



MONASH University
Castan Centre for Human Rights Law



Castan Centre for Human Rights Law

Monash University

Melbourne

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

Prepared by Tania Penovic

Research assistance provided by Castan Centre interns:

Hester Kelly and Deborah Lemish

We are grateful for the opportunity to make a submission to this timely enquiry. The immigration detention regime has long been associated with concerns about Australia's compliance with its human rights obligations. We are hopeful that this enquiry will lead to substantive change which brings the Migration Act into line with Australia's human rights obligations.

The current inquiry will add to a significant body of research into immigration detention. Australia's mandatory immigration detention regime has spawned a multitude of reports. Beyond the observations made by international and domestic human rights bodies, the detention regime has been the subject of a series of federal government enquiries. The legislative framework underpinning the detention regime has nevertheless remained largely resistant to change. Many of the conclusions reached in the reports of those enquiries are still applicable to the regime as it is currently administered.

Following the 2005 reforms to the detention regime¹, a Senate enquiry into the Migration Act's administration and operation² identified the three key problems associated with immigration detention to be its indeterminate duration, questionable effectiveness and consistency with international law.³ These problems have unfortunately not been resolved. While the 2006 Senate enquiry facilitated some positive developments, including regular scrutiny by the Australian Human Rights Commission and Commonwealth Ombudsman, most of its recommendations were not adopted.

More recently, the Joint Standing Committee on Migration (JSCM) issued three reports, the first of which recommended the enactment of the government's key immigration detention values into law as a matter of priority. The Migration Amendment (Immigration Detention Reform) Bill 2009 sought to give legislative backing to the values. Some of the seven values

¹ Migration Amendment (Detention Arrangements) Act 2005

² Senate Legal and Constitutional Affairs Committee, Inquiry into the administration and operation of the Migration Act 1958, 2 March 2006 [5.37] http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/report/index.htm

³ Senate Legal and Constitutional Affairs Committee, Inquiry into the administration and operation of the Migration Act 1958, 2 March 2006 [5.37] http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/report/index.htm

were to be embedded in law, some affirmed in principle while others were omitted from the Bill.⁴ A further Senate report recommended that the Bill be revised in order to correspond more closely with the key immigration values. While the Bill has since lapsed and has not been re-introduced, the Senate Committee's conclusions also remain applicable.

Human Rights and immigration detention

Reform of Australia's mandatory detention regime has been called for by a range of human rights bodies, including the Committee on Economic, Social and Cultural Rights, the Committee against Torture, UN Special Rapporteur on the Right to Health and UN Working Group on Arbitrary Detention. In hearing communications alleging violations of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee has repeatedly found the detention in question to be mandatory in violation of article 9(1). While immigration detention is not arbitrary per se, the committee has found that detention is arbitrary if it is not justified in all the circumstances and proportionate to the aims pursued. Unlawful entry into Australia and fear that an asylum seeker may abscond into the Australian community have been found by the committee to be insufficient grounds to justify indefinite and prolonged detention, which was accordingly arbitrary in contravention of article 9(1) of the ICCPR.⁵

In light of its harsh human impact, immigration detention has been found to amount to cruel and inhuman treatment as proscribed by the ICCPR⁶ and Torture Convention.⁷ It also imposes a penalty on asylum seekers who come to Australia by boat, thus contravening article 31 of the Refugee Convention which prohibits the imposition of penalties on the

⁴ For example, value 4's requirement that the length and conditions of detention, including the appropriateness of both the accommodation and services provided, will be subject to regular review, or value 7's requirement that conditions of detention ensure the inherent dignity of the human person'.

