COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Immigration detention in Australia

WEDNESDAY, 15 OCTOBER 2008

CANBERRA

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JOINT STANDING

COMMITTEE ON MIGRATION

Wednesday, 15 October 2008

Members: Mr Danby *(Chair)*, Mrs Vale *(Deputy Chair)*, Senators Bilyk, Eggleston, Hanson-Young and McEwen and Mrs D'Ath, Mr Georgiou, Mr Randall and Mr Zappia

Members in attendance: Senators Bilyk and McEwen and Mr Danby, Mr Georgiou, Mr Randall and Mr Zappia

Terms of reference for the inquiry:

To inquire into and report on:

- the criteria that should be applied in determining how long a person should be held in immigration detention
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks
- options to expand the transparency and visibility of immigration detention centres
- the preferred infrastructure options for contemporary immigration detention
- options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing, Immigration Transit Accommodation (ITA) and community detention
- options for additional community-based alternatives to immigration detention by
  a) inquiring into international experience;
  b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;
  c) comparing the cost effectiveness of these alternatives with current options

WITNESSES

Committee met at 11.39 am

TOWLE, Mr Richard, Regional Representative, Office of the United Nations High Commissioner for Refugees

CHAIR (Mr Danby)—I now declare open this public hearing for the inquiry into immigration detention in Australia. Today we welcome the regional representative of the United Nations High Commissioner for Refugees, Mr Richard Towle. I would like to commence today's proceedings by acknowledging the extensive work undertaken by UNHCR globally in addressing the plight of refugees. Thank you, Mr Towle, for your appearance today. I look forward to your input into today's hearing. The committee does not require you to give an oath, but I must remind you that this hearing is a legal proceeding of the parliament and warrants the same respect as the proceedings of the House itself. I call on you to give us an introductory statement.

Mr Towle—Thank you very much. The Office of the United Nations High Commissioner for Refugees covers from Canberra: Australia, New Zealand, Papua New Guinea and 12 independent states in the South Pacific. Of course we work very closely with our counterparts in South-East Asia on common refugee issues and people movements throughout this region and also internationally. Thank you very much for the opportunity to be here and share with you some reflections on immigration detention in this country.

I understand that you have the paper that we submitted in September which includes 14 fairly generalised recommendations on how we see the changes that have been put in place from July. Could I say from the outset that the UNHCR welcomes what we regard as very significant changes to detention policy that were announced I think in July. It is no secret with UNHCR that we had two what I think are principal concerns with previous government policy on detention. The first of these was the blanket application of detention based on the irregular or illegal manner of arrival into Australia. The mandatory policy was triggered by virtue of your method of arrival. The second fundamental concern that we had about the previous policy was that places where asylum seekers and refugees were being held were outside the sovereign territory of Australia where there was no effective domestic oversight and supervision.

What we welcome about the new government policy, of course, is that both of those significant issues have now been overcome. The new policy does two important things in our view. First of all, it removes the blanket and somewhat arbitrary nature of detention and replaces it with a risk based assessment where the onus of proof shifts to the detaining authority. We think that is a very significant change in the right direction. Secondly, all detentions will take place within the sovereign territory of Australia. Those changes we welcomed publicly, both here and in Geneva, through our high commissioner and senior officials. What in our view needs to come comes next is the clarity of guidelines and guidance for those who are making these difficult decisions and assessments. As far as I am aware, I think that is still very much a work in progress. Unfortunately, from our perspective, the work in progress has been overtaken by the arrival of two small boats to Christmas Island which will be subject to these new policy announcements and new procedures while they are still being considered and put in place. We think that there is obviously a clear and pressing need to develop guidelines and guidance for those who make detention decisions so that it is very clear as to the basis on which those decisions are being taken.

From the UNHCR's perspective, there are a number of key elements we would like to see roll out, and we understand that these are early days in terms of the policy. The first is that we would like to see some clarity around the coverage of the detention policy—that it should cover the entirety of the Commonwealth of Australia, including the excised territories. I think it is implicit in the policy statements but it has not been made explicit, and we think that it is important that there is one detention policy for the whole Commonwealth of Australia.

The second—and this is probably the crux of the issues under the first report that you will be considering—is: how do you go about assessing the risks relating to security, including health and the identity of people? In the UNHCR's perspective, of course, identity is a key. Many people who come to Australia in an irregular way come with false documentation or no documentation at all, particularly those who come by boat. So the question of identity is a critical one, which we accept, as is the security of the community of Australia. We think that there may be a qualitative difference between detention on the basis of identity and security and separation or segregation on the basis of health risk. We are not convinced that you need to detain on the basis of health assessments but, rather, some form of health or medical related segregation, and that is one of the submissions that we have made.

