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Joint Standing Committee on Migration

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**INQUIRY INTO IMMIGRATION DETENTION IN  
AUSTRALIA**

Submission from

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The writer has for a number of years been engaged in promoting the welfare of Asylum Seekers living in the Melbourne community in the context of the agencies of the Uniting Church in Australia and has followed closely the situation of those held in detention centres. The views expressed are personal but shared by many others.

Professor E.C. Forsyth

July 14, 2008

## SUMMARY

The system of detention employed by Australian Governments of both parties over a period of nearly two decades to exercise control over the unauthorised entry to Australia of people from other countries seeking protection as asylum seekers has caused unparalleled and unnecessary suffering to large numbers of genuine refugees at immense financial cost to the Australian community. The writer believes that the system of mandatory detention of such asylum seekers should be strictly limited in time and character and replaced by supervised accommodation in hostels near urban centres with provision for legal and welfare services while applications are processed. He also believes that the procedures for determining the outcome of applications for refugee status should be placed under the supervision of the courts and that all appeals to tribunals should be heard by two or more suitably qualified members who should be required to make decisions in the spirit of the 1951 Refugees Convention.

### **Rationale adduced for detention of unauthorised asylum seekers**

The principal reasons given for mandatory detention of unauthorised arrivals seeking asylum in Australia are that this is necessary (1) to enable health, security and identity issues to be determined, (2) to ensure that the persons concerned remain under close supervision until their applications for a visa as a refugee claimant and any appeals that follow are processed, and (3) to ensure that, in the event of an unsuccessful claim, an applicant can be removed from the country without hindrance.

Governments have also claimed that detention is necessary as a deterrent to others who may be planning to seek asylum in Australia, but this policy, based on the false idea that asylum seekers have committed an offence, is not permitted as a criterion for the detention of asylum seekers established by the UNHCR and involves using punitive measures against innocent people to achieve a different objective.<sup>1</sup>

It should be noted that Australia is the only country in the first world to implement a policy of detention of unauthorised asylum seekers from their arrival to the determination of their claim and that it is a policy directly contrary to the UNHCR's 1999 Revised Guidelines on the Detention of Asylum Seekers.<sup>2</sup> The belief that asylum seekers will abscond unless they are detained is largely contradicted by experience with people whose application has been rejected and who await deportation in the community

### **The nature of detention at present**

The conditions prevailing in detention centres at present are particularly harsh. Government ministers have claimed in the past that they are not prisons, yet detainees are held in them against their will in locked facilities surrounded by walls and razor wire supervised by attendants trained as prison officers who treat detainees as criminals using humiliating and punitive measures such as solitary confinement to

<sup>1</sup> Julian Burnside QC, *Watching Brief: reflections on human rights, law and justice*, Melbourne, Scribe, 2007, p. 118-9.

<sup>2</sup> Frank Brennan, *Tampering with Asylum: a universal humanitarian problem*, University of Queensland Press, 2003, p. 86.

maintain order.<sup>3</sup> (A former prison chaplain once said of detention centres in my presence, “I know a prison when I see one.”) In some centres, staff seem to see it as their mission to break the spirit of the detainees. The situation of the detainees is in fact harsher than that of convicted criminals as they do not know how long they will be held in detention (and it may be for years<sup>4</sup>), they do not know of any reason why they should be treated as criminals, they are often held in remote places in oppressive climatic conditions where it is difficult to obtain legal advice or welfare assistance or have any contact with the outside world, where toilet and hygiene facilities and access to medical care are inadequate and where there is nothing to do. The result is that their situation provokes deterioration of health, serious depression and attempts at suicide. Their plight has been described and condemned by many observers including psychiatrists, psychologists, lawyers and official representatives of United Nations bodies<sup>5</sup> as well as by some detainees who themselves have been able to make reports to welfare and legal organisations. Before the 2007 election, the mass of information made available appears to have made no impact on government thinking until a revolt by certain government members of Parliament resulted in the removal of women and children from detention into the community.

