ChilOut - Children Out of Immigration Detention

Submission to the

Joint Select Committee on Australia's Immigration Detention Network

15 August 2011

Thank you for this opportunity to make a submission to the Joint Select Committee on Australia's Immigration Detention Network.

ChilOut – Children Out of Immigration Detention ChilOut is a not-for-profit community group of Australians campaigning on behalf of children held in immigration detention.

We believe that Australia's system of mandatory prolonged detention is a breach of international human rights conventions to which Australia is signatory. In particular, the detention of children and the manner in which they are treated more generally in the immigration regime is a breach of the Convention on the Rights of the Child as well as a breach of Australian cultural standards of protecting and nurturing vulnerable children.

While ChilOut has a special focus on the rights of children, because children are treated the same as adults under the system of mandatory detention, we will make comment on the detention network as a whole system, not just the treatment of children.

We are available to provide further information at the committee's request.

Information on the submission authors relevant experience and knowledge.

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Dianne Hiles AM, is a board member of ChilOut and a former Chair of ChilOut and A Just Australia. She has recently returned from conducting research on the Christmas Island Detention Centre. Dianne has been involved in the issue of immigration detention for 10 years.

Introduction

Immigration detention is a highly controversial issue in Australia. While most people agree on the need to detain criminal deportees or immigration compliance cases (those in breach of visa conditions such as the duration of stay in Australia or the right to work) the detention of asylum seekers remains hotly debated. This submission will focus on the immigration detention of asylum seekers.

Clearly, all advice points to the failure of the Immigration Detention Network (IDN) as it currently operates, in particular offshore detention, to support the administrative immigration functions relating to asylum seekers in a cost-effective and efficient manner:

- Detention is an extremely expensive form of accommodation
- Offshore detention exponentially increases costs and reduces efficiency
- Detention is unnecessary in most cases and to date has been unnecessary in all cases of detained children
- Mental health impacts of detention reduces the capacity of people to properly assist in the immigration process
- Detention actually decreases compliance with immigration processes and increases rates of forced removals
- Health concerns are more appropriately dealt with under existing quarantine laws
- It damages the physical and mental health of detained people who are later granted visas to remain in Australia, increasing costs of later health service delivery and creating barriers to their successful settlement
- Detention has been shown to cause particular damage to children's mental health, emotional well-being and causes developmental delays
- Mandatory detention is a breach of human rights conventions and reduces Australia's capacity to engage in international diplomacy.

Before seeking to change the IDN we must first define what is the outcome sought by asylum seeker policy, and how can the IDN support that outcome.

Good asylum seeker policy should:

- discourage dangerous journeys, but not punish those found it necessary to make that journey
- quickly and correctly identify who is a refugee and grant those people protection
- afford all people in Australia their human rights, as well as access to the legal mechanisms which protect those rights
- recognise the special vulnerability of children and protect their rights and development needs
- return home in safety and dignity those who are found not to be in need of Australia's protection
- adhere to all international conventions that Australia has voluntarily signed and wishes to remain signatory to
- protect Australians from any health or security concerns
- achieve the above in the most cost-effective way possible, without any waste of tax-payer dollars.

International experience and studies have shown that system-wide use of alternatives to detention is a more effective way to support the administrative functions of an immigration department, while upholding individual rights and reducing costs.

We look forward to the development of the IDN in Australia towards achieving these objectives.

Submission on terms of reference

(a) any reforms needed to the current Immigration Detention Network in Australia;

What is not being expressly examined by this inquiry is the purpose of the IDN itself. Without defining what are the goals or purpose of detention for different caseloads, it is impossible to assess the success of the IDN or even how the network should be run.

Before looking at the *way* the IDN is run, we need to look at whether or not the IDN *should* be run, both on legal grounds and whether or not it is even necessary for many of the caseloads.

There are two main reasons given for the mandatory detention of asylum seekers: either as administrative detention or as part of an overall border protection strategy to deter future boat arrivals.

Detention as deterrence

Under the Constitution of Australia, Parliament has the power to draft laws that allow for administrative detention where required for the purposes of removing persons from Australia or granting permission to enter Australia.