⁵ *A v Australia*, Communication No. 560/1993; *Mr C v Australia*, Communication No. 900/1999; *Baban v Australia*, Communication No. 1014/2001; *Bakhtiyari v Australia*, Communication No. 1069/2002; *D and E v Australia*, Communication No. 1050/2002; *Danyal Shafiq v Australia*, Communication No. 1324/2004; Saed [Shams](#) Communication No. [1255/2004](#), Kooresh [Atvan](#) ([1256/2004](#)), [Shahin Shahrooei](#) Communication No. [1259/2004](#), [Payam Saadat](#) Communication No. [1260/2004](#), [Behrouz Ramezani](#) Communication No. [1266/2004](#), [Behzad Boostani](#) Communication No. [1268/2004](#), [Meharn Behrooz](#) Communication No. [1270/2004](#), [Amin Houvedar Sefed](#) Communication No. [1288/2004](#).

⁶ *Mr C v Australia*, Communication No. 900/1999; *Baban v Australia*, Communication No. 1014/2001.

⁷ Concluding Observations of the Committee Against Torture: Australia, UN Doc CAT/C/AUS/CO/I (15 May 2008), at <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-AUS-CO1.pdf>

basis of illegal entry or presence.⁸ The regime discriminates against asylum seekers who have sought to enter Australia by boat, and thus contravenes the ICCPR (articles 2, 24 and 26) and Convention on the Rights of the Child (CRC) (article 22). This discrimination has been entrenched further by the excision policy and current use of Christmas Island as a detention facility. The detention regime is also inconsistent with the UN High Commissioner for Refugees' Executive Committee Conclusion No 44 and UNHCR guidelines concerning detention of Asylum Seekers.⁹ The guidelines provide that asylum seekers should not, as a general principle, be detained. Detention may nevertheless 'exceptionally be resorted to' subject to four permissible exceptions, namely to verify identity, to facilitate a preliminary interview to identify the basis of an asylum claim, in cases where asylum-seekers have destroyed their travel and /or identity documents or used fraudulent documents in order to mislead authorities and fourthly, to protect national security and public order where there is evidence to show that the asylum-seeker is likely to pose a risk to public order or national security.

With respect to children, the practice has been fundamentally inconsistent with the CRC.¹⁰ Minister Bowen's decision to grant residence determinations to children held in immigration detention and their family members was a significant step towards the realisation of human rights. We believe that this step should be backed by legislative amendment providing that minors and their family members must not be held in immigration detention.

Compliance with policy values

⁸ See generally Goodwin-Gill G, 'Article 31 of the 1951 Convention relating to the Status of Refugees: non-penalization, detention and protection' in E Feller, V Turk and F Nicholson (Eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), 185-252

⁹ UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, February 1999

¹⁰ Australian Human Rights Commission, A last resort? The National Enquiry into Children in Immigration Detention, April 2004 at http://www.hreoc.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf The regime was considered to be inconsistent with Articles 37(b), (c) and (d), the best interests consideration in art 3(1), the need to extend appropriate assistance to child asylum seekers as well as refugees in accordance with art 22(1) and the obligation to provide an environment which fosters the health, self-respect and dignity of children recovering from torture and trauma in accordance with art 39. With respect to the individual cases, see Mr Ali Aqsar Bakhtiyari and Mrs Roqaiha Bakhtiyari v Australia, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003).

The key immigration detention values promised to align immigration policy more closely with human rights. While the maintenance of mandatory detention as an essential component of strong border control is to some degree inconsistent with the other detention values, the new policy honoured the Rudd government's election promise to adopt a more humane approach to the processing of asylum seekers than its predecessor. The values promised to end arbitrary detention by reversing the presumption of confinement and requiring immigration officers to justify any decision to detain. Rather than using detention until the protection status is finally determined, detention would be used to manage health, identity and security risk. Subject to a transparent and clearly defined risk assessment process, the new values promised to alleviate the impact of indefinite detention and significantly reduce public costs.

