

Submission to the Joint Select Committee on Australia's Immigration Detention Network

To: Committee Secretary
Joint Select Committee on Australia's Immigration Detention Network

From: Refugee and Immigration Legal Service Inc. (RAILS)

Date: 12 August 2011

Introduction

RAILS is a Community Legal Centre situated in Brisbane and focusing on the delivery of legal services to refugees, asylum seekers and disadvantaged migrants. RAILS is a member of the National Association of Community Legal Centres (NACLC) and the Queensland Association of Independent Legal Services (QAILS). RAILS has 30 years of experience providing free information, advice, casework and representation to the migrant community in Queensland.

RAILS provides assistance, advice and representation to *lawful non-citizens* (as defined in section 13 of the *Migration Act 1958* (the Act)) applying for a Protection (sub-class 866) Visa, and receives income through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Citizenship (DIAC) for that purpose.

RAILS does not provide assistance or representation to clients in immigration detention going through the various non-statutory processes for assessing refugee status, implemented on behalf of the Minister, and known respectively as Refugee Status Assessment (RSA), Protection Obligations Determination (POD), Independent Merits Review (IMR) and Independent Protection Assessment (IPA).

RAILS does provide advice and representation to *unlawful non-citizens* (as defined in section 14 of the Act) in immigration detention seeking judicial review in the Federal Magistrates Court of negative IMR assessments. These legal services are provided to clients over the telephone, and face to face, either in an immigration detention centre, or outside of an immigration detention centre to clients in community detention.

Summary

- The policy of holding all *offshore entry persons* (as defined in section 5 of the Act) in immigration detention pending a determination of their refugee status is arbitrary and inhumane.
- The distinction between offshore entry persons and other refugee claimants should be abolished. All refugee claimants present in Australia should be permitted to lodge an application for a Protection Visa, as of right.
- Denying applicants in immigration detention access to a proper statutory process, vetted by parliament and protected under law, for the assessment of their claims, results in flawed decision making.

- There should be greater transparency and accountability for decision makers involved in the assessment process.
- Applicants should be released into the community on bridging visas until their applications are determined. In the alternative, at the least, applicants should be released into community detention while their applications are determined.
- Face to face contact between refugee claimants and lawyers advising them about judicial review of administrative decisions is essential in order to obtain timely and accurate legal advice. Alternative models for the provision of legal advice are ineffective.
- If detention of *offshore entry persons* is to continue while their applications are processed, detention centre facilities and infrastructure should accommodate the provision of face to face legal advice at every stage of the process, including in relation to judicial review of administrative decisions.
- Cooperation and coordination between DIAC and its detention service providers should be improved to better facilitate the efficient delivery of legal advice to detainees.

Immigration detention

RAILS submits that the policy of holding all *offshore entry persons* (as defined in section 5 of the Act) in immigration detention pending a determination of their refugee status is arbitrary and inhumane.

The policy of differentiating between refugee claimants for protection according to the manner and place of their arrival in Australia is designed specifically to deter refugee claimants from seeking entry to Australia to claim asylum. Given the very low likelihood that such people would be granted a visa to enter Australia, the policy is aimed at excluding the possibility of refugee claimants seeking Australia's protection otherwise than through offshore UN mandated re-settlement. The outcome is that only relatively affluent or educated persons from developed countries are effectively able to lodge onshore applications for protection in Australia because they are the only persons able to access visas to enter Australia to be able to do so. This system unfairly disadvantages refugees from developing countries and the major refugee source countries around the world.

It is worth noting that, in relative terms, the number of refugee claimants coming to Australia, by whatever means, is de minimis. There are currently 10.55 million refugees in the world receiving the assistance of the UNHCR. (That figure does not include approximately 14.7 million internally displaced persons who are not recognized under international law as refugees.) Three quarters of the world's refugees are residing in a country neighbouring their own, frequently without any legal recognition of their status, hence their need for settlement in countries like Australia that are signatories to the Convention. Only 17% of the world's refugees are outside their region of origin, according to UNHCR. The geographical isolation of Australia means that *irregular* arrivals of refugee claimants to Australia will only ever be marginal. The failure of deterrence policies under successive commonwealth governments has also shown that it will never be eliminated. It is time to abandon detention of refugee claimants as a failed policy, and to fulfil Australia's responsibilities as a responsible global citizen by eschewing such callous attempts to avoid taking our share of the burden of the world's refugees.

