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Committee Secretary
Joint Standing Committee on Migration
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Hon. M. Danby and Committee Members,

Submission to the Joint Standing Committee on Migration Inquiry into immigration detention in Australia

The Centre would first like to commend the government on convening a Parliamentary inquiry into immigration detention. A thorough inquiry into this serious matter is long overdue. The Centre also cautiously welcomes the Minister's recent announcement of making changes to Australia's detention regime. The proposed changes will go some way to ameliorate the harm caused by indefinite immigration detention and to improve procedural fairness to the refugee status determination process. These changes come on top of the closing of detention centres on Nauru and Manus Island, the end of the Pacific Solution and the abolition of Temporary Protection Visas. After more than a decade of the erosion of rights and due process, these are all welcome steps. However, several significant problems remain unaffected by the announced changes, and greater reform both to the legislative framework and to operational procedures is urgently needed. There is also a need to see greater detail of the announced changes to see how much impact they will have on the human rights of asylum seekers.

The Centre for Human Rights Education is a centre of research, scholarship and teaching in human rights with a specific focus on refugee and asylum seeker rights and indigenous rights. The Centre is multidisciplinary and is located in the Faculty of Humanities, so whilst we incorporate legal frameworks in our work, we are not lawyers and rely more on sociology,

politics and social work in our framing of human rights. It is from this perspective that we make this submission. Staff of the Centre have published extensively in the field of refugee and asylum seeker rights including a focus on immigration detention. The Chair of the Centre, Professor Linda Briskman, is the Convenor of the People's Inquiry into Immigration Detention, an extensive nationwide inquiry which received over 400 submissions from former detainees, supporters, former detention centre staff, legal advocates, health professionals and others. Prior to moving into academia, Lucy Fiske worked with asylum seekers both in the community and in detention for approximately 6 years and continued her work with Temporary Protection Visa holders and to a lesser extent, with detainees in a voluntary capacity. Caroline Fleay has been coordinator of the Amnesty International Refugee Team in WA. All staff of the Centre have been involved in activism, education and research opposing mandatory indefinite detention for many years. We make this submission then, from a position of both practice and research experience.

Foundational Principles

The Centre is opposed to the detention of asylum seekers as a group except in the rare circumstance of compelling security reasons. The removal of a person's liberty is a very serious sanction, one of the strongest sanctions a state can exercise on people within its borders. Depriving a person of her/his liberty is a decision which ought to be taken very reluctantly, with several measures to ensure due process, transparency, independent oversight and avenues for appeal against the decision. In recent years, this has not been a feature of immigration detention. Mr Palmer noted in his report *Inquiry into the circumstances of the immigration detention of Cornelia Rau* that:

> DIMIA officers are authorised to exercise exceptional, even extraordinary powers. That they should be permitted and expected to do so without adequate... constraints on the exercise of these powers is of concern. (Palmer 2005, ix)

Mandatory Detention

Maintaining immigration detention as mandatory supports the maintenance of the culture of detention (described below). The mandatory aspect of detention places detention as the norm, as the starting point which a series of decisions may then move away from. Mandatory detention discourages the use of discretion to not detain. By restating the centrality of mandatory detention as the first of the recently announced seven values undermines many of the changes which follow and sends a confused message: that Australia wants to avoid a repeat of the human rights violations which have occurred in immigration detention while reaffirming the basic framework for responding to unauthorised arrivals. Mandatory detention is not necessary as demonstrated by the number of asylum seekers living in the community and the very low rate of people absconding. Asylum seekers have a vested interest in complying with the visa determination process as it is the lawful protection of a state which they seek. Mandatory detention does not allow for individual assessment of either the need for, or the likely impact of detention. All asylum seekers should be released to live in the community while their claims are assessed.

