

SUBMISSION TO JOINT STANDING COMMITTEE ON MIGRATION

Inquiry into immigration detention in Australia

PROFESSOR MARY CROCK

Australia's immigration detention regime has emerged over the last 20 years as a source of sustained and at times acute criticism in both national and international fora. It is difficult to think of another single issue that has spawned as many inquiries and attracted as much adverse attention in the media. My own interest is of long standing, reaching back to the late 1980s and the controversy that arose over the detention of asylum seekers from Cambodia. It has been my view throughout this period that Australia's laws, policies and practices have been and continue to be at odds with obligations we have assumed under international law. Just as importantly, our behaviour has been at odds with anything approximating the standards that should be expected of a modern democracy built on respect for human rights and dignity. In 2006, research conducted with Harvard University found that Australia demonstrated the worst practice amongst three states when compared with the United Kingdom and the United States of America.¹

Within the Committee's terms of reference, this submission addresses what I see as the most critical shortcomings of immigration detention in Australia. These are the regime for the release of detainees; the placement of the detention centres; and the management of the detention facilities. Unless these matters are considered together and in a holistic fashion, the issue will continue to blight Australia's international reputation.

Length of detention – 3 key principles

Children should only be detained as a last resort and for the shortest possible period of time;

Immigration detention should be used to protect Australia from the threat posed by the individual being detained and for no other reason. In particular, detention should not be used as a putative deterrent for other irregular migrants; and

The assessment of whether a detainee poses a risk of any kind should be susceptible to independent review by a court of law.

¹ See Jacqueline Bhabha and Mary Crock *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Sydney: Themis Press, 2007). See also Mary Crock *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia* (Sydney: Themis Press, 2006); Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the United States* (Cambridge, Mass, 2006); and Jacqueline Bhabha and Nadine Finch, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the United Kingdom* (Cambridge, Mass, 2006). The reports can be accessed at www.humanrights.harvard.edu; and www.law.usyd.edu.au/scigl/publications

Recommendations:

- 1 Australia should revert to the arrest and detention regime that applied before September 1994. All persons arrested on suspicion of unlawful status should be brought before a magistrate within 48 hours and thereafter every 7 days until the person's identity and immigration status is determined.
- 2 Where a person poses no risk to the community, there should be a **presumptive limit of 6 weeks** on the length of time that person is held in immigration detention. This is the model used in most countries of asylum.
- 3 The **criteria** used to permit release from detention should include an assessment of the risks posed by the individual of flight or of any threat the individual might pose to the Australian community. Consideration should be given also to the time likely to be involved in assessing a case and/or the likely ability to secure the removal of the applicant to another country.
- 4 **Placement** of detention centres: Centres should be within easy reach of major metropolitan centres so as to facilitate processing and detainees access to legal advice. Paradigm of remote detention centres should be abandoned because they are inefficient, expensive and are a major source of abuse of human rights.
- 5 **Management** of detention centres should be in the hands of government rather than private companies to ensure full openness and accountability.

Further submissions are provided in relation to recommendations 1 and 4:

- 1 **The criteria that should be applied in determining how long a person should be held in immigration detention²**

The issue of immigration detention must address the question how a person comes to be detained and the oversight regime that pertains once a person has been placed in detention. It is my view that a critical shortcoming of the present regime is that there is no external oversight of either how a person comes to be detained or of what happens thereafter. At present, the Ombudsman – an official with recommendatory powers only – is given access to immigration detainees who have been in detention for TWO years. “Oversight” of this nature is little short of a joke.

