Submission No 143

A JUST AUSTRALIA

Refugee Council of Australia

Joint Standing Committee Inquiry into Immigration Detention
Report #1 Immigration detention in Australia: A new beginning

Response from A Just Australia and the Refugee Council of Australia

Introduction

In July 2008 the Minister for Immigration and Citizenship, Senator the Hon. Chris Evans, announced the *New Directions in Detention* policy. This policy stated that only three groups would be subject to mandatory detention: unauthorised arrivals for the purpose of health, identity and security checks; those who pose an unacceptable risk to the community; and those who have been repeatedly non-compliant with visa conditions or immigration processes.

In order to create an immigration detention system that meets the *New Directions*, two things are needed: an independent system of checks and balances to ensure the bureaucracy running the system is transparent and accountable to the Minister and Parliament; and to ensure that individuals have the right to enforceable remedy in the face of breaches of the *New Directions* criteria.

The approach thus far has been primarily focused on creating a transparent and accountable bureaucracy, with independent review by the Ombudsman. While this would create an excellent framework for reviewing the job performance of the Department, which may lead to fewer cases of unwarranted detention in the future, it does nothing for any individual currently being detained in breach of the *New Directions* criteria.

Immigration detention is completely outside of the Australian mainstream legal system, where all other forms of detention have enforceable remedies for individuals. Without independent review – preferably judicial – there is no effective remedy for individuals whose detention is unwarranted. Instead, detention decisions are still being left to the discretion of the Department and ultimately the Minister for Immigration.

In order to bring Australia's immigration detention system back into the mainstream of accepted standard practice of other forms of detention, we need to have clearly defined and legislated criteria for the need to detain, with time limits for each criteria and for detention decisions to have true external review with enforceable remedy for breaches.

Response to recommendations: General comments

The overarching problem with the approach taken to immigration detention - in the JSCM report as well as the current policy framework - is that the policy of mandatory detention has created an accepted default position of 'detention unless proven otherwise'. In no other system of detention in Australia is it considered acceptable to detain people who have shown no individual risk to the community or compliance risk. Nor is it considered acceptable to detain people simply because it is more convenient for the bureaucracy to have that person on hand for processing.

Rather than merely ameliorating the damage that a policy of mandatory detention inflicts on people, policy-makers and the community need to go back to the basics and review the justifications for detention prior to determining a new detention policy. The simple fact is that there are no studies or statistics that show that current forms of immigration detention achieve their objectives of minimising risk to the community, combating high-rates of non-compliance or deterring others from immigration offences.

If the Australian Government is serious about evidence-based policy writing, then mandatory, prolonged, unreviewable detention must end now, as there is no evidence to show this massive expenditure or infringement of individuals' rights has had the desired or purported impact. Indeed the available evidence is to the contrary, showing that asylum seekers have a vested interested in remaining engaged with the immigration process to resolve their protection claims.

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Response to recommendations: Criteria for release – health, identity and security checks

Recommendation 1 - publish criteria for what constitutes a public health risk

We welcome this recommendation. Health screening of immigration detainees for the purpose of release into the Australian community should be no more onerous than for other temporary entrants (such as tourists) from the same country of origin. Once a person is released, the more extensive health checks as conducted for permanent entrants can then be conducted, and such checks governed by existing public health frameworks.

With published criteria, it will be evident if a much higher standard of health check is being required compared to other people allowed into the Australian community, that will result in people being unnecessarily detained.

Recommendation 2 - establish a time frame for health checks and the statistics of the time frame being met/not met published in the DIAC annual report.

Establishing a timeframe will facilitate a more transparent immigration detention regime. However, the statistics should be published more regularly than suggested. Additionally, while timeframes that are non-binding can be used to judge the performance of the Department, they will have little impact on the justice afforded to individuals as to whether their detention is prolonged.

Again, the inherent problem with the overall approach is that policy is being determined from the viewpoint of creating a transparent and accountable bureaucracy that is answerable to the Minister and the Parliament. Little to no attention is being paid to the rights of the individuals who are being detained by that bureaucracy. Publishing statistics of how many people had unnecessarily prolonged detention may assist in reviewing job performance, but it does detained individuals little good.

Recommendation 3 –Where a person's identity is not conclusively established within 90 days, and they pose no specific risk to the community and have complied with all reasonable requests, develop mechanisms (such as a particular class of bridging visa) to enable a conditional release from detention.

Recommendation 4 - Where a person's security assessment is ongoing after 90 days of detention, and they pose little risk to the community as advised by ASIO and have complied with all reasonable requests, develop mechanisms (such as a particular class of bridging visa) to enable a conditional release from detention.

These recommendations are an important step forward to achieve the goal of preventing unnecessary detention. The method of using bridging visas to expedite release pending a substantive visa outcome is a practical approach that can be implemented quickly and cheaply. However, eligibility for such bridging visas must not be discretionary or rely upon the goodwill of the department or the Minister as is currently the case for the newer forms of bridging visas used to release long-term or difficult caseloads from detention such as the Removal/Return Pending Bridging Visas used to release stateless or 'unreturnable' people.

Again, to ensure the immigration detention regime is consistent with accepted standards in other forms of detention in Australia, release mechanisms must be independently enforceable for individuals.

Recommendation 5 – Where a security assessment is ongoing over 6 months, review the ASIO evidence and procedures of that assessment, and provide advice to the Ombudsman as to if the delays are legitimate.

This is an appropriate recommendation. While individual security assessments and overall security procedures must, by their very nature, be confidential, it is essential to ensure the rights of individuals are being upheld during this process. However, we believe that it is necessary for this stage to also have independent review with enforceable remedy.