Statistics show that it is the developing world doing the heavy lifting in terms of refugees. Pakistan has the highest number of refugees residing within its borders compared to its GDP per capita (710 at the end of 2010). The first industrialised nation was Germany, coming in at 25th (17 refugees per 1 USD GDP per capita).

There should not be a two class system for refugee claimants

A refugee's status under the Convention is not influenced by the manner of his or her arrival in Australia, and that artificial distinction in the Act should be abandoned. Indeed, under Article 31 of the Refugee Convention, States are not permitted to discriminate against refugees on the basis of the mode of arrival.

All refugee claimants present in Australia should be treated equally. The policy of preventing refugee claimants, by operation of section 46A of the Act, from lodging an application for a Protection Visa and having their claims tested according to Australian law is an unacceptable abrogation of Australia's international obligations under the Convention. The substituted non-statutory administrative process is deeply flawed: it is not governed by law but by executive policy and lacks fundamental safeguards that a process founded in law would provide. This sub-standard and para-legal process leads to hearings frequently lacking in procedural fairness and results in decisions that are illogical, wrong, and as demonstrated by recent decisions of the Commonwealth courts, unlawful.

Restraining applicants in immigration detention in remote facilities without access to a proper statutory process vetted by parliament and protected under law is resulting in flawed decision making. DIAC has well established procedures for assessing the claims of refugee claimants set out in the Act and the *Migration Regulations* 1994 (the Regulations). Those processes have had the opportunity of being subjected to parliamentary scrutiny and debate. They are governed by statute.

Claims are assessed by officers operating from well-resourced centres in Australia's major cities. Exigencies of procedural fairness and quality assurance are accommodated.

Review procedures for *lawful non-citizens* are also governed by statute. Those procedures are implemented by the Refugee Review Tribunal, a statutory body. Its jurisdiction, powers and procedures are set out in the Act and the Regulations. Members are appointed under the Act and employed under the *Public Service Act* 1999. Their conduct is governed by a Code of Conduct, APS Values and the APS Code of Conduct. Community liaison meetings are held and notes published. Statistics relating to the Tribunal's performance are published, as are Tribunal decisions.

Procedures for assessing the claims of *offshore entry persons* are ethereal by comparison. The process for assessment has no statutory force. It is operated pursuant to procedures manuals devised by DIAC for the purpose of administering an executive policy of the government. Those processes have been deprived the benefit of parliamentary scrutiny or debate, and are highly changeable.

The processes take place at makeshift facilities in immigration detention centres. These are typically in remote locations, and the facilities are basic and temporary. Dungen accommodation is typical. Inappropriate constraints, such as time pressures, are placed upon the process, partly by reason of the geographical remoteness of the sites and the need to coordinate the various participants, and partly by the need to process detainees as quickly as possible as a legal condition on their incarceration.

Reviews are not conducted by a statutory body, but by individuals sub-contracted to a private corporate entity. There are none of the safeguards applicable to the Refugee Review Tribunal. The process is opaque: the process of recruitment and appointment is unclear; statistics are not published and difficult to obtain; decisions are not published.

There is very little opportunity for public scrutiny of the reviewers or their decisions. IAAAS does not extend to providing legal representation to detainees in relation to judicial review of those decisions, and detainees are reliant upon the provision of pro bono legal services by organisations such as RAILS for that purpose. Again, difficulties associated with access to and the remoteness of detention centre facilities impede access to justice to detainees in such circumstances.

Natural justice

It is essential that any process implemented by or on behalf of DIAC be conducted in such a way as to ensure that justice is not only done, but is seen to be done. The process must have integrity, not only to ensure that Australia complies with its obligations under the relevant international treaties, but also to ensure that members of the public within Australia can have faith that asylum seekers are being assessed fairly and equitably, and so that aspiring applicants for protection feel that their claims have received a fair hearing. The latter consideration is of particular importance for the welfare of those being detained in immigration detention.

The process for assessing claims of *offshore entry persons* is uncertain and changeable. Numerous amendments have been made to the processes in the last 12 months.

The principles of natural justice generally require that a person be given a fair hearing and that the process is free, not only from bias, but also from the reasonable apprehension that the decision maker is biased. A decision that is illogical in the sense that no decision maker could reasonably reach that conclusion on the evidence is also not permitted. If any of those principles is breached, the integrity of the process is hopelessly compromised.

