Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organizations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organization that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

The NSWCCL has been actively engaged in matters relating to the detention of refugees and asylum seekers and is a strong supporter of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* for several reasons which will be outlined below.

Concerning immigration detention, Australia has numerous obligations as a signatory of international treaties. Its obligations under the *Universal Declaration on Human Rights, International Covenant on Civil and Political Rights (ICCPR), Convention Relating the Status of Refugees*, and the *Convention against Torture (CAT)* have to be reflected in the Australian domestic law. That is why this bill aims at upholding Australian international obligations towards immigration detention.

As the trend is to demonise asylum seekers who arrive in Australia, we underline that, according to a recent report from the *United Nations High Commissioner for Refugees*[1], in 2010, Australia received 8,250 asylum applications. Although these applications rose by a third compared to 2009, they decreased by more than a third compared to 2001. We also have to notice that Australia is below levels of other industrialized and non-industrialized countries and ranks 15th on the list of asylum receiving industrialized countries last year.

[1] http://www.unhcr.org/4d8cc18a530.html

Australia's obligations under the *Refugee Convention*

Australia signed the *Refugee Convention* in 1954 and the *Protocol Relating to Refugees* in 1973. As well as providing a definition of 'refugee', the *Convention*'s purpose is to protect refugees against forcible return, explain what their rights and obligations are in the country in which they seek asylum and also to set up a system whereby refugees have access to durable solutions; voluntary repatriation, resettlement or local integration.[2] The provisions of the *Refugee Convention* state that no penalties will be imposed on refugees for their illegal entry or presence if they come directly from a territory where their life or freedom is under threat as long as they present themselves without delay to the authorities and have good reason for illegal entry. It appears that the implementation of the mandatory detention policy, the denial of the right to judicial review and procedural fairness and the excision policy, which allows offshore asylum seekers to be bared from applying for a visa with no access to procedural fairness, certainly breaches Australia's obligations under the *Refugee Convention*.

Recommendations made in the *Universal Periodic Review*

The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is one of the key elements of the new Human Rights Council, which reminds States of their responsibility to fully respect and implement all human rights and fundamental freedom. During the first review in January 2011, Australia received 145 recommendations from other UN Member States, many of these recommendations focused on the nation's treatment of refugees and asylum seekers. One key recommendation in this area concerned the need for Australia to repeal the provision of the *Migration Act 1958* relating to the mandatory detention regime. Switzerland called for the detention conditions to be brought "into line with international standards in the field of human rights" and countries such as Norway and Slovenia called for Australia to ensure the processing of asylum seekers' claims were in accordance with the *UN Refugee Convention*. Switzerland further commented that Australia should not detain 'migrants other than in exceptional cases and limit this detention to six months' in order to bring Australia's domestic laws into line with international standards relating to refugees and asylum seekers.

The joint NGO submission to the *Universal Periodic Review* of Australia in July 2010 highlighted that Australia should legislate to provide protection for asylum seekers in accordance with human rights and refugee law. The submission stated that Australia should 'end its policy of mandatory immigration detention, close the Christmas Island and Curtin

[2] Amnesty International , 'Australia's obligations to refugees and asylum seekers' 2009.

detention centers and ensure that all asylum seekers can access health care and work rights. All asylum seekers should be processed on-shore and be entitled to adequate judicial oversight.'[3]

Long-term detention often leads to violence and self-harm

The recent riots on Christmas Island on March, 17th, which involved hundreds of asylum seekers, emphasized the overcrowding of this detention centre. As at 4 February 2011, there were 2573 people in immigration detention on Christmas Island[4] while the current capacity of the facilities is 1956 people.[5] The Department is now trying to bring that figure of 2573 people down to 2000 people, by shifting asylum seekers from Christmas Island to mainland facilities in order to relieve pressure on Christmas Island.

However, this solution to move them to the mainland is not a long-term solution. Indeed, it has led and it will lead to an overcrowding of the mainland facilities and more pressure will be put on them. For instance, following the move of 80 asylum seekers from Christmas Island to Scherger Immigration Detention Centre, the latter is currently 74 detainees over capacity. This situation of overcrowding could have perverse effects as we witnessed the suicide, on March 17th, of a 20-year-old member of the Hazara ethnic minority at Scherger.