The values advanced human rights which had hitherto received insufficient protection in the following key respects:

- Children were not to be accommodated in immigration detention centres (value 3), aligning practice with article 37(c) of the CRC by moving towards treatment of child asylum seekers with humanity and respect for their inherent dignity and in a manner which takes into account the needs of persons of his or her age
- Value 4's recognition that indefinite or otherwise arbitrary detention is not acceptable and that conditions of detention (including accommodation and services) be subject to regular review promised to align Australia's policy with articles 9 and 10 ICCPR and article 37 of the CRC.
- The recognition in value 5 that detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time and in value 6 that detainees be treated fairly and reasonably within the law (article 37(b) and (c) CRC, article 9(1) and 10(1) ICCPR)
- In providing that conditions of detention will ensure the inherent dignity of the human person, value 7 also reflects article 10(1) ICCPR, article 37(c) CRC and the prohibition on cruel and inhuman treatment in article 7 of the ICCPR and article 16 of the Torture Convention

Administrative implementation of the key immigration values is reported to have commenced in June 2008.¹¹ Yet three years on, these values have not been fully implemented. The under-utilisation of community detention, the large population of asylum seekers held in immigration detention centres, the duration of their detention, the conditions in which many are held and the regular disturbances and acts of self harm within the immigration detention network raise serious questions of compliance. In March 2011, more than 750 people had been detained for over a year. In its recent report concerning detention at Villawood, the Australian Human Rights Commission observed that

At the time of the Commission's visit to Villawood IDC, sixty per cent of the 386 people detained there had been in detention for longer than six months, and more than forty five percent had been in detention for longer than twelve months. Twenty six people had been in detention for more than two years – this included eight people for more than three years, one person for more than four years and one person for more than five years. These long periods of detention are extremely concerning, and risk breaching Australia's human rights obligations.¹²

On the introduction of the key immigration detention values, Petro Georgiou observed that *'it appears the reforms will be carried out by administrative fiat. Improvements of any sort are to be welcomed, but the lack of legislative mandate means the reforms are especially vulnerable to the vagaries of the political winds, which, as we know, can shift abruptly.'*¹³ Indeed, the failure to embed the values in legislation has rendered them vulnerable to non-compliance. The values have been applied in a piecemeal and minimalistic manner. The Joint Standing Committee on Migration has supported the policy values and recommended their enactment into law as a priority, noting their absence from the Migration Act both in spirit and substance.¹⁴ Whether the values be retained or updated, the values which apply to immigration detention must be consistent with Australia's human rights obligations and enshrined in legislation.

¹¹ Department of Immigration and Citizenship (DIAC), Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, 31 July 2009, p. 7.

¹² 2001, Immigration Detention at Villawood, Summary of Observations from visit to Immigration Detention Facilities at Villawood at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html at Part 6.

¹³ Petro Georgiou 'Protection should be paramount' *The Age* July 31, 2008 at <http://www.theage.com.au/opinion/protection-should-be-paramount-20080730-3ncr.html>

¹⁴ JSCM, Immigration Detention in Australia: A new beginning- Criteria for release from detention, 1 December 2008 pp 83-84 at <http://www.aph.gov.au/house/committee/mig/detention/report.htm>

Health, safety and well-being

The current enquiry's terms of reference include an examination of the health, safety and well-being of detained asylum seekers and of those engaged in working with them. There is now a preponderance of uncontroversial medical opinion concerning the deleterious impact of immigration on health and well-being and the preventable and often irreversible effect on mental health. Professor Patrick McGorry's characterisation of immigration detention centres as 'factories for producing mental illness and mental disorder'¹⁵ is consistent with the conclusions of a range of mental health professionals, including the chair of the Department of Immigration and Citizenship's detention health advisory group, Professor Louise Newman. Evidence of the impact of immigration detention on mental health was cited by former Immigration Minister, Chris Evans, in launching the government's key immigration values.¹⁶ The committee will be familiar with reports of self-harm enacted daily within the detention network which have prompted the initiation of an own motion enquiry by the Commonwealth Ombudsman.