In terms of the process and the framework, we believe that a legislative or regulatory framework that is clear and transparent is important so that it is not subjected to the shifts and changes of government policy too frequently. It needs to be clear so that those affected, both those being detained and advocates, and indeed the public at large, are able to see what the risk assessments look like in general—not in specific cases but in general. That can be improved by clear procedures that provide reasons for the detention and offer opportunity for oversight through some form of independent mechanism. Critically, in our view, as a break from the past there should be a detention assessment based on the risk of the individual, not on deterrence or punishment of those people. In our view deterrence and a punitive element should not be part of the detention regime response.

We have made three specific recommendations in relation to Christmas Island. I understand you have been out there and seen the place for yourself. In our view Christmas Island is a naturally contained physical environment, so any decisions around the need for further detention within that geographically contained region need to be looked at pretty carefully and limited very much to health and security risks relating to people on the island rather than the mainland, but those are issues that I understand will take a little time to reflect on and roll out.

So far I welcome the Minister for Immigration and Citizenship's consistent discussions with stakeholders, including UNHCR. I think that is a very important step to bring the main actors on board through consultation and discussions, and we welcome that and will continue to participate in those sorts of discussions. I think I will leave it at that. Those are very broad reflections. More specific details are found in the recommendations themselves. I am very happy to field any questions or comments if you wish.

CHAIR—Thanks, Mr Towle. Thank you very much for your submission. I have a couple of questions that I would like to ask you before I turn it over to colleagues. In your submission you call for 'effective judicial or "arms-length" administrative review' of decisions to detain. Do you think that the review system that the government has proposed—the three-month review

conducted by DIAC, the Department of Immigration and Citizenship, and the six-month review conducted by the Ombudsman—meets those requirements or do we need to do more?

Mr Towle—I think that there does need to be some more discussion around that. Under international human rights law there are requirements that anybody who is detained have the opportunity to have that tested by a competent judicial court of independent authority. There is some discussion about how far that relates to people who are detained in an immigration context, but I think there are some quite serious human rights issues that do need to be looked at there in terms of how far and in what form judicial oversight or independent oversight is necessary. From UNHCR's perspective, what is important is a clarity of decision making that is transparent and where reasons are recorded in writing. If there is to be a review, it has to be an effective review. Whether it is within the same department by superiors, I think, is a question of quality, but at the end of the day it needs to be an independent and arms-length review itself.

CHAIR—Does the Ombudsman count as an independent and arms-length review according to UNHCR?

Mr Towle—I believe it could be. We are not so concerned with the title of the independent review; it is more a question of the authority and powers of that reviewing body. In essence it seems to me that the decision, the factual basis and the criteria base for the assessments of whether somebody poses a threat to the community should be clear on the face of the record and should be questioned as to whether they are rational or irrational. Whether that is done by an ombudsman or by a judicial body of a different character is really not a question for us to answer. We believe it just needs to be an independent and separated decision from that taken by the primary detaining authority.

CHAIR—Here is my last question before I turn it over to colleagues. You recommend that indicative time frames be introduced to the process to determine offshore refugee applications.

Mr Towle—Yes.

CHAIR—That has been a lot of the testimony from asylum seekers too—that not knowing the time frame in which these decisions are to be made is one of the things that lead to all kinds of problems including, in the worst case, even mental health problems. What are some of the processing issues with offshore applications?

Mr Towle—I think you are right, Mr Chair: that is a critical issue. We would like to see indicative time frames—not binding, because there will always be cases that will take longer and there will be some that do not take as long, and of course it depends on the flow of numbers. If the numbers remain relatively low, and we hope and expect that they will, they are manageable within, certainly in our view, a fairly limited time-bound period of, say, three months. I do not see any reason, with the right allocation of resources, why an assessment for an ordinary refugee claim could not be made by a primary authority within two to three months. That is achievable.

Certainly in our view, those who are detained ought to be prioritised from those who are at large in the community. There are special reasons for prioritising people who are in detention. The purpose of linking the time frames of the refugee status determination with the detention, I think, is self-evident, particularly on Christmas Island, if that is where it is going to take place, to

simply prevent the rolling on of indefinite forms of detention, with all of the problems that you associate with that: mental health and other forms of emotional and physical deprivation. In UNHCR's experience of working with refugees, you cannot look at detention apart from the mechanics of refugee status determination. They need to be synchronised. As I said, I think that can be done within an indicative