Sections 189 and 196 of the Migration Act outline the policy of mandatory detention, requiring that officers must detain an unlawful non-citizen until they are removed or deported from Australia, or granted a visa. A visa grant does not have to be a permanent or substantive visa – it can be a temporary bridging visa granted for the duration of substantive visa processing.

Immigration detention is lawful and compatible with the spirit of the separation of powers under the Constitution of Australia, only as long as it is *necessary* to support the functions of the Department of Immigration and Citizenship (DIAC.)

If detention of asylum seekers is being conducted to deter future arrivals, then it is punitive in nature and therefore a breach of the limitations on Parliamentary and Executive power under the Australian Constitution. [1]

In official communications, parliamentarians and DIAC are very careful to describe detention as administrative in nature in order not to give rise to legal challenges to mandatory immigration detention laws.

However, in comments to the media and other forms of communication, parliamentarians and departments quite correctly characterise immigration detention as a key part of the overall policy approach to deter future asylum seekers.

The Australian Parliamentary Library categorises mandatory detention as a deterrent policy. *The 1990s through to the mid 2000s saw an increase in policies aimed at deterring asylum seekers from coming to Australia by boat including the introduction of mandatory detention laws*[2]

In 2007, former Prime Minister Kevin Rudd categorised immigration detention as a deterrence *"Deterrence is effective through the detention system but also your preparedness to take appropriate action as the vessels approach Australian waters on the high seas*."[3]

Tony Abbott has also categorised immigration detention as a deterrence to boat arrivals.[4]

Former Coalition Immigration Minister Phillip Ruddock referred to detention as a deterrent to reduce boat arrivals.[5]

[1] This issue was covered in great detail by the High Court in Al-Kateb v Godwin [2004] HCA 37; 219 CLR 562; 208 ALR 124; 78 ALJR 1099 (6 August 2004) http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.html

[2] http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm

[3] http://www.theaustralian.com.au/national-affairs/defence/rudd-to-turn-back-boatpeople/story-e6frg8yx-1111114943944

[4] http://www.abc.net.au/news/stories/2011/05/07/3210497.htm?site=sydney

Administrative detention

The main official reason given for the detention of the asylum seeker caseload is that it is administrative detention. The deprivation of liberty can be defined as administrative detention where that detention is necessary to perform an administrative function. In this case it is for the purposes of health, identity and security checks or to determine visa status. [6]

If the detention of asylum seekers is indeed administrative, then the purposes of this inquiry should be to investigate the best way to deliver on the administrative functions currently performed under a detention environment, and how to do so as efficiently and cost-effectively as possible.

If it is the finding of this inquiry that immigration detention is more than merely administrative detention, and is being conducted for the policy purposes freely admitted to by politicians of both major parties, then that is clearly a breach of the constitutional limitations of government power and a matter of great concern.

In short, Australian lawmakers should adhere to Australian laws.

Departmental support for administrative detention

Time and time again, DIAC argues in support of prolonged detention as necessary to conduct their administrative functions. They have stated that children can be properly cared for in a detention environment, but that does not mean that children *should* be cared for in detention, or even that it is necessary to detain them, a requirement of detention remaining administrative and lawful.

The different treatment that plane vs. boat arrival asylum seekers receive, shows that the administrative detention of boat arrival asylum seekers is not necessary.

Case 1 – plane arrival

Person arrives on a tourist or other temporary visa. They have not been required to complete health or security checks in order to enter Australia. Person applies for asylum after arriving in Australia. Person is eligible for a bridging visa to remain in the community for the duration of processing. Person does not have to undergo health or security checks to be granted a bridging visa.

Case 2 – boat arrival

Person enters Australia without a visa and is detained offshore for the entire duration of processing, or until removed from Australia. Person is generally not eligible for a bridging visa.

The question that must be asked, is why is detention necessary to perform the immigration functions for a boat arrival person, but not a plane arrival? DIAC may claim that plane arrivals have identity documents, but around 20% of boat arrivals also have identity documents. Given that historically the majority of asylum seekers arrive by plane, do not pass health or security checks, but are allowed to reside in the community, it is hard to understand why the Department requires the detention of boat arrival asylum seekers for administrative purposes.