The mental harm associated with the detention experience is not limited to asylum seekers. After managing the notorious Woomera facility for 18 months, Allan Clifton said *'I was suicidal. I couldn't go out of the house. I couldn't get off the couch. I was basically a vegetable.'*¹⁷ The current experience of detention in Australia's IDCs, including Christmas Island, replicates many of the concerns associated with the Woomera facility under the Howard government. It has been reported that overstaffing, inadequate staff training and minimal counselling have contributed to trauma among contractors employed by Serco. One former guard employed at Christmas Island reported that binge drinking is common among staff and that some reported for work in an intoxicated state in order to manage the stress entailed in performing their duties.¹⁸

¹⁵ Adam Cresswell, 'Call to abandon 'factories for mental illness'', The Australian, 26 January 2010 at <http://www.theaustralian.com.au/news/nation/call-to-abandon-factories-for-mental-illness/story-e6frg6nf-1225823428382>

¹⁶ Chris Evans MP, New Directions in Detention - Restoring Integrity to Australia's Immigration System, Australian National University, Canberra, 29 July 2008.

¹⁷ C Carey, 'Woomera: victims of the war zone', The Sunday Age, February 25, 2007.

¹⁸ ABC Lateline, 'Guard blows whistle on detention centre conditions' 5 May 2011 at <http://www.abc.net.au/lateline/content/2011/s3209164.htm>

We are concerned that values 4 and 5 have been routinely overlooked, with tragic consequences. Maintaining an environment in which people are detained for indeterminate (and often prolonged) periods is not conducive to the realisation of the rights of asylum seekers or those of others who function within those environments.

Community based alternatives

We believe that the practice of detaining asylum seekers until their claims have been finally determined should be abandoned. Once security and health checks have been conducted and risk assessment undertaken, asylum seekers should be released into the community unless they are assessed as presenting an unacceptable risk to the community which can only be contained by detention. Unacceptable risk to the community must be determined with reference to defined criteria and subject to judicial review.

The UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers set out monitoring requirements such as reporting and residency requirements (eg requiring asylum seekers to reside at a particular address) in addition to provision of sureties, release on bail and residence at open centres. Alternatives to detention adopted in other countries include release into the community subject to a bond, surety, regular reporting, bail or varying degrees of supervision.

The Joint Standing Committee on Migration found that evidence suggests that it is not necessary to keep people who meet the criteria for release in secure detention facilities for long periods of time pending resolution of their immigration status.¹⁹ A range of United Nations treaty bodies have called upon Australia to abandon its mandatory immigration detention regime and consider less restrictive and damaging arrangements pending the determination of immigration status.

¹⁹ JSCM, Immigration detention in Australia: Community based alternatives to detention, 25 May 2009 <<http://www.aph.gov.au/house/committee/mig/detention/report2.htm>>

A high degree of compliance has been observed in community based alternatives to detention of asylum seekers.²⁰ A study conducted by Hotham Mission between February 2001 and February 2003 tracking 200 asylum seekers accommodated in the community in Melbourne reported a 100% compliance rate.²¹ Yet community based alternatives remain underutilised.

Outsourcing detention facilities

The impacts of immigration detention have been exacerbated by the private operation of Australia's immigration detention facilities. An environment in which vulnerable people are detained for an indeterminate period is not conducive to the realisation of human rights. When such an environment is operated pursuant to a profit motive, concerns about human rights may be accorded low priority.

Since November 1997, detention services have been operated by three separate corporations. The detention environment operated by Australasian Correctional Management (ACM) was found by the Ombudsman to be subject to systemic deficiencies.²² The Flood Enquiry found administration and management deficiencies and a culture of hostility towards detainees.²³ Group 4 Falck Global Solutions Pty (G4S) were awarded the services contract in August 2003 but the problems and deficiencies identified were not resolved. The Roche review identified problems in management and monitoring of detention facilities. The Palmer Enquiry observed that culture is slow to change and that some 60% of ACM staff had been absorbed by G4S. Palmer concluded that the services contract was 'fundamentally flawed' with poorly defined standards and governmental

²⁰ See generally Sampson, R., Mitchell, G. and Bowring, L. (2011) *There are alternatives: A handbook for preventing unnecessary immigration detention. Melbourne: The International Detention Coalition*

²¹ A Just Australia, Submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry on the Migration Amendment (Immigration Detention Reform) Bill, 01 August 2009, 8.

