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CONTENTS

EDITORIAL

Welcome to the APRIL 2021 issue of ANZSIL *Perspective*.

My editorial team and I are delighted by the launch in February of the ANZSIL *Perspective* online platform www.anzsilperspective.com where you can find all our latest *Perspectives* and our archive.

As ANZSIL Perspecive continues to grow, we look forward to monthly or fast turnaround contributions which can particularly reflect our regional representation in international law practice and academia.

We are particularly keen to encourage book reviews as well as articles.

This month we are very pleased to have two excellent perspectives on the requirement that the child's best interest be paramount where the State is taking any action that affects children, including when it comes to decisions about detention and the protection of individuals from discrimination in the context of automated decisions..

As you know, in my role as editor I am keen to encourage contributions from across our membership and the wider international legal community, especially early career researchers such as doctoral candidates, postdoctoral researchers and legal professionals who have recently entered practice. I am also pleased that our contributions in 2020 included discussion and responses to earlier publications so that ***ANZSIL Perspective*** is also contributing to continued debate and education. I look forward to the submissions for May 2021.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 9 May 2021. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

In Law and Practice: Australia's Obligation to Prohibit Child Detention in the Context of International Migration

By Kristie Bluett

More than three years have passed since the United Nations Committee on the Rights of the Child issued new general comments pronouncing immigration-related detention of children to be a clear violation of the Convention on the Rights of the Child (CRC). However, many States parties to the CRC, including Australia, have failed to adjust their laws and practices to comply with the new international standard. It is time for them to do so.

Immigration Detention Violates the Child's Best Interest

On 16 November 2017, the Committee on the Rights of the Child published two Joint General Comments together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families that further elaborate on the rights of children and obligations of States in the context of international migration. *Joint General Comment Nos. 3 and 22* sets forth general principles concerning the human rights of migrant, refugee and asylum-seeking children, including the best interests of the child principle (CRC Article 3), while *Joint General Comment Nos. 4 and 23* focuses on State party obligations in countries of origin, transit, destination and return.

The two Joint General Comments underscore inter alia the requirement that the child's best interest be paramount where the State is taking any action that affects children, including when it comes to decisions about detention. In Joint General Comment Nos. 4 and 23, the Committee on the Rights of the Child issued a forceful rebuke of child detention in the context of international migration and recognized explicitly for the first time the "fundamental right" of every child to "freedom from immigration detention." It urged States to "expeditiously and completely cease or eradicate" immigration-related detention of children and asserted that "[a]ny kind of child immigration detention should be forbidden by law[.]"

The 2017 Joint General Comments reflect the culmination of years of building condemnation of immigration detention for children by the international community. Participants at the Committee on the Rights of the Child's Round Table discussions in Geneva in 2012 emphasized that "regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable." In 2015, the U.N. Human Rights Council's Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment similarly declared that within the context of administrative immigration enforcement, "the deprivation of liberty of children based on their or their parents' migration status is never in the

best interests of the child." And on International Migrants' Day in December 2016, a group of UN experts reiterated that immigration detention is a "clear child rights violation" and never in a child's best interest. In the more recent *Joint General Comment Nos. 4 and 23*, the Committee on the Rights of the Child solidified these positions into formal authoritative guidance to State parties to the CRC.
With this latest guidance, the Committee on the Rights of the Child has taken a more progressive, prohibitory stance on the detention of children in the context of international migration than the general rule set forth in the Convention. Pursuant to CRC Article 37(b), detention of a child is permissible when used "only as a measure of last resort and for the shortest appropriate period of time." However, in the context of international migration, children should *never* be held in detention. It does not matter if a child is traveling alone (unaccompanied) or with his or her parents (accompanied) or another adult (separated). Nor does it matter if the State lacks other available options. In such cases, it is the State's obligation to create alternative, non-custodial solutions.

In providing its rationale, the Committee distinguished immigration-related detention from a State's detention of children as a measure of last resort in domestic spheres such as juvenile criminal justice. The Committee noted that a child's irregular entry or stay in a country cannot *under any circumstances* have consequences similar to those for the commission of a crime. According to the Committee, unlike in the context of juvenile criminal justice, the possibility of detaining children as a measure of last resort is not applicable in immigration proceedings because it would conflict with the CRC's best interests of the child principle and the child's right to development.