The Centre recommends that public health concerns could reasonably lead to quarantine, but that this ought to be undertaken in the same way it would for a lawful entrant and detention is not warranted. The Centre does not support detention but if the government is determined to maintain detention then a more acceptable policy would be for unauthorised arrivals to be detained for a period of up to 30 days to enable the Department to undertake investigations into a person's identity, but that beyond this the Department must present positive evidence of a concern for detention to be extended, rather than detention being the default position in absence of evidence to the contrary.

The Department has initiated much improved alternative detention programs and this move is to be commended. It remains however, that people are detained and the conditions of detention do not alter this fact.

Excision

The recently announced changes maintain the practice of 'excising' parts of Australia for immigration purposes and means that the vast majority of unauthorised arrivals will not benefit from the changes to mandatory detention on mainland Australia. The changes appear to mean that asylum seekers held on Christmas Island will have access to a migration agent and to a mechanism of appeal, but people will remain in detention, in a remote location, without access to the same refugee status determination process as onshore asylum seekers and without access to Australian judicial processes. There is no need to maintain excision and offshore refugee determination. It is a recent development of dubious legal and moral foundations and the federal government has an opportunity to change the legislation and enable all asylum seekers to be brought to mainland Australia where they can access Australia's refugee system. Maintaining excision maintains a fundamentally unfair system.

Legislative and Cultural Change

It is our opinion that legislative change is needed immediately to protect against the excesses of mandatory detention, but that cultural change is also needed, most immediately within the Department of Immigration, but also with detention subcontractors, and with the Australian community more broadly.

As Palmer has noted above, the Department of Immigration has been operating with extraordinary powers and with inadequate training and inadequate checks on the use of those powers for a considerable period of time. There is significant evidence that the Department has developed a culture which encourages the use of detention without due regard for the gravity of such an act. The Commonwealth Ombudsman was referred some 248 'cases' in which it was suspected that a person had been wrongly detained (that is, detained while they had a valid Australian visa). I commend those Ombudsman reports to the Inquiry and refer to two in particular here. The Ombudsman's report into the detention of Mr G (Report No 6, 2006) and into the detention and deportation of Vivian Alvarez Solon (Report No 3, 2005).

Mr G. Arrived in Australia in 1975 from East Timor and has lived here since then. He is a permanent resident who developed a mental illness following the violent deaths of several family members. He is well known in Fremantle WA where he is often homeless. In 2002 he was arrested by police who suspected he may be an 'illegal entrant'. The police called the Immigration Department afterhours number and the officer on duty ordered Mr G's detention without interviewing him either by telephone or in person. Mr G was detained for a period of 43 days before being released. During that time sustained efforts were made by the East Timorese community to establish his lawful status and to get him released. The ACM manager at Perth IDC recognised Mr G as a long-time Fremantle local and wrote to Immigration Department officials on 4 September 2002 saying that he thought Mr G was likely being wrongly detained. Department officials did not reply to his email, but did discuss this among themselves. One officer wrote:

> ... fortunately, Mr G is not educated enough to consider suing us for unjustified detention however, I think we need to be very careful in regard to how long we continue to detain him. If released he will be easy enough to find if it is found that he is unlawful. (cited in Commonwealth Ombudsman Report No.6 2006, 10)

Another replied:

> We have lawfully in the past detained Australian citizens until their status has been proven. The duration is not an aspect. The legality of the detention has been proven in the courts. (cited in Commonwealth Ombudsman Report No.6 2006, 10)

The Ombudsman pointed to a culture in which only a suspicion was required to detain a person, but that absolute proof was required for release, and that Department officers were not required to defend their decisions to an independent authority, leaving them vulnerable to being influenced by personal opinions. In the case of Vivian Alvarez Solon an immigration officer voiced his/her suspicion that she was a sex slave trafficked into Australia. This suspicion was repeated several times and contributed substantially, to the officers' failure to properly establish her identity and lawful status in Australia.