Recommendation 1

That this Joint Select Committee issue a statement defining the purpose of the Immigration Detention Network be limited in scope to supporting the administrative functions of the Department of Immigration and Citizenship. Where the administrative functions of the Department can be conducted outside of the detention environment for an individual, then that detention can no longer be characterised as being for administrative purposes and is therefore unlawful.

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[5] '*Detention* "*lesser evil*",' *The Advertiser*, *3 November 2003*, p5.

[6] The Department releases conflicting advice as to the purpose of detention for asylum seekers, whether it is only for health and security checks, or for the entire duration of the visa process itself: On one page the DIAC website states *"Immigration detention is not used to punish people. It is an administrative function whereby people who do not have a valid visa are detained while their claims to stay are considered or their removal is facilitated."* http://www.immi.gov.au/managing-australias-borders/detention/about/background.htm Yet on another page it states that mandatory detention applies to *"all unauthorised arrivals, for management of health, identity and security risks to the community."* *http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm*

Recommendation 2

That this inquiry investigate the parameters under which there is a need for detention to support the administrative functions of DIAC and provide recommendations on how to ensure that immigration detention is limited to lawful administrative detention for proven need.

Recommendation 3

That this inquiry investigate and recommend remedies to detention of individuals that is found to be not necessary to perform administrative functions.

(b) the impact of length of detention and the appropriateness of facilities and services for asylum seekers;

(d) the health, safety and wellbeing of asylum seekers, including specifically children, detained within the detention network;

(e) impact of detention on children and families, and viable alternatives;

The negative impacts of detention have been documented in numerous studies and reports. Detaining children has been shown to have serious consequences for children's mental health and emotional well-being and causes developmental delays that remain long after the detention has ended. Such reports and studies are too numerous to list them all. ChilOut is not aware of any independent study that shows there are no health impacts of detention, or that current Australian detention facilities are appropriate places to house children, particularly for long durations.

Depriving a person of their liberty is one of the harshest legal sanctions and should be used with caution and due process.

The anxiety and other mental health effects caused by the indeterminate length of detention are well documented. We are particularly concerned about the risks long-term detention presents to families through the breakdown of parents' ability to function.

Not only does the system have life and death impacts beyond "administrative detention", it is not subject to the rigorous checks and balances that are in place for judicial incarceration. There is no confidence in the complaints process and external review agencies can only make recommendations. Even the Commonwealth Ombudsman does not have any enforcement authority.

The risk of acquiring long-term mental health issues increases exponentially with the length of detention. This was acknowledged by the minister when the release of children into community detention was first announced in October 2010: "This is especially important for children, for whom protracted detention can have negative impacts on their development and mental health."[7]

To achieve the principle of detention for "the shortest practicable time" for children, again, criteria need to be determined around which children should be detained, why, and for how long. Currently, children are only eligible for release into the community at the whim of the immigration minister of the day. At any time, the whim can change, leaving vulnerable children to the "negative impacts" of protracted detention.

The immigration detention regime does not keep children safe and presents significant risks to their ongoing wellbeing.

[7] Chris Bowen MP, Minister for Immigration and Citizenship, 'Government to move children and vulnerable families into community-based accommodation', Media Release, 18 October 2010.

International law and the detention of children

The IDN as it operates breaches international human rights instruments. Some of the breaches of the Convention on the Rights of the Child include the following.

Convention on the Rights of the Child – Article 3

In all actions concerning children … the best interests of the child shall be a primary consideration.

Convention on the Rights of the Child – Article 22

… a child who is seeking refugee status … whether unaccompanied or accompanied … [shall] receive appropriate protection and humanitarian assistance…

Detaining children violates their basic human rights. But when they are housed in locked facilities such as Christmas Island, it is the responsibility of the government and its contractors, in this case Serco Asia Pacific ("Serco"), to take the very best care of the children. There is irrefutable evidence that the detention regime damages people. Allowing that effectively State-perpetrated damage to extend to children should be absolutely unconscionable in a developed, civilised society.

Convention on the Rights of the Child – Article 39

Children subjected to abuse, torture or armed conflicts should recover in an environment which fosters the health, self-respect and dignity of the child.