The proscription against a State's immigration-related detention of children includes when migration and asylum procedures could result in the detention of the child's parents due to the parents' (or parent's) own migration status. When a child's best interests require keeping the family together, instead of detaining the child along with the parents to prevent separation, it is the Committee's position that the requirement not to deprive the child of his or her liberty extends to the child's parents and, therefore, the authorities must select a non-custodial solution for the entire family.

Australia's Obligation to Abolish Child Immigration Detention

Notwithstanding the Committee's explicit guidance in 2017, State practice and policies with regards to immigration-related detention lag behind the international standard. UNICEF reported in 2019 that many States parties to the CRC continue to detain children in the context of international migration, including "when holding children in the final stages of a removal order, or in detaining families under the guise of preserving family unity." Other states have yet to update their immigration laws to prohibit the detention of children. Australia's Migration Act, for example, still calls for mandatory and indefinite detention of persons arriving without a visa, including those seeking asylum. There is no exemption in the law for children or families traveling with children.

Australia, as a State party to the CRC, has an obligation to ensure full compliance – in law and in practice – with the treaty. Pursuant to CRC Article 4, States parties must undertake all appropriate legislative measures necessary for the implementation of treaty rights. *General Comment No. 5*, which provides the Committee on the Rights of the Child's authoritative guidance on Article 4, affirms that a comprehensive review of all domestic legislation to ensure full compliance is an obligation for States parties. And in *Joint General Comment Nos. 3 and 22*, the Committee similarly explains that States parties "have a duty to ensure that the principles and provisions" of the CRC "are fully reflected" in the relevant domestic legislation. As outlined above, child immigration detention has now been declared a clear violation of the CRC and freedom from immigration detention has been recognized as a fundamental right of all children. Thus, Australia's obligations under the CRC are not limited to ending child immigration detention in practice, but include enacting or amending relevant legislation to ensure the law complies with the treaty, including the treaty's best interest principle.

In its 2019 *Concluding Observations* to Australia, the Committee on the Rights of the Child expressed its concern over the Migration Act's mandatory detention provision and urged the government to amend the law to prohibit the detention of all children in the context of international migration. It also urged Australia to enact legislation prohibiting the detention of children and their families in regional processing countries. Notwithstanding the Committee's observations at the end of 2019, the Australian government has failed to heed its advice. It has not amended its Migration Act in line with the Committee's recommendations or enacted new legislation prohibiting the detention of children and their families in regional processing countries. Nor has it released the few children remaining in immigration detention on Australian territory.

The government's non-compliance with the CRC may be due to the fact that child immigration detention has become almost non-existent in Australia in recent years. The latest statistics published by Australia's Department of Home Affairs on 31 January 2021 suggest that fewer than five children are being held in immigration detention facilities. In fact, only two children remain in Australia's detention network and are being held in an Alternative Place of Detention on Christmas Island. The latest statistics also show that no children remain in the offshore processing centers on Nauru and Papua New Guinea. But eliminating – or virtually eliminating – the practice of detaining children is not sufficient to fulfil Australia's legal obligations under the CRC. And as long as the detention of children in the context of international migration is permitted – and even mandated – under the law, Australia remains in violation of its international obligations.

In what may be considered a shift in position, the Australian government indicated support for several recommendations on ending immigration-related detention of children at its recent Universal Periodic Review in January 2021. Several of these recommendations spoke only to the practice of detaining children; however, it also "supported" recommendations to review its migration laws and policies to bring them in compliance with international obligations on the rights of the child. Of course the sincerity

of the government's support on the matter is yet to be seen. Notably, a bill to amend the Migration Act was introduced just last year, but it contained no amendments aimed at ending the mandatory detention of children and families arriving without visas. Nor did it include any amendment to prohibit the detention of children and families in other immigration contexts. Rather, the bill introduced additional restrictive measures that may be imposed upon detainees such as confiscation of cell phones. If Australia wishes to comply with its obligations under the CRC, it must end the detention of all children in the context of international migration both in law and in practice and provide instead non-custodial solutions. This means not only the release of the family held on Christmas Island into a community setting, but it also means amending its Migration Act of 1958 to prohibit placing children and families in immigration detention in all circumstances.