²² Commonwealth Ombudsman, Report of Own Motion Investigation into the Department of Immigration and Multicultural Affairs IDCs (2001)

²³ Phillip Flood, Report of Inquiry into Immigration Detention Procedures 2001 [4.1]; JSCM, n 19 [3.5-3.6].

oversight. G4S was fined \$500,000 in 2005 for refusing detainees food, water and access to toilets for the duration of a 7 hour bus trip between IDCs.²⁴

The services agreement concluded with Serco in December 2009 has not seen substantive improvements. Serco's management of the detention network has seen an increase in disturbances and acts of self harm. Persistent concerns around the staffing of detention facilities, as mentioned above, include chronic understaffing, inadequate staff training and use of unlicensed guards.²⁵ It is reported that Serco has incurred a number of fines for breaches of its service contract²⁶ and alleged that the prospect of fines has facilitated a culture in which incident reports are destroyed and workers are instructed that complaints will not be tolerated.²⁷

Once outsourcing has occurred, the process of return to the public sector is difficult. In July 2008, Minister Evans announced that the tender process underway at the time would be continued. The Minister stated that '[t]he absence of alternative public service providers would require the extension of the current contract arrangements for a minimum of two years and [t]he cancellation of the tender process would expose the Commonwealth to potential compensation claims from the tenderers.'²⁸ The Joint Sanding Committee on Migration has recommended the return of immigration detention services to the public sector.²⁹ A return to private operation of the immigration detention network would be difficult. But it is a necessary step towards fostering greater transparency and respect for human rights.

²⁴ Jewel Topsfeild, 'Labor Breaks detention promise' *The Age*, 20 January 2009
<<http://www.theage.com.au/national/labor-breaks-detention-promise-20090119-7ku5.html>>

²⁵ ABC 7.30 'Detention centres under spotlight' 18 April 2011, Reporter: Heather Ewart
<<http://www.abc.net.au/7.30/content/2011/s3194932.htm>>

²⁶ Paige Taylor 'Christmas Island asylum centre at risk: former manager' , *The Australian*, 22 March 2011
<<http://www.theaustralian.com.au/national-affairs/asylum-centre-at-risk-manager/story-fn59niix-1226025709520>>

²⁷ ABC 7.30 'Detention centres under spotlight' 18 April 2011, Reporter: Heather Ewart
<<http://www.abc.net.au/7.30/content/2011/s3194932.htm>>

²⁸ Chris Evans MP, *New Directions in Detention - Restoring Integrity to Australia's Immigration System*, Australian National University, Canberra, 29 July 2008.

²⁹ JSCM, *Immigration Detention in Australia: Facilities, Services and transparency* 18 Aug 2009
<<http://www.aph.gov.au/house/committee/mig/detention/report3.htm>>
Recommendation 48 [7.132]

Excision

While abandoning the Howard government's Pacific Solution, the government has used the excised territory of Christmas Island to process asylum seekers and has in recent months advanced efforts towards a bilateral agreement for the processing of asylum seekers calling on Australia's protection in other nations. While the transfer of asylum seekers for processing in Malaysia is at present the subject of a legal challenge³⁰, detention on Christmas Island continues and negotiations with Papua New Guinea concerning the recommissioning of the Manus Island facility appear to be well advanced.

The Department of Immigration and Citizenship informed the Australian Human Rights Commission that the key immigration values will operate on Christmas Island.³¹ Nevertheless, it was noted in the second reading speech of the Migration Amendment (Immigration Detention Reform) Bill 2009 that persons in excised offshore places 'will continue to be subject to the existing detention and visa arrangements of the excision policy'.³² Irrespective of the values' intended reach, the logistical difficulties presented by detention on Christmas Island were to inevitably compromise their realisation.