> In relation to Vivian, one officer opined—without any supporting evidence—that Vivian might have been a 'sex slave'. This opinion was repeated by other officers in subsequent reports and, in the Inquiry's view, probably influenced to some extent the decisions made about Vivian. (Commonwealth Ombudsman Report No. 3 2005, 47)

These examples point to a disturbing culture in which detention powers are too readily used, where personal; opinion and suspicions are accorded the status of evidence, and where officers are more concerned about keeping a person in detention than releasing them. These two examples refer to the detention of Australian residents, many thousands of asylum seekers were detained during the same period and were detained within a culture which had little sympathy or understanding of the seriousness and impact of depriving a person of her or his liberty.

This culture will take time and concerted effort to change; legislative changes are essential but insufficient in and of themselves. The Centre recommends sustained efforts at cultural change underpinned by legislative changes that clearly indicate a departure from the detention system of the last 15 years and the introduction of legislated judicial review of every decision to detain, with the onus being on the Department of Immigration to demonstrate compelling reasons for detention.

Ongoing harm caused by detention.

Detention has been demonstrated to cause significant psychological harm and to continue having a lasting effect long after release from detention. The work of Derrick Silove, Zachary Steele, Dr Aamer Sultan and many others has ably documented the deterioration in mental health directly caused by immigration detention. The case of Shayan Badraie highlighted the impact and lead to mobilising Australian citizens to lobby for the release of children from immigration detention and eventually to a significant compensation payout to Shayan and his family. There are many stories similar. The Centre knows a young woman in Perth who was detained for a period of approximately 9 months in 2000 when she was 10 years old. During her detention she witnessed the suffering of fellow detainees, the cruelty of the guards, a suicide attempt and a violent incident between fellow detainees and guards. Upon release from detention she continued to have sleep problems, nightmares, night starts, flashbacks, feelings of high anxiety, fearfulness and depression. This manifested in many ways each day and compromised what most people would wish for a child: a carefree and innocent childhood. One story which demonstrates this is that when she was at school and the teacher announced that the class would be going on camp, she became distressed and cried to her mother – fearing that they were to be sent back to the camp – immigration detention.

Detention causes harm to adults and children alike, to those with pre-existing mental health problems and trauma and those without. The trauma is not culturally determined. Given that the harmful effects of detention are well established, the decision to detain ought to be taken in the knowledge that such detention is likely to harm the individual particularly when that detention is prolonged and indefinite.

Scrutiny and Secrecy

Most people who have been held in immigration detention in Australia have been held in isolated camps in remote locations. This makes proper scrutiny of those camps difficult. Many detainees have reported difficulties accessing bodies such as HREOC to lodge complaints and difficulty communicating with their representatives as all communication must be sent through detention guards or Departmental staff. Within a punitive culture, lacking independent oversight, guards and immigration officers have often been obstructive rather than facilitative of detainees' communication with external bodies. There have also been instances of guards using excessive force against detainees resulting in serious injuries, of detainees being denied access to medical care, of having their possessions taken from them and returned as 'reward' for compliance, of name calling and taunting by guards and other

degrading treatment. Conditions in which there is a clear power imbalance and no independent oversight are ideal conditions for abuse of power and human rights violations. This has been demonstrated globally and across time and is the reason that independent scrutiny is a fundamental necessity. The Centre supports the affirmation of the inherent dignity of people held in immigration detention as a core value. This value statement is one essential step towards culture change and needs to be supported by legislative and operational changes.

The Centre recommends:

- Permitting complaints to be made to HREOC verbally, by a person other than the complainant and/or anonymously.
- Giving HREOC the power and resources to make unannounced inspections of immigration detention centres unrelated to any specific complaints and mandating a number of such visits annually as an indicator of HREOC annual activity.
- Greater access to detention centres by the general public, more telephones available for use by detainees, regularly giving all detainees telephone cards
- Only using detention centres located in or near capital cities.
- Introducing and enforcing penalties for individuals as well as organisations involved in the mistreatment of detainees.

Conditions in detention.