Kristie Bluett is an international human rights lawyer and independent consultant and researcher. Most recently, she has served as a consultant for the American Bar Association Center for Human Rights and the UN High Commissioner for Refugees. From 2014-2017, Ms. Bluett co-taught the International Women's Human Rights Clinic at Georgetown University Law Center in Washington, D.C. And in 2017-2018, she provided pro bono legal counseling to asylum-seekers on the Greek island of Leros. Her research and publications focus primarily on individuals' rights and States parties' obligations under the UN human rights treaty system. The views expressed in this *Perspective* are her own and should not be attributed to any professional association.

Protecting equality in the context of the proliferation of artificial intelligence technology

By Tetyana (Tanya) Krupiy

The advances in artificial intelligence technology create an imperative to protect individuals from discrimination in the context of automated decisions. In order to meet their obligations under Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states need to adopt a holistic and multi-pronged approach to regulation. Anna Lauren Hoffmann coined the term "data violence" to talk about incidents when developers gather data and program artificial intelligence systems in a manner which results in harmful outcomes for individuals. Hoffmann elaborates that, "Those choices are built on assumptions and prejudices about people, intimately weaving them into processes and results that reinforce biases and, worse, make them seem natural or given." A recent example is that of British authorities using an algorithm to predict the final results of students on their A-level examinations. The model favored students from private schools.

Susan Leavy argues that diversity among computer scientists will ensure that developers do not embed societal biases into artificial intelligence systems. (p. 14) The fact that a company employs a diverse team does not guarantee that the team will program the system in a manner which assures compliance with the principle of discrimination. The recent events involving Google highlight that it is insufficient for states to regulate new technologies in order to prevent discrimination. There is a close relationship between how corporations treat their employees, how corporations operate and how they design artificial intelligence technologies. It is therefore necessary for states to regulate how organisations hire personnel, treat their employees, operate and allocate resources. In December 2020 the BBC reported that Google dismissed "highly influential" artificial-intelligence computer scientist Timnit Gebru. Gebru challenged Google's request to retract a research paper. The paper examined how the models of natural language embedded structural bias against women and persons belonging to ethnic minorities. Gebru describes Google as "institutionally racist." She recounts working in a toxic environment which hindered employees from underrepresented groups from progressing. An email she circulated to her colleagues stated, "There is no incentive to hire 39% women: your life gets worse when you start advocating for underrepresented people, you start making the other leaders upset when they don't want to give you good ratings during calibration." The company has one of the lowest retention rates for black women.

Article 26 of the ICCPR places an obligation on states parties to adopt measures addressing all these areas of concern. Article 26 of the ICCPR places an obligation on states parties to adopt legislation. The Human Rights Committee in the General Comment 28 explained that the ICCPR requires states parties to adopt legislative measures to ensure the enjoyment of Covenant rights to their citizens. (par. 3) Although the general comments are not legally binding on states, (p. 3-4) states attach "great importance" to them. (p. 5) The Human Rights Committee clarified in *Nahlik et al. v. Austria* that states parties are under an obligation to protect individuals against discrimination which occurs in the public

sphere and in the private sphere with a quasi-public dimension. (par. 8.2) Thus, Article 26 requires states to enact legislation to govern organisations involved in the development and use of new technologies.

Article 26 requires states to adopt a multi-pronged approach to governing organisations and new technologies. First, it obligates states to regulate the development and use of artificial intelligence decision-making processes. The Human Rights Committee in the General Comment 18 states that the ICCPR does not define the term "discrimination." (par. 6) The term "discrimination" shall mean "any distinction, exclusion, restriction or preference based on sex, race, colour, descent, language, religion, political or other opinion, national or social origin, property, birth, disability…or other status which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (par. 7) Article 26 is applicable to the development and operation of artificial intelligence decision-making processes. The design and operation of an automated decision-making process determines whether the use of these systems results in a violation of the prohibition of discrimination. Article 26 prohibits distinguishing between, excluding or giving preference to individuals based on prohibited grounds. Consider the stages in the development process when the computer scientist defines the problem to be solved (p. 19), gathers the data (p. 78) and labels the data to make it meaningful for the artificial intelligence system. (p. 30) Solon Barocas and Andrew Selbst explain that how the programmer defines the criteria for being a good employee and labels the data can create disadvantage for members of a particular group. (p. 680) Article 26 prohibits a programmer from defining criteria for a good candidate and labelling the data in a manner which results in the exclusion of candidates who belong to a protected group from gaining employment.