Many children within the detention regime have fled active war zones, and depriving them of liberty does not promote their recovery from such experiences. Detention compounds trauma.

Convention on the Rights of the Child – Article 37(b)

No child shall be deprived of his or her liberty unlawfully or arbitrarily.

The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

Recommendation

Develop alternative accommodation facilities – In order for detention to adhere to the principle that "the detention of children should be a matter of last resort" some alternative accommodation facilities must be provided. Currently, all children are detained in locked detention facilities until personally approved by the minister for release into community detention.

Recommendation

Develop criteria for the need to detain or release children – In order for the detention of children to not be arbitrary, guidelines and criteria for the need to detain or release certain children must be specified and put into practice. Currently, the criteria to detain children is simply that they do not hold a valid visa. This creates an arbitrary detention regime for children.

Recommendation

Apply a time limit to the detention of children – In order for the detention of children to be "for the shortest appropriate period of time", acceptable time limits must be defined in law and implemented in practice. Currently children may potentially be consigned to detention indefinitely.

Recommendation

Institute a detention review process that can be enforced – In order for the external review process to be effective, the reviewing agencies need to be invested with some powers of compulsion. Currently, reviewing agencies can only make recommendations to an "administrative detention" regime which deprives people of their liberty but is not subject to the rigorous checks and balances that are in place for judicial incarceration.

(f) the effectiveness and long-term viability of outsourcing immigration detention centre contracts to private providers;

ChilOut notes that it is ALP policy to return immigration detention operations to Commonwealth control. We look forward to the current ALP government taking steps towards this goal.

(i) the performance and management of Commonwealth agencies and/or their agents or contractors in discharging their responsibilities associated with the detention and processing of irregular maritime arrivals or other persons;

ChilOut holds grave concerns for the well-being of children in the IDN. We are particularly concerned with the plight of unaccompanied minors, who form the majority of children remaining in detention after the recent release of more than 50% of the caseload of detained minors. The Minister for Immigration is the guardian of unaccompanied children, and this confers on him a responsibility for these children's welfare. It is hard to see how their welfare and best interest is being taken care of by a guardian who has chosen to continue to detain these vulnerable children.

Recommendation

Institute an alternative Guardian for children in detention – There is a compelling logic for a Federal Children's Commissioner to take on the role of guardian and advocate for children's best interests. While such a role does not exist, it could be undertaken by the respective States' Children's Commissioners, invested with explicit authority that their powers are not subservient to Commonwealth laws for the purposes of child protection. Currently the best interests of the child are subject to the conflict of interest caused by dual roles undertaken by the minister.

(l) compliance with the Government's immigration detention values within the detention network;

The current detention arrangements for boat arrival asylum seekers remains a serious breach of the government's immigration detention values. The prolonged detention of boat arrival asylum seekers is not risk-based, and is not only for health, security and identity checks. ChilOut is not aware of a single boat arrival asylum seeker passing those checks and being moved out into the community, except for the much publicised decision to release children… but not all children.

Recommendation

Develop a risk-based determinant framework – In order for detention to be justified, and not presumed, the focus of determining the need for detention should be based on an assessment of the risk to the community. Currently, detention is presumed and not risk-based.

(m) any issues relating to interaction with States and Territories regarding the detention and processing of irregular maritime arrivals or other persons;

There remains a serious conflict between state child protection laws and agencies mandated for child protection, and the operation of the Commonwealth IDN. The clearest example is a well-known case of a family detained in the now closed Baxter IDF. The Family Court ordered the release of the children on the grounds that the detention environment constituted child abuse under South Australian child protection laws. The Department appealed that decision, not on the grounds that it was not child abuse, but on the grounds that the Family Court has no jurisdiction to stop the Department from engaging in child abuse. They won the appeal on those grounds.

The precedent remains valid. Surely it is a conflict with Australian cultural values to allow the Commonwealth the power to engage in child abuse?

Recommendation

Create a unified, national code of mandatory reporting – In order for reporting of suspected child abuse to be standardised, a single code should be developed and applied to all places where asylum seeking children are accommodated. Currently children are subject to varying standards of protection through different State reporting requirements and Commonwealth laws taking precedence over State laws.