The worst type of detention was that which placed asylum seekers “off-shore” in Nauru and Manus Island under the so-called “Pacific Solution”. This, fortunately, has been discontinued by the present Government.

(Asylum seekers who have arrived with tourist or student visas and apply for refugee status after their arrival are not placed in detention despite the fact that their application for a visa was almost certainly (though understandably) obtained by giving false information about the purpose of their application.)

Detention centres of this kind and the treatment described of those held in them is contrary to all international conventions on procedures for the processing of refugees and asylum seekers and is contrary to the principles of common humanity.

### **The legal situation**

Although it is not illegal to enter Australia without a visa, Australia’s *Migration Act 1958* requires that unauthorised persons who enter Australia must be detained and that, unless they are subsequently granted a visa, must be removed from Australia as soon as possible. This applies almost exclusively to people who arrive on our shores in fishing boats. But this act needs to be interpreted in the light of Australia’s obligations under the 1951 *Convention on Refugees*, to which Australia is a signatory. There is also an *International Covenant on Civil and Political Rights*. These and other conventions aim to protect refugees from cruel and unjust treatment, and while they may not have legal force under Australian law, infringements of their provisions

<sup>3</sup> On the use of solitary confinement in detention centres, see Burnside, op. cit., p. 113-5.

<sup>4</sup> A majority decision of the High Court stating that the law allowed a stateless person who did not fit certain criteria for refugee status to be kept in detention indefinitely is particularly disquieting.

<sup>5</sup> J. Burnside, op.cit., p. 36 and 119-120. Burnside notes that a judge sent in 2002 by the High Commissioner for Human Rights to inspect the Woomera detention centre was at first refused access by the Australian Government. When permission was finally granted, after massive renovation work had been undertaken by staff, the judge concerned wrote a devastating report on the conditions prevailing there observing that there were many breaches of Australia’s obligations under international conventions to which Australia was a party. An eye-witness account from a solicitor who had visited the Woomera detention centre is presented on p. 37-38.

should not be tolerated. As those seeking Australia's protection as asylum seekers are entitled to do so even without passport or other documentation under the international convention and have not committed an offence under Australian law by doing so, it is improper and misleading to refer to them as "illegal non-citizens" or "queue-jumpers" and there is no justification for treating them like criminals. Any provisions for detention should be determined in the light of this situation.

As regards the procedures by which asylum seekers, including those who have arrived in Australia with a tourist, student or other short-term visa, have their applications processed, the first hearing is conducted and a decision made by a government employee whose understanding of all the cultural and political elements involved in the applicant's situation may be open to question, especially if there is a language barrier. If an appeal is made against an unfavourable decision to the Refugee Review Tribunal, a decision is again made by a single member who is not necessarily trained in law (the Act does not prescribe any qualifications for members), and that decision is final. Governments have enacted legislation to ensure that RRT decisions cannot be overturned by a court, but the High Court of Australia has determined that, if any decision is based on an error in law, it can refer the decision back to the tribunal for revision. Throughout the time that this process is being conducted, the detainee remains in detention. This overall situation appears to the writer to be contrary to the principles on which Australian law is based and needs to be corrected if alternatives to long-term detention are to be implemented.

A further injustice that occurs in the processing of asylum seekers' claims arises when an applicant for refugee status makes a successful claim and is released from detention but is then faced with a demand that he pay for the "accommodation" provided for him in the detention centre. It is not clear to the writer if all detainees are faced with such a demand on their release, but it is well known that at least some of those who have been detained for a long period are called upon to pay huge sums, which, needless to say, they do not possess. There can be no justification for this policy: even criminals are not required to pay for "accommodation" when they are imprisoned. Similarly, a person who is released into the community on certain types of Bridging Visa is not allowed to work and has no access to Medicare, housing or assistance with living costs and would be destitute without the support of existent church and other welfare agencies.