While Christmas Island immigration detention facilities are already overcrowded, the other immigration detention centres are close to their capacity.

This overcrowding is partly the result of the time asylum seekers are spending in detention while waiting for their asylum claims to be processed. These excessive delays in processing claims lead to long-term detention of asylum seekers. Indeed, according to the last report made by the *Australian Human Rights Commission* as a result of its 2010 visit to the immigration detention facilities on Christmas Island[6], in May 2010, there were then 2421 people detained on Christmas Island. Of those 2421 people, 656 had been detained for three months or more. Of those 656 detainees, 121 had been detained for nine months or more. The Commission also visited immigration detention facilities in Darwin in September 2011. It related[7] that almost 80 percent of the 783 people detained had been there for longer than three months, and more than 30 percent had been detained for longer than six

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[3] Joint NGO Submission to the Universal Periodic Review of Australia, July 2010

[4] http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20110204.pdf

[5] http://www.immi.gov.au/managing-australias-borders/detention/facilities/locations/christmas-island/

[6] http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.html#Heading224

[7] http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.html#Heading48

months. For most of them, this time of detention included an initial period on Christmas Island.

This overcrowding is also the result of the introduction by the Government, last April, of a suspension of the processing of new asylum applications from Sri Lanka and Afghanistan. The argument given by the Government was the evolution of the situation in these two countries. It suspended the processing of new asylum claims by Sri Lankan nationals for a period of three months and the processing of new asylum claims by Afghan nationals for a period of six months. On July, 7th 2010 and on September, 30th 2010, the Government lifted the suspension of processing of asylum claims from Sri Lankan and Afghan asylum seekers.

Before this suspension, in February last year, according to the Department of Immigration, the average time in detention for an asylum seeker was 78 days. Since then, the current average time is three times what it was one year ago, namely 214 days. This prolongation of detention led to a situation of overcrowding, especially on Christmas Island. Moreover, this long-term detention has generated stress, desperation, frustration and violence among asylum seekers. Riots which broke out on Christmas Island are the peak. Waiting can also lead people to self-harm and sometimes to suicide. This is the case of a 20-year-old Afghan man who killed himself on March, 28th. He was severely depressed after waiting almost a year for his asylum claim to be processed.

End indefinite detention

Australian government has to end indefinite detention as it also breaches Australia's international human rights obligations and leads to inhuman treatment of asylum seekers.

As long-term detention affects more asylum seekers and refugees waiting for their asylum claims or security clearance to be assessed, indefinite detention affects asylum seekers who have been refused protection visas following adverse security assessments by ASIO. These asylum seekers are non-removable due to the risks in their countries. As they have neither been released, nor granted Return Pending Visa, they are facing indefinite detention in Immigration detention facilities.

However, under article 9(1) of the ICCPR, indefinite detention is unlawful. Indeed, article 9(1) states that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Besides, indefinite detention of asylum seekers who are thought to pose a risk to the Australian national security does not meet Australian international obligations as it cannot be challenged in any Australian court. Indeed, under article 9(4) of the ICCPR, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." But as the reasons for such adverse assessments have not been disclosed to them by ASIO, asylum seekers are not able to go to court to challenge them. They have been denied the right to judicial review.

The Australian government would argue that the detention of these asylum seekers is justified on security grounds. Even if the argument of security detention can be raised, a time limit to this detention is compulsory.

End mandatory detention

Indefinite detention is the result of the Australian policy of mandatory detention. This policy has been active since 1992 and concerns all persons entering Australia without a valid visa. As soon as they enter Australia, they are detained in immigration detention facilities. Under sections 189, 196 and 198 of the *Migration Act 1958*, all non-citizens unlawfully in Australia must be detained, and kept in immigration detention until granted a visa or removed from Australia. Section 196.1 states that "An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is: (a) removed from Australia under section 198 or 199; or (b) deported under section 200; or (c) granted a visa. Thus, these provisions of the *Migration Act 1958* lead to a mandatory detention of asylum seekers and refugees, which makes Australian immigration detention regime one of the strictest ones in the world. Indeed, mandatory detention also breaches Australia's human rights obligations and especially article 9(1) of the ICCPR.