Response to recommendations: Criteria for release – unacceptable risk and repeated non-compliance

Recommendation 6 - Develop and publish the criteria for assessing 'unacceptable risk to the community.'

This is a very important recommendation and is highly welcomed. It is critical that there be publicly accessible criteria by which all decisions to detain are made in order to improve transparency and accountability for those decisions.

However, the current system and JSCM recommendations are non-binding in that there are no enforceable remedies for individuals where the criteria are being breached. A lack of judicial external review also means there will be no jurisprudence developed around decisions to detain for immigration purposes.

> *Recommendation 7 - Individually assess all persons in immigration detention, including those detained following a section 501 visa cancellation, for risk posed against the unacceptable risk criteria.*

The New Directions in Detention policy should be implemented as soon as possible. While the policy should be enacted into legislation, as well as new methods of release and community welfare/accommodation programs developed, all currently available methods of release should be utilised to release people under the new direction as a matter of high priority.

> *Recommendation 8 - The Committee recommends that the Department of Immigration and Citizenship clarify and publish the criteria for assessing the need for detention due to repeated visa non-compliance.*

We welcome this recommendation. However the same limitations apply as for recommendation 6. Without enforceable remedy, the criteria themselves are non-binding and unenforceable.

> *Recommendation 9 - The Committee recommends that the Australian Government apply the immigration detention values announced on 29 July 2008 and the risk-based approach to detention to territories excised from the migration zone.*

We welcome this recommendation. Excision attempts to create a legal vacuum to implement government policies that are in breach of our constitution or inconsistent with other domestic laws. Additionally, excision policies are clearly incompatible with the New Direction policy. Excision creates additional difficulties in delivering the same level of services available to asylum seekers on the mainland, particularly children.

Response to recommendations: Review mechanisms for ongoing detention

> *Recommendation 10 - DIAC develop and publish details of the scope of the three month detention review, and provide individual reviews to the person in immigration detention.*

This recommendation will enable the detained person or their advocate to be aware of any adverse findings that result in a person failing to be eligible for release, which would give them a chance to correct or dispute any inaccurate findings. However, as the decision to detain has no enforceable external review, it remains discretionary for the Department to overturn incorrect adverse evidence on application by the individual or their advocate.

> *Recommendation 11 - Commonwealth Ombudsman's six month detention reviews be tabled in Parliament and the Minister for Immigration respond within 15 sitting days, addressing each recommendation and provide reasons why that recommendation is accepted, rejected, or no longer applicable.*

This will be a very important step to create greater transparency and accountability within the immigration detention system. However, as with other recommendations, this change will impact on the bureaucratic systems, but will have little impact on protecting the rights of individual people who are being unnecessarily detained.

> *Recommendation 12 - Enshrine in legislation, regulations and procedural guidelines, the reforms to immigration detention policy announced by the Minister for Immigration and Citizenship.*

We strongly welcome this recommendation. These important changes to policy should be enacted as a matter of priority.

> *Recommendation 13 – Introduce a twelve-month time limit on immigration detention, provided a person is not determined to be a significant and ongoing unacceptable risk to the Australian community. Persons to be released on a bridging visa with reporting requirements if required.*
>
> *Recommendation 14 – Decisions to detain longer than 12 months due to significant and ongoing unacceptable risk to the Australian community should be subject review by an independent tribunal and judicial review.*

A time limit on the detention of people who pose no risk to the community is an important step forward in developing remedies for individuals, rather than focusing on mechanisms for the bureaucratic systems overseeing immigration detention.

However, recommendation 13 - imposing a twelve-month time limit – reflects the principle that the Department can detain a person for up to one year without any external enforceable review of that power. While this is undoubtedly an improvement on the current system of mandatory indefinite detention, this does not adequately safeguard against the possibility of unwarranted detention, and in fact, allows for it.

Response to recommendations: Removals and detention charges

> *Recommendation 15 - The Committee recommends that where enforced removal from Australia is imminent, the Department of Immigration and Citizenship provide prior notification of seven days to the person in detention and to the legal representative or advocate of that person.*

We strongly welcome this recommendation. Many removals and deportations have occurred by ensuring that individuals or their advocate are unable to utilise legal channels to halt or review a removal, resulting in people being removed who may otherwise have been eligible to remain in Australia.

> *Recommendation 16 - The Committee recommends that the Australian Government consult with professionals and advocacy groups in the immigration detention field to improve guidelines for the process of removal of persons from Australia.*

We strongly welcome this recommendation. The full JSCM recommended list of areas to be included in the guidelines creates an excellent framework for improving the process of removing persons from Australia.

> *Recommendation 17 - The Committee recommends that the Australian Government instigate mechanisms for monitoring and follow-up of persons who have claimed asylum and subsequently been removed from Australia.*

We strongly welcome this recommendation. Research from respected organisations such as the Edmund Rice Centre have raised questions as to the safety of failed asylum seekers who were removed both from Australia and the 'Pacific Solution' centres on Nauru and PNG. Some were later granted protection in other convention signatory countries.

Monitoring and follow-up mechanisms would not only impact individuals, but would be an effective quality assurance monitor of the efficacy of Australia onshore refugee status determination systems. However, this is a challenging idea to implement, as it requires monitoring in sometimes dangerous countries. We recommend that more attention be paid to front-loading the system with improved protection claims processing and a pre-removal risk assessment, as is used in Canada.

> *Recommendation 18 - repeal the liability of immigration detention cost and waive existing detention debts for all current and former detainees, effective immediately.*

We welcome this recommendation. It is an important principle of justice to halt the practice of charging people for their incarceration. **We note and support the proposed changes in this regard announced recently by the Minister.**