Prevention is always better than cure. Despite the remaining vestige of legal recourse available to applicants in the form of an application to the Federal Magistrates Court for judicial review, such relief will be an unsatisfactory answer in most circumstances to the question of error in a decision. That is so for a range of reasons, including:

- the lack of access for detainees to appropriate and timely legal advice. The IAAAS program does not provide funding for advice on judicial review so detainees rely upon pro bono legal service providers;
- the remoteness of detention centres and access constraints.

Examples of flaws in the process observed by RAILS

The following list contains examples of issues RAILS frequently observes with decision making involved in the non-statutory process:

- Claimants often report that insufficient time was given to them to discuss their claims with their own advisers and to prepare their submissions.
- Claimants report a lack of continuity of personnel. Frequently submissions are prepared by lawyers or agents other than the person interviewing the claimant at the initial conference. This appears to be directly attributable to the need for IAAAS providers to coordinate *task forces* to travel to detention centre facilities for blocks of time. Reports also suggest that decisions are being made by DIAC officers who did not conduct, and were not present at, the claimants' interviews. RAILS is concerned that lack of continuity of representation, and decision makers, will lead to errors in the presentation and receipt of both evidence and submissions.
- Decision makers often display a propensity toward adverse credit findings when other explanations are open on the evidence. RAILS is concerned that this propensity may arise from a lack of training and understanding among decision makers in relation to principles of refugee law, as interpreted by Australian courts. This is particularly the case with some of the individuals provided by the private corporate entity for the purposes of undertaking reviews of initial assessments.
- The use and reliance upon standardised templates for decisions is ubiquitous. While there may be merit in dealing with applications efficiently by drawing upon general background research and applying it to specific instances, the use of standard precedents for findings about circumstances in the country of origin might lead fair minded observers to apprehend bias on the part of decision makers. This is a fundamental issue of natural justice. Again, this issue seems contributed to by the time and geographical constraints imposed by the need for the process to be conducted at remote locations. It is also a feature of relying upon a private contractual arrangement for the administration of a quasi-judicial function.
- RAILS has observed a large degree of inconsistency in decisions. Stories are common of individuals from the same village with similar claims receiving different outcomes, and of enormous inconsistency in factual findings about the circumstances in countries of origin. This is contributed to by the lack of transparency and accountability in the decision making process: decisions and statistics are not published or readily available.
- RAILS is concerned that insufficient weight is frequently given to the subjective fear of persecution felt by refugee claimants. Again, RAILS is concerned that this

arises from a lack of training or understanding among decision makers of the principles of refugee law

- Out-dated and inaccurate country information is frequently relied upon as a basis for denying claims of applicants. Again, this is permitted by a lack of transparency and accountability in the decision making process.
- RAILS has perceived a real apprehension among sections of the detention population of bias by particular individual decision makers. Statistics are difficult to obtain, but there seems to be at least to be some empirical support for that perception when overturn rates of various reviewers for claimants of the same ethnicity are compared. This apprehension is not assisted by the opacity of the process.

Many of these issues could be diminished if existing and well established procedures for assessing refugee status set out in the Act were adopted for all applicants, including *offshore entry persons*.

Detention facilities

As mentioned, the geographical location of the many detention centres, coupled with issues of road infrastructure and entry restrictions, create unnecessary constraints on access to immigration detention centres for lawyers and other observers.

RAILS' experience is with the Scherger Detention Centre (SDC) in Queensland. That experience provides a useful example of the issues with lack of accountability and transparency in the immigration detention network.

The SDC is located on an RAAF base, 32 kilometres outside of Weipa, in the Gulf of Carpentaria around 1.5 hours by plane from Cairns. The roads are unsealed and require a 4WD vehicle.

There is no public transport to access the SDC. Travel to and from the SDC is impossible without an escort. The Weipa taxi service does not travel there.

The environment in an immigration detention centre is very constrained. There is a high level of security and detainees privacy and personal liberty is greatly restricted. In general terms the environment is controlled with no flexibility particularly when situations other than routine activities occur.

Access to justice in immigration detention is constrained by the general inefficiencies and processes in place. For example, as access to clients relies upon DIAC and SERCO.

RAILS has observed that lack of effective communication between DIAC and its respective security contractors (including SERCO) leads to delays and inefficiencies with the targeted delivery of legal services to refugee claimants. Knowledge and understanding amongst the detainee population of the assessment processes is very low.

All of these issues would be alleviated by release of refugee claimants into the community.