In 2004, the High Court stated[8] that a person could be detained, sometimes indefinitely, if there was no possibility for their removal from Australia and that mandatory detention was valid. It means that some asylum seekers can spend all their life in detention, waiting for a visa or for their removal. Mandatory detention leads to long-term and indefinite detention.

Long-term and indefinite detention lead to the degradation of mental and physical health of asylum seekers. That is why the policy of mandatory detention has to cease. Detention should only be used as a measure of last resort.

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[8] *Al-Kateb v Godwin* [2004] HCA 37

End offshore processing and the excision policy

In September 2001, the *Migration Amendment (Excision from Migration Zone) Act 2001* amended the *Migration Act 1958*. It led to the excision of territories such as Ashmore Islands, Cartier Islands, Christmas Island and Cocos Islands from the Australian Migration Zone. Following this excision legislation, "The Pacific Solution" was decided by the Howard government. Asylum seekers who arrived from Indonesia and were intercepted at sea were detained in detention centres on islands excised from the Migration Zone, such as Christmas Island. In these excised areas, they had no right to apply for a Visa but only for refugee status. This policy also allowed the removal of unauthorised arrivals to another country.

While the Rudd Government decided to end up "The Pacific Solution" in 2007, it also chose to maintain the excision of islands from the Australian migration zone. It means that asylum seekers who first enter at an excised offshore place become offshore entry persons and are prevented from applying for a visa. The bar on the visa application process can only "be lifted at the discretion of the minister if he considers it to be in the public interest."

Asylum seekers who are processed as offshore asylum seekers are not granted the same rights as onshore asylum seekers, namely people who arrived lawfully and people who arrived unlawfully on mainland Australia by sea or air. Indeed, the first difference is that asylum seekers who arrived unauthorised at an excised offshore place are not allowed to apply for a visa. They are only able to have their protection claims examined by the department under the "non-statutory Refugee Status Assessment process". Once they have been found to be refugees, the minister decides if he allows them to apply for a visa. It means this is only the minister, and his "non-compellable" power, who decides on asylum seekers' futures. Moreover, offshore asylum seekers are denied access to Australian courts while onshore asylum seekers are allowed to seek a merits review of the decision from an independent tribunal.

Last November, the High Court ruled[9] that two Tamil men arrived by boat were denied "procedural fairness" in the review of their rejected refugee status claims. They had appealed to the High Court on the grounds that former immigration minister Chris Evans had failed to consider their cases personally. Although the validity of this offshore processing has been called into question by the High Court which found it "flawed", the High Court ruling has neither repealed it nor the excision policy.

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9 Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41 (11 November 2010)

As Christmas Island, following the riots, had recently been closed to new arrivals, we saw, on March 25th, the brief move of some asylum seekers who were intercepted by Customs at sea and who were taken to the mainland for processing, to a remote beach on Ashmore Reef. The government indicated that it took this decision for "operational reasons". However, we know that the decision to disembark them on an excised place was not innocent and was for legal reasons. Indeed, if they had first been taken to the mainland, they would have had access to courts. The first aim of this move was to ensure that they would be processed as offshore asylum seekers. They now have fewer appeals rights. This recent event shows that offshore processing is still relevant today.

This excision policy has led to the offshore detention of asylum seekers on Christmas Island. In 2001, following the "Pacific Solution", the Phosphate Hill facility was built on Christmas Island as a temporary immigration detention facility. Christmas Island Immigration Detention centre, which could contain 800 beds, was built in 2006, in order to replace the temporary facility. Yet, in 2011, the Phosphate Hill facility is still open and all the facilities are overcrowded.

Contrary to what the Department of Immigration states on its website[10] ("The retention of the excision zone does not prevent Australia fulfilling its international obligations under the Refugees Convention and under other relevant international instruments."), offshore detention on Christmas Island is a breach of Australia's international obligations under the *Refugee Convention*. Indeed, the Australian government is treating differently asylum seekers who arrive on excised territories. That is why, in order to meet its international obligations, Christmas Island facilities should shut down.

We submit and we agree that, because offshore asylum seekers are denied some rights, the government should repeal the excision policy and offshore processing.

[10] http://www.immi.gov.au/media/fact-sheets/75processing-irregular-maritime-arrivals.htm