Before 1 September 1994, different regimes governed the arrest and detention of *suspected* unlawful non-citizens, deportees (now removees) and border claimants. In the case of suspected unlawful non-citizens, detainees were required to be brought before a “prescribed authority” within 48 hours of arrest, and then could not be detained for more

² The following material is taken from a draft of my forthcoming book *Immigration and Refugee Law in Australia*

than seven days without being re-presented before that authority.³ The prescribed authority, in turn, could only authorise the continued detention of a suspect if he or she was satisfied that the detention was reasonably required in order to enable the Minister to consider either the unlawful status of the detainee, or whether a deportation order should be made.⁴ By way of contrast, the arrest and custody of a prospective deportee was not subject to the same temporal and procedural restraints. Officers were required only to furnish the detainee with details of why he or she was arrested and with particulars of the deportation order.⁵ The only circumstances in which a deportee had to be brought before a prescribed authority (again, within 48 hours) was where he or she made a statutory declaration claiming that a mistake had been made in the identification of the person named in the deportation order.⁶

Although not without problems,⁷ this regime had a distinct advantage over the scheme that has been in force since 1 September 1994. Immigration officials since that date have not been required uniformly to obtain warrants before an arrest is made and have not been required to submit persons arrested to any form of external scrutiny. The results have been disastrous.

The central problem with this regime is that both arrest and detention turns on the formation by an officer of the Department of a “reasonable suspicion” that an individual is an unlawful non-citizen. As noted earlier, detention is mandatory for any person in the migration zone who is *known or reasonably suspected* to be an unlawful non-citizen.⁸ The only mechanism for challenging the “suspicion” of an officer is for a detainee to seek judicial review of her or his detention. The system does not provide any regular mechanism for the oversight or checking of either initial decisions to detain or the continued detention of a person in immigration custody. As the high profile cases *Cornelia Rau* and *Vivienne Solon-Alvarez* illustrated, there are many reasons why detainees may be incapable of initiating their own challenge to the lawfulness of their detention. At best they may be unaware of their legal entitlement to advice relating to their detention and so may not make the request in writing that must trigger access to a lawyer. At worst, they may suffer from a mental or other disability that effectively

³ See former s 88 of the Act.

⁴ *Grech v Heffey* (1991) 34 FCR 93.

⁵ See former s 89 of the Act, now s 253(1)-(3).

⁶ See present s 253(4)-(7).

⁷ While this detention regime worked well enough in the majority of cases, the legislative regime was at once too specific and yet not specific enough. Problems arose, for example, in determining the purpose for which non-citizens were being detained. The former s 92 of the Act permitted the apprehension of non-citizens for the purpose of determining their legal status, while the more liberal s 93 facilitated the detention of prospective deportees: see present s 253. The courts condoned the prolonged detention of persons whom the government was finding difficult to remove. However, they held that the detention of persons for purposes ulterior to their immediate removal was unlawful: see *Park Oh Ho* (1989) 167 CLR 637. The courts became increasingly careful in their scrutiny of the legislation relied on by the Department to justify the custody of non-citizens: see *Grech v Heffey* (1991) 34 FCR 93; and *Lim* (1992) 176 CLR 1.

⁸ See s 189(1). Section 189(2) provides that an officer must also detain any person who is in Australia (but outside the migration zone) whom he or she reasonably suspects is seeking to enter the migration zone, and would, if in the migration zone, be an unlawful non-citizen. As noted above, the Act also provides for the detention of persons on board a ship suspected of being involved in a contravention of the Act, and allows those persons to be brought into the migration zone: s 245F(9).

prevents them from taking the appropriate action. As chronicled elsewhere,⁹ Cornelia Rau had been an Australian permanent resident for 18 years before she was arrested on suspicion of being an unlawful non-citizen. She spent more than 10 months in detention, which included periods in solitary confinement at Baxter IRPC in South Australia. Her plight became public because of alarms raised not by her guards, but by other immigration detainees concerned by the extent of her (obvious) mental illness. Vivienne Solon-Alvarez suffered from both mental illness and physical incapacity (having suffered spinal and other injuries in an accident shortly before her arrest). This Australian resident of 20 years standing, mother to two Australian born children, was both detained and removed in what can only be called deplorable circumstances to the Philippines.

