 2010 during the ABC's Q&A that 'there's no children in detention centres as such, so there's no children behind the razor wire.'⁴¹ However, the statistics released 15 October 2010 reveal that hundreds of children are still held in closed immigration detention facilities on Christmas Island and the mainland. Amnesty International highlight that the number of children in immigration detention 'is rapidly approaching the highest levels seen during the Howard era...[and] to claim, as the government does, that children are not being held in detention centres in Australia is simply disingenuous.'⁴² Under the proposed immigration detention reforms (the Bill)⁴³ the detention of children will remain legal and according to the ABC, DIAC stated the Government is not legally compelled to allow children older than 15 to attend school.⁴⁴

Educational policies for asylum seeker children

Australia is a signatory to seven international UN human rights treaties.⁴⁵ The right to education as defined by the United Nations (UN) Committee on Economic, Social and Cultural Rights states:

³⁷ AHRC Media Release, 'Plans to move children from immigration detention facilities welcomed' *Australian Human Rights Commission*, 18/10/2010, http://www.humanrights.gov.au/about/media/media_releases/2010/103_10.htmlhttp://www.humanrights.gov.au/about/media/media_releases/2010/103_10.html

Mark Schliebs, Refugees to 'harm' kids' education

<http://www.theaustralian.com.au/news/nation/refugees-to-harm-kids-education/story-e6frg6nf-1225940904012>

³⁸ Above n 18, 5.

³⁹ Human Rights and Equal Opportunity Commission (HRC) *A Last Resort? National Inquiry into Children in Immigration Detention* (2004) 577-641

<www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm> at 15 January 2010.

⁴⁰ Australian Human Rights Commission, *Immigration detention on Christmas Island* (2010) 29-30.

⁴¹ ABC Television, *Q&A* (2010) <<http://www.abc.net.au/tv/qanda/txt/s3010595.htm>> at 22 September 2010.

⁴² Amnesty International, (2010) <<http://www.amnesty.org.au/news/comments/23903/?>> at 15 September 2010.

⁴³ *Migration Amendment (Immigration Detention Reform) Bill* (2009) (Cth).

⁴⁴ Jane Bardon, *Asylum teens 'not required' to attend school* (2010) ABC Online

<<http://www.abc.net.au/news/stories/2010/09/17/3014276.htm>> at 1 October 2010.

⁴⁵ *International Convention on the Elimination of All Forms of Racial Discrimination, 1965; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Convention on the Rights of the Child, 1989; Convention on the Rights of Persons with Disabilities.*

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.⁴⁶

The foremost treaty protecting children is the CRC. It addresses the educational rights of children generally and includes the rights of asylum seeking children. The CRC was signed by Australia in 1990. It provides that a country must not discriminate against any one group of children. Article 3(1) states that all children should receive special treatment, that the best interests of the child shall be primary consideration, and that children in detention have the right to be treated with humanity and respect (art 37(a)(c)). Article 28 requires that education should be equally attainable by all children:

States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) make primary education compulsory and available and free to all;
- (b) encourage the development of different forms of secondary education including general and vocational education, make them available and accessible to every child; and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) make educational and vocational information and guidance available and accessible to all children;
- (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.⁴⁷

In short, all children in Australia have a right to an education under the CRC. Under these provisions, which preclude the discrimination of a group of children, asylum seeking children should be able to access a similar educational framework received by a comparable group of children, such as refugees.

⁴⁸

The AHRC argue that mandatory immigration detention breaches Australia's obligations under the ICCPR and the CRC and the *UNESCO Convention Against Discrimination in Education*,⁴⁹ which prohibits the creation of 'separate educational systems or institutions for persons or groups of persons' and provides the right of '...foreign nationals resident within their territory the same access to

⁴⁶ *United Nations Committee on Economic, Social and Cultural Rights*, General Comment No 13(1).

⁴⁷ Above n 25, art 28.

⁴⁸ *Ibid.*

⁴⁹ *International Covenant on Civil and Political Rights*, 1966, art 9(1); *Convention on the Rights of the Child*, 1989, art 37.

education as that given to their own nationals.’⁵⁰ Read together these provisions have been interpreted to apply directly to the position of asylum seeking children.

Domestically, the education of minors is governed by State and Territory legislation and there is no standard curriculum for asylum seeking children. Except where there is an inconsistency, State legislation regarding education applies in immigration detention centres including on Christmas Island. In Australia, education is compulsory up to the age of 15 or 16 depending on the State. At a federal level, the *Immigration Law (Guardianship of Children) Act* (IGOC Act) entrusts the Minister with the guardianship of unaccompanied minors.⁵¹ This legislation creates a conflict of interest insofar as the Minister of Immigration is both the children’s guardian and responsible for decisions under the *Migration Act*. Recommendation 8 of the AHRC 2010 Report calls for further changes to Australian law to remove the Minister of Immigration as the legal guardian of unaccompanied minors and appoint an independent guardian.

