



15 June 2009

National Human Rights Consultation Secretariat
Attorney-General's Department
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By email

Dear Sir / Madam,

Submission on the Rights of Refugees and Asylum Seekers

We are pleased to send you the attached submission for consideration by the Consultation Committee, chaired by Father Frank Brennan AO, and also constituted by Mary Kostakidis, Mick Palmer AO APM and Tammy Williams.

This submission is made on behalf of the Refugee Advice and Casework Service (Australia) Inc ("RACS"). RACS is Australia's oldest specialised legal service for asylum seekers and refugees, established over 20 years ago. It provides free advice and assistance to asylum seekers in the community and in immigration detention centres at Villawood and on Christmas Island, under a contract with the Department of Immigration and Citizenship. In 2007-08, RACS assisted over 1,000 people from over 61 countries of origin, including 28 new clients in detention.

Based on its long experience in representing asylum seekers in Australia, RACS would like to highlight its on-going concerns about the lack of human rights protections under Australian law for asylum seekers and refugees.

Please be in touch if you require any further information.

Yours sincerely,

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President
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1. Arbitrary Detention

Although immigration detention is permitted in principle by international law, Australia's system of *mandatory* detention can, in individual cases, breach Australia's obligation under international human rights law to guarantee freedom from *arbitrary* detention (ICCPR, article 9). This is notwithstanding the introduction of the government's 'New Directions in Detention' policy.¹ The UN Human Rights Committee has identified repeated cases of arbitrary immigration detention in Australia. Even lawful detention may be arbitrary if it is unreasonable,² which occurs where it is unnecessary or disproportionate.³

2. Permissible Grounds of Detention

RACS believes that Australia should apply UNHCR's *Revised Guidelines on the Detention of Asylum Seekers* to limit detention to cases where it is genuinely necessary, rather than applying its existing indiscriminate policy of mandatorily detaining all asylum seekers. Guideline 2 establishes the presumption that asylum seekers should not normally be detained. Guideline 5 then sets out limited exceptions, accepting that detention is permitted only if it is necessary:

- to verify an asylum seeker's identity;
- to determine elements of an asylum seeker's claim (that is, the essential claim, rather than a full merits consideration of all facts while a person remains detained);
- to deal with cases where required documents have been destroyed; or
- to protect national security or public order.

These grounds ensure that Australia would not interfere unnecessarily with freedom from arbitrary detention, while permitting detention in limited cases where it is justifiable. Very few asylum seekers pose any risk to the Australian community and there is usually little reason to detain asylum seekers after their identity is established and their asylum claim is notified to the authorities.

3. Review of Detention

Australian law does not allow substantive judicial review of the grounds for detaining an asylum seeker. This breaches the ICCPR obligation to provide full judicial review of the reasons for detention and the right to an effective remedy (including compensation for unlawful detention). Australian courts are limited to reviewing whether a detainee arrives unlawfully, but have no power to decide whether it is necessary and proportionate to detain a particular person in their individual circumstances.

¹ 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', speech by Minister Chris Evans, available at <http://www.chrisevans.alp.org.au/news/0708/immispeeches29-01.php>.

² Human Rights Committee, *Van Alphen v The Netherlands* (1990) No 305/1988.

³ Human Rights Committee, *Toonen v Australia* (1994) No 488/1992.

This means that Australian courts cannot consider whether a person's detention is arbitrary, unreasonable or unnecessary, or order the government to release particular individuals. The only recourse is for detainees to raise alleged human rights violations with the Commonwealth Ombudsman or the Australian Human Rights Commission. While both bodies may determine that a breach of human rights has occurred and have the power to make recommendations - including that compensation be paid - there is no means of enforcing such recommendations.

4. Conditions of Detention

International law standards also govern the conditions of detention and require the protection of human rights of detainees. Accessibility is an integral problem in relation to the conditions in detention facilities, including access to education, recreation, legal services and religious facilities, and access by media personnel. The privatisation of detention facilities has also raised questions about transparency in the management, particularly given the secrecy provided by commercial confidentiality between the government and contractors. The benefits of public scrutiny and transparent public administration cannot be underestimated in avoiding inhuman or degrading treatment.