In his February 2011 report on Christmas Island, Ombudsman Allan Asher found that there were too many people detained and 'the stage has been reached where the current scale of operations on Christmas Island, as very remote from the mainland, and supporting infrastructure and services, is not sustainable.'³³ Mr Asher later observed that by February 2011, facilities were 'stretched well beyond capacity and the conditions explosive' and that

³⁰ The government has concluded arrangements with Malaysia towards an exchange of asylum seekers attempting to enter Australia with refugees processed in Malaysia. While the resettlement of recognised refugees is laudable, the transfer of asylum seekers to Malaysia is of deep concern. While it currently falls to the High Court to determine whether Malaysia meets relevant human rights standards as required for the purposes of a declaration under section 198A(3) of the Migration Act, we are concerned about the treatment of asylum seekers processed in Malaysia, including the danger of refoulement to places where their life of freedom may be threatened.

³¹ Department of Immigration and Citizenship (Undated), Response to the Australian Human Rights Commission's 2009 *Immigration Detention and Offshore Processing on Christmas Island Report*, http://www.hreoc.gov.au/Human_Rights/immigration/idc2009_xmas_island_response.html

³² Penny Wong (2009) Second Reading speech: Migration Amendment (Immigration Detention Reform) Bill 2009, Senate, Debates, 25 June 2009

³³ Commonwealth Ombudsman (2011), *Christmas Island Immigration Detention Facilities: Report on the Commonwealth and Immigration Ombudsman's oversight of immigration processes on Christmas Island, October 2008 to September 2010, February 2011—02 | 2011* [1.8] at www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf

his report 'sounded an early warning to our Government that unless it moved the bulk of these people off Christmas Island immediately and into appropriate facilities on the mainland, the island might implode, with disastrous consequences'.³⁴ The inevitable implosion occurred in March and again in July 2011.

The concerns relating to Australia's compliance with its human rights obligations, discussed above, are applicable to detention on Christmas Island. Additional concerns apply to offshore detention. Maintaining a bifurcated system of refugee processing ensures that Australia's obligations under section 31 of the Refugee Convention cannot be met. Offshore entry persons are penalised by denial of safeguards offered by Australian law and isolation from support and services. The effects of isolation on mental health are exacerbated by geographic remoteness. The policy of excision should be abandoned.

Cost

We expect that the Committee will be provided with detailed information concerning the costs of immigration detention, including the daily cost per detainee and the cost of establishing and maintaining accommodation within the detention network. The costs of alternatives to detention are comparatively low,³⁵ in both financial and human terms. We strongly recommend that these alternatives be pursued and utilised to the fullest extent.

Conclusion

Few Australian policies have been subject to the degree of scrutiny afforded to mandatory immigration detention. Thousands of pages of observations and recommendations have been issued. This profusion of words has not been matched by substantive reform. With each successive enquiry, we have hoped for an end to wholesale, prolonged and indefinite immigration detention. We welcome the current enquiry and sincerely hope that this will be the one which facilitates a new approach to refugee processing which reduces costs to the taxpayer while honouring human rights.

Recommendations

³⁴ Commonwealth Ombudsman (2011), 'A fair deal for asylum seekers? A guest lecture by Commonwealth Ombudsman Allan Asher to the University of Melbourne Law School, 14 April [Online] Available <http://www.ombudsman.gov.au/docs/speeches/a_fair_deal_for_asylum_seekers.pdf>

³⁵ See generally Sampson, R., Mitchell, G. and Bowring, L. (2011) *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition at 51.

- The practice of detaining asylum seekers until their claims have been finally determined should be abandoned.
- Once security and health checks have been conducted and risk assessment undertaken, asylum seekers should be released into the community unless they are assessed as presenting an unacceptable risk to the community which can only be contained by detention.
- Unacceptable risk to the community must be determined with reference to defined criteria and subject to judicial review.
- Community based alternatives to detention should be utilised extensively
- The excision policy should be abandoned and the provisions of the Migration Act relating to excised offshore places and offshore entry persons should be repealed.
- Section 198A of the Migration Act should be repealed to ensure that asylum seekers are not detained in declared countries
- Key immigration detention value 1 should be abandoned and the remaining values embedded in law.