These challenges present a barrier to achieving equality in the provision of education for children detained on Christmas Island, especially when compared to refugees and onshore asylum seeking children who receive greater access to services. This disparity is unjustified according to international conventions to which Australia is a party. Despite recent Government announcements signaling that many of these children will be relocated to the mainland, currently there is little legal recourse available to children detained on Christmas Island to enforce their educational rights. Perhaps a recent decision by the British High Court who found in favour of two asylum seeking teenage boys who argued a council in South London failed to place them in appropriate mainstream schools thus breaching their duty under the *Education Act 1996* (UK), may guide the Australian courts in the future.⁵²

Australia therefore has a two tiered system of education for asylum seeking children – one which applies to onshore asylum seekers and one which applies to asylum seekers whose claims are determined in excised offshore places through differential treatment under the *Migration Act* which restricts their access to the refugee status determination system.⁵³ The failure to introduce the protections afforded to children by the CRC and other international conventions has resulted in the inadequacy of the education provided to children in mandatory detention. Satisfying these obligations in Australia poses a significant challenge whilst the off shore processing strategy remains in place.

The question to be asked is whether Christmas Island meets these standards. The Australian Government and Human Rights organisations disagree on how the provisions contained in the CRC should be interpreted in assessing Australia’s obligations. Refugee advocates argue that Australia is in breach of these rights. The UN recently voiced concern over the immigration detention of children. The latest report by the AHRC, released in October 2010 reiterates their recommendations made in 2004 and again in 2010. They maintain that keeping children in detention breaches Article 28 and other standards set by the CRC. DIAC does not consider that the CRC explicates the standard of education that should be upheld. Yet, as the AHRC explains, the CRC clearly states that ‘within a

⁵⁰ *UNESCO Convention Against Discrimination in Education*, 1960, art 3(e).

⁵¹ *Immigration (Guardianship of Children) Act 1946* (Cth).

⁵² Glynn P, *London Borough of Croydon in breach of legal duties to provide education* (2010) Pierce Glynn - Solicitors <http://www.pierceglynn.co.uk/news_1.htm> at 22 October 2010.

⁵³ Above n 29.

country there must be no lesser provision of education for any one group of children, regardless of nationality or immigration status and regardless of how the child arrived in the country'.⁵⁴

From my observations and those made by independent non-governmental organisations, the impact of domestic immigration policy on the education of asylum seeking children has prevented Australia from meeting its international human rights obligations. Over 90% of asylum seeking children are recognised as refugees and allowed to live in Australia⁵⁵ and the Asylum Seeker Resource Centre report that in the case of Iraqi children, the percentage is closer to 98%.⁵⁶ The right to education should be legislated to ensure that the children will be integrated into existing school communities. The AHRC proposes that the educational standards for asylum seeking children should include (paraphrased):

- a. English language teaching as a priority;
- b. access to vocational training;
- c. adequate curriculum support with appropriate resources and equipment for teachers to ensure that children have equal and non-discriminatory access to educational opportunities;
- d. children in detention (for more than 4 weeks) should be entitled to day release to attend schools in the community where practical and;
- e. access to play, games, sports and leisure facilities appropriate to age, with appropriate supervision daily. Equipment and toys should be provided available to children in the community.⁵⁷

This paper demonstrates that there is a significant gap between commitments that Australia has made in the context of the international community, and how these commitments are honoured. Political will is necessary to create a fairer system.

⁵⁴ Above n 25, art 2.

⁵⁵The International Commission of Jurists, Australian Section, *Submission to National Inquiry into Children in Immigration Detention* (2003) Australian Human Rights Commission

<http://www.hreoc.gov.au/human_rights/children_detention/submissions/jurists.html#education> at 27 January 2010; Linda Briskman et al, *Fine words but no action on Christmas Island* (2010)The Australian

<<http://www.theaustralian.com.au/news/opinion/fine-words-but-no-action-on-christmas-island/comments-e6frg6zo-1225823063217>> at 31 August 2010.

⁵⁶ Asylum Seeker Resource Centre, *Get Kids Out Detention* (2010) <<http://www.asrc.org.au/campaigns/1-get-kids-out-detention/>>at 15 September 2010.

⁵⁷ The International Commission of Jurists, Australian Section, *Submission to National Inquiry into Children in Immigration Detention* (2003)

<http://www.hreoc.gov.au/human_rights/children_detention/submissions/jurists.html#education> at 27 January 2010.