The Australian Human Rights Commission has reported that detainees see the arbitrary and indefinite deprivation of their liberty as causing the most distress. This raises serious concerns surrounding the effects of indefinite detention on the mental health of detainees. The practices of solitary confinement and segregation pose significant risks to both physical and mental well-being of detainees. The use of solitary confinement in the case of suicide victims appears to only exacerbate the situation and often signals an appropriate situation requiring consultation with doctors and/or psychologists. Despite the Immigration Detention Standards forming part of the Government's contract with detention facility management, solitary confinement has been inappropriately used as a control mechanism to discipline detainees.

We are particularly concerned about the ability of asylum seekers on Christmas Island to access services, especially legal assistance and trauma counselling. Since October 2008, RACS has been engaged to provide legal services to asylum seekers on the island on three separate occasions, and each time we have encountered difficulties because of the remoteness of the location, not least in securing a team of lawyers able to travel there at short notice. An issue of increasing concern is the delay between the asylum seekers' arrival and when they receive legal advice. For example, in late May 2009 RACS travelled to the island to assist asylum seekers from SIEV 34 who had been detained on the island for more than 6 weeks without receiving independent legal advice.

5. Alternatives to Mandatory Detention

Alternatives to mandatory detention in the form of community release schemes may circumvent the traumas experienced by those placed in detention for long periods of time. They may also reduce the trauma experienced by detainees, which is even more acutely felt by those suffering from mental illness. There is a variety of appropriate alternatives to mandatory detention of asylum seekers. Community-based alternatives to immigration detention exist in most countries that accept refugees and asylum seekers. These operations provide a wealth of comparative experiences that ought to be considered in developing future alternatives, and demonstrate that policy based alternatives have produced positive outcomes elsewhere.

Community release programs protect asylum seekers and refugees from the physical and mental harm caused by mandatory and often prolonged detention. Neither Australia's national nor border security would be jeopardised by releasing asylum seekers who do not present sufficient reason for detention. A rigorous and stringent process of monitoring could ensure compliance with conditions of release. This may include regular reporting, restrictions on residence, provision of sureties or bonds, electronic monitoring, or open accommodation centres. A long-term community detention program is more fiscally sound than mandatory detention policy, which is extremely expensive.

In the EU, US, UK, Canada and New Zealand, detention is only permitted in restricted circumstances and judicial and procedural safeguards are stronger. Canada, for instance, has been a model of an achievable asylum determination system that allows full review rights as well as protection under the Charter of Rights and Freedoms.

6. Children in Detention

The particularly adverse impacts of mandatory detention on children's physical and mental well-being have been well-documented. In 2004 the Australian Human Rights Commission released a comprehensive report examining Australia's compliance with the Convention on the Rights of the Child, finding that the system of mandatory detention breached a large number of children's human rights.⁴ It also found that children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour.

While we welcome the government's 'New Directions in Detention' policy that children will not be held in immigration detention, we are concerned that there is presently nothing in domestic law that formally prevents such detention. Section 4AA of the Migration Act 1958 (Cth) provides only that the detention of children is a matter of 'last resort'.

4 Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, (2004) available at http://www.humanrights.gov.au/human_rights/children_detention_report/index.html.

As at 22 May 2009, 100 children remained in immigration detention, including 26 under residence determinations, 70 in alternative temporary detention in the community and four in immigration residential housing. 807 people were in immigration detention as at 22 May 2009, 340 of them at the Christmas Island facility.