### **Costs**

The cost to the Australian taxpayer of maintaining asylum seekers in prison-like detention centres is immense, especially if capital expenses and the cost of moving detainees to remote centres and from one centre to another are included. The most glaring example of such cost is the detention centre on Christmas Island, which so far has incurred construction costs of some \$400 million and costs tens of millions a year to operate, even when empty. So far, it seems, it has held a total of only about 50 asylum seekers and is currently empty. When the high cost of transferring detainees to and from this remote island is also taken into account, the policy of using it is seen to be grossly uneconomic. The writer believes that detention under conditions more closely corresponding to those envisaged under international conventions would be a great deal less costly to the public purse.

## RECOMMENDATIONS

In view of the observations made above, the writer makes the following recommendations in response to the Committee's terms of reference:

1. The criteria applied in determining how long a person should be held in detention should be strictly related to the main stated reason for detention, namely the need for health, security and identity checks. This should not exceed three months unless exceptional reasons apply or unless a person's application for refugee status has been rejected and he or she is awaiting deportation. As the vast majority of asylum seekers are shown eventually after any appeals have been heard to be genuine refugees, hearings should be conducted only after applicants have been assisted in the preparation of their case in relation to the criteria to be met to avoid bad decisions as a result of confusion, misunderstanding and language barriers.
2. Detention centres should be subject to regular inspection by both international and national authorities and the reports made to the Australian Government should be made public. They should also be readily accessible to lawyers, social and welfare workers and to others who are or wish to be friends of the detainees, all of whom should be free to comment on what they see as happening in the centres.
3. The use of the present prison-type detention centres should be discontinued and replaced by some form of supervised hostel accommodation where detainees have a degree of freedom of movement but with the obligation to report to their supervisors at certain times. (The current use of "home detention" for some families is still oppressive.) Closed detention centres in which detainees do not have freedom of movement should be the exception and used only in special circumstances. The use of staff trained as prison officers should be discontinued: they should be replaced by staff who are trained in management of people and are encouraged to treat detainees with normal respect.
4. Detention centres of this type and detention health centres could be placed under the management of non-government organisations such as churches and welfare agencies which would be expected to ensure that legal, welfare and health services were provided to enable asylum seekers who had fled their country and made the journey to Australia in traumatising conditions were given the assistance and support needed to prepare them for entry into the Australian community in the event that their application was successful. It would also be possible for them to provide educational services, especially instruction in English and in Australian social traditions, to maintain the morale of detainees, relieve boredom and facilitate communication and eventual integration. On their release from detention, it would be appropriate to provide temporary housing and services to enable them to obtain more permanent accommodation if they received a visa. A model for this second stage is provided by the Uniting Church, whose Hotham Mission in Melbourne offers, in the framework of its Asylum Seeker Project and in collaboration with the Baptist Church, rent-free hostel accommodation

for male asylum seekers living in the community with Bridging Visa E, who, under present regulations, have no right to work, no Medicare entitlements and no government welfare assistance while they wait for the outcome of their visa application. Each resident is assigned a case-worker who assists with advocacy, referrals and access to support networks. They also receive a small living allowance. The cost of this assistance is covered by donations by business organisations and members of the public. If such a model were adopted by government, financial support would be essential. Even now, the right to work to cover living expenses and maintain self respect together with access to Medicare should be permitted for asylum seekers living legally in the community.

5. In view of the immense cost of maintaining the present detention centres and holding asylum seekers in them for indefinite periods, which now can be up to ten years, the proposals made above would constitute an immense saving for the public purse, even though the cost of maintenance in hostel accommodation and capital costs in buildings would have to be financed by government. The cost would also be reduced if asylum seekers were allowed to work to cover living expenses after the initial period of checking while awaiting the result of their visa application.
6. The maintenance of justice in all procedures relating to applications for refugee status will only be possible if (a) they are placed under the control and supervision of the courts of law, which should have the authority to overturn tribunal and ministerial decisions, (b) all hearings at the level of the Refugee Review Tribunal are conducted by at least two members, who should be required to have appropriate legal or other qualifications for their task and to make decisions in the spirit of the 1951 Refugee Convention, and (c) urgent steps are taken to ensure that all investigations and procedures are conducted expeditiously to avoid serious delays.