The then conservative government responded quickly to these outrages with two government sponsored inquiries.¹⁰ Interestingly, however, no attempt was made to reinstate judicial oversight of the arrest and detention process – a system which rarely saw individuals detained inappropriately for any length of time. Instead, the Commonwealth Ombudsman was given a new role and designation as “Immigration Ombudsman”. All persons who have been held in detention for two years or more are now subject to review by that authority. It was in the course of undertaking this review that over 240 cases of wrongful detention were subsequently identified.¹¹ At time of writing, the government has paid out millions of dollars in damages for wrongful detention. Yet nothing has been done to change *the law* that has allowed such mistakes to occur.

Neither Cornelia Rau nor Vivienne Alvarez ever saw their detention litigated in court: settlements were reached in both instances. What is alarming is that their experiences were not isolated. Subsequent inquiries uncovered more than 240 cases of wrongful arrest and detention.

4 The placement of the detention facilities

The model of Australia’s use of remote detention facilities reflects the peculiar history of immigration control in Australia following the arrival of boat people from Cambodia in 1989. This history is one that saw an extraordinary battle develop between Parliament and the judiciary over the treatment of immigration detainees (who were in fact asylum seekers). Detention centres were placed in increasingly remote locations for the express purpose of making it more and more difficult for lawyers to access the detainees. The most extreme manifestation of this pattern of behaviour was the establishment of holding centres on Manus Island and Nauru and the “excision” of all territories outside of mainland Australia from Australia’s “migration zone”. These areas and the detention centres thereon were placed literally outside of Australian domestic law. The placement

⁹ See Mary Crock, Ben Saul and Azadeh Dastiyari *Future Seekers II: Refugees and Irregular Migration in Australia* (Sydney: The Federation Press, 2006), 154- 162.

¹⁰ See Mick Palmer, *Inquiry into the circumstances of the immigration detention of Cornelia Rau: Report* (July 2005): available at: <http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf> (accessed 6 June 2008); and Neil Comrie *Inquiry into the Circumstances of the Vivien Alvarez Matter Report No 3 of 2005*, available at: http://www.immi.gov.au/media/publications/pdf/alvarez_report03.pdf (accessed 6 June 2008).

¹¹ Reports on the findings made by the Immigration Ombudsman are available at http://www.comb.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports.

of detention centres at Port Hedland, Woomera, Baxter and Curtin are examples in point within Australia.

With the passage of time and the retirement of the politicians who had such personal investment in these bizarre schemes, it is time to put the nonsense of these years behind us.

The schemes were a failure at every level. **First**, they did not succeed in deterring a single asylum seeker. If the boats stopped coming after 2001, this was because of interdiction and *at source* measures – it had nothing to do with the way people were handled after their apprehension. **Second**, they created incredible inefficiencies in the system because of the difficulties involved in moving personnel to the places where the detainees were being kept.

In 2004, it cost me as much to buy a return ticket to Christmas Island as it would have to travel to London and back.

The use of remote centres means that both advisors and officials have to adopt an intensive “task force” approach to processing. This means that detainees are forced to interact with their advisors in an intense and fraught environment that does not allow for the establishment of proper relationships of trust. Officials are also required to handle cases in an intense fashion, undermining their fact finding abilities.

Third, the remoteness of the centres inevitably lengthens the periods for which people are held and increases the risk of psychological and other harms being suffered by the detainees. The experiences of those held during the years of conservative governance after 1996 are well documented. Similar harms occurred to long term detainees under Labor between 1989 and 1994.

Fourth, keeping detainees out of sight and out of mind facilitates abuse at the hand of the persons responsible for detaining the detainees. Periodic oversight by visiting authorities can never equate to the day to day oversight that occurs in city centres that are readily accessible. The psychology of the remote centres is also poisonous as the subliminal message to the centre operators is that these people are creatures of lesser entitlements. I know of no-one who has spent any time in or visiting the remote detention centres who cannot recount multiple tales of quite flagrant abuses of peoples’ human rights. If the remoteness of the centres places detainees at risk from such abuse, one might add that the dreadful effect of prolonged and isolated detention on the detainees also puts the centre officials at considerable risk from the detainees. Again, this is so well documented that it should be a self evident fact at this point in time.

I would be pleased to address the committee on any of these points.

Professor Mary Crock
Professor of Public Law, The University of Sydney
12 July 2008