Housing children in immigration residential housing and immigration transit accommodation is far preferable to holding them in immigration detention centres, since they provide a higher standard of accommodation and a better physical environment. Nevertheless, the Australian Human Rights Commission has expressed concern that the adverse psychological effects experienced by children in community facilities are similar to those experienced in detention. This is in part because they are still closed detention facilities and the movement of children and their families remains restricted.⁵ In relation to Christmas Island, numerous children are currently being detained at the isolated Phosphate Hill Immigration Detention Facility due to the lack of available alternatives.

7. Bridging Visas

Asylum seekers who enter Australia on a valid visa and who then apply for asylum will be granted a bridging visa which allows them to remain in the community while their application is being processed. Asylum seekers who arrive without a valid visa and make a claim for asylum are detained in immigration detention and, in certain circumstances, may be granted a bridging visa to reside in the community while their applications are being processed.

Bridging visas have been widely criticised because of their restrictive conditions which make it very difficult for people to survive without considerable support from charity. These conditions include:

- no financial assistance;
- limited housing assistance;
- limited access to legal advice;
- limited access to study; and
- no right to work, unless the asylum seeker enters Australia with a valid visa and lodges his/her application for protection within 45 days, or, if the Minister for Immigration is 'personally considering' a request under section 417 of the Migration Act and the person can show a compelling need to work.

The government has recently announced that it intends to amend the 'no work rights' condition placed on bridging visas, which should allow the majority of asylum seekers access to the fundamental right to work. The 'no work rights' condition has been particularly detrimental, resulting in numerous asylum seekers becoming destitute.

⁵ Australian Human Rights Commission, *2008 Immigration Detention Report* (2009), available at http://www.hreoc.gov.au/Human_Rights/immigration/idc2008.html.

While we welcome the policy shift noted above, we are concerned that this is not yet entrenched in law. In particular, we note the finding of the House of Lords that the United Kingdom was in breach of its human rights obligation not to subject people to inhuman or degrading treatment where it did not enable asylum seekers to support themselves and they became (or were on the verge of becoming) destitute.⁶

Even where work rights are granted during the processing of an application for a protection visa, they are removed when a failed asylum seeker seeks the Minister's intervention under section 417 up until the request is personally considered by the Minister (if ever). This penalises asylum seekers from pursuing legitimate avenues of appeal, thereby undermining a central feature of procedural fairness and an integral part of refugee determination proceedings.

8. The Need for Complementary Protection

One reason why some asylum seekers spend long periods in detention is because Australia lacks any system of complementary protection for those who are not strictly refugees but who nonetheless require human rights protection on other grounds (such as freedom from return to torture or cruel, inhuman or degrading treatment). Under international human rights law, Australia has an absolute duty not to return people to face such forms of harm. In Europe, the UK and Canada, the domestic implementation of human rights law means that States are not permitted to send people back to these (and other) human rights abuses. The rights of stateless people also receive inadequate attention in the Australian legal system, despite Australia having ratified the 1954 Convention relating to the Status of Stateless Persons.

The lack of complementary protection unnecessarily prolongs the time that some asylum seekers spend in detention, causing unnecessary and unjustifiable harm to detainees and seriously wasting public revenue. This is because at present, claims of this nature can only be assessed on a discretionary basis at the end of the determination process through a request to the Minister for Immigration under section 417 of the Migration Act.

In addition to providing a domestic foothold for claiming international protection, a domestic human rights instrument in Australia could also ensure that the legal status of people afforded complementary protection is consistent with human rights law. In this regard, it is positive to note that the present government has undertaken to introduce a system of complementary protection and to afford beneficiaries the same legal status as Convention refugees.⁷ At this stage the government has not indicated that it intends to include the protection of stateless people in a system of complementary protection.

⁶ *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66; see also *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540.

⁷ See the draft model, proposed in late 2008: http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0809/diac_gon/46_gon_21_oct_08_att.pdf; see also Immigration Minister Chris Evans, 'Budget 2009–10—Humanitarian Program', *Media Release*, (12 May 2009), available at <http://www.alp.org.au/media/0509/msimmc123.php>.

We believe this issue needs separate attention so that such people are not left unprotected in Australia.