Article 26 is applicable to the process of the artificial intelligence system creating a model of the environment (p. 677), calculating predictions about the future performance of candidates (p. 679) and producing a decision. The artificial intelligence system generates the model of the environment based on finding correlations and regularities in the data. (p. 677) Imagine a situation where the system produces an unfavorable decision for the applicants due to finding a specific set of correlations in the data of the applicants. The presence of correlations stems from fact that the applicants took a career break to care for young children. Article 26 applies to these stages in the decision-making process. How the artificial intelligence decision-making system maps the data about individuals onto the mathematical model and how it processes the data determines whether it draws a distinction between the candidates based on the protected grounds. Article 26 prohibits impairing the ability of individuals to enjoy rights on an equal basis with others as a result of using a process which distinguishes between applicant based on prohibited grounds. It follows that states should adopt legislation to require organisations to comply with the prohibition of discrimination when designing and using artificial intelligence decision-making processes.

Second, Article 26 applies to some situations where the use of an artificial intelligence decision-making process produces effects at societal level. (p. 48) In a recent publication I argue that the use of artificial intelligence decision-making processes rekindles the practice of differentiating between individuals based on social class. The operation of an artificial intelligence decision-making process which creates preference for one group while disadvantaging another group falls under the prohibition within Article 26. This provision prohibits conferring a preference on a group based on social origin. Consequently, states should legislate to create mechanisms for carrying out impact assessments to ensure that the impacts of the operation of artificial intelligence decision-making processes on societal level enable compliance with the prohibition of discrimination.

Third, Article 26 obligates states to require corporations to adopt hiring, retention and whistleblower protection procedures which ensure compliance with the prohibition of discrimination. Gebru's experience demonstrates that an employee can experience adverse treatment on more than one ground. By dismissing Gebru, Google treated her unfavorably based on the protected grounds of sex, race and the holding of opinions. (par. 7) Gebru experienced adverse treatment on the ground of her opinions because Google fired her for circulating information which highlighted the way in which artificial intelligence models disadvantaged ethnic minorities and women. Her dismissal was additionally related to her sex and race. Gebru expressed opinions as a woman of colour. Article 26 ICCPR covers situations where an employee receives lower performance rankings or is dismissed on the ground of raising awareness about the needs of underrepresented groups. In such cases the organisation draws a distinction between employees based on their opinions and thereby excludes individuals with a protected characteristic from accessing opportunities. Such conduct has the effect of impairing the enjoyment of rights on an equal footing.

Fourth, Article 26 ICCPR recognises the connection between institutionally embedded injustices and the adverse treatment of the employees on the basis of their opinions. It necessitates redressing the root causes of discrimination. General Comment 18 states that "the principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant." (par. 10) The reference to the need to eradicate conditions which cause discrimination provides support for interpreting Article 26 as obligating states to address the root causes of discrimination. States should adopt a variety of legislative measures to protect their citizens from discrimination in the digital context. States should legislate to require organisations to hire individuals from groups which have historically experienced discrimination. States should hold organisations accountable for failing to treat all employees on an equal basis and for failing to protect individuals who advocate for the interests of underrepresented groups. Furthermore, states should legislate to require organisations to ensure that organisational processes and the work environment are inclusive. States should require organisations to allocate resources to their employees to identify deficiencies in new technologies and to detect adverse impacts on individuals who enjoy protection under the prohibition of discrimination. A counterargument would

be that Article 26 does not include the requirement for organisations to reform their structures and practices. The purpose of the ICCPR to recognize "the inherent dignity" and "equal rights of all" can be better advanced by interpreting the term affirmative action broadly to include the adoption of positive measures to redress the root causes of discrimination.

Tetyana (Tanya) Krupiy is a postdoctoral fellow at Tilburg University in the Netherlands. Prior to this, she received funding from the Social Sciences and Humanities Research Council of Canada in order to undertake a postdoctoral fellowship at McGill University. Tanya has expertise in international human rights law, international humanitarian law and international criminal law. Tanya is particularly interested in examining complex legal problems which arise in the context of technological innovation. Tanya's work appears in publications, such as the Melbourne Journal of International Law, the Georgetown Journal of International Law, and the European Journal of Legal Studies.