The alternative housing projects are a vast improvement on detention centres, but alternative detention remains detention and while we welcome any improvements in detention conditions, we fundamentally believe that the core issue is the use of detention and that regardless of detention conditions, the loss of liberty is dehumanising, offends human dignity and is a profound violation of human rights.

A woman from Somalia who was detained for just under 1 year in the late 1990s described waking the middle of the night to wash her underwear by hand and wearing it damp during the day as there were no facilities for her to do her laundry in private and to wash and dry them alongside the clothes of men not related to her was a great indignity. This is no act of cruelty by detention officials, but highlights the inherent indignity of detention itself.

We are pleased that the practice of calling detainees by their numbers has now ceased. This practice was particularly dehumanising. One Centre staff member was involved in a campaign for the release of 3 Somali men detained in Port Hedland in the late 1990s and 2000. The men were eventually removed. On the morning of their leaving Port Hedland during the shift change of detention staff, the night staff ran alongside the van calling out to the morning staff "The SS's are leaving! The SS's are leaving!" The staff had become fond of the men, and wanted to alert their colleagues that this was the only chance to say good-bye, but even in this situation, the men were known to staff only by their numbers.

A system which aims to uphold human rights ought to maintain focus on the key issue of whether a person should be detained or not. If the determination is that detention is warranted, then of course they should be detained in good conditions and all other human rights (dignity, safety, freedom to practice one's religion etc) should be protected.

Release into the community

The Centre strongly recommends that all asylum seekers be released into the community on mainland Australia while their claims are assessed. This would ensure that asylum seekers' civil and political rights to liberty are not infringed. Equally important however, are people's economic, social and cultural rights. Currently there are inadequate resources available to asylum seekers living in the community. Many people have no work rights and no access to the Asylum Seekers Assistance Scheme meaning that they are forced in to poverty and dependence on friends, relatives and community groups. This also functions to shift the cost burden away from government to under-resourced church and community groups who are struggling to meet the needs to both asylum seekers and others living in poverty. The stress which enforced poverty and dependence creates for asylum seekers can be severe and prolonged as the community based refugee status determination process often takes at least one year if not many more.

If fewer people are held in immigration detention, the federal government will make a cost saving of at least $100 per person per day and likely much more. A portion of these funds should be diverted to improve financial support to community based asylum seekers. The Centre recommends that the funds continue to be administered through the Australian Red Cross, but with changes to eligibility, in particular:

- The 6 month waiting period should be abolished with people becoming eligible for payments as soon as they lodge their protection application.
- Asylum seekers should not be required to reapply for ASAS upon appeal to the Refugee Review Tribunal and payments should be maintained smoothly through the appeal process.
- The rate of ASA should be brought into line with equivalent Centrelink payments to ensure that funds are sufficient to cover the basic cost of living.
- A concession card should also be attached to the scheme enabling people to access cheaper public transport, utilities and other essential services.
- All community based asylum seekers be granted permission to work and access to Commonwealth supported places at educational institutions.

Conclusion

The Centre for Human Rights educations condemns immigration detention as harmful, unnecessary and a violation of fundamental human rights. The Centre recommends an immediate end to mandatory detention, the excision of Australian territory, non-statutory refugee determination processes and that all asylum seekers be permitted to live in the community with adequate financial support while claims are assessed.

The Centre is grateful for the opportunity to make this submission and would welcome the opportunity to speak at a hearing if invited.

Signed

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Prof. Linda Briskman
Lucy Fiske
Dr Caroline Fleay

5 August 2008

References

Commonwealth Ombudsman Report No.3. 2005. *Inquiry into the circumstances of the Vivian Alvarez matter.* Canberra: Commonwealth Ombudsman.

Commonwealth Ombudsman Report No.6. 2006. *Report into referred immigration cases: Mr G.* Canberra: Commonwealth Ombudsman.

Palmer, Mick. 2005. *Inquiry into the circumstances of the immigration detention of Cornelia Rau.* Canberra: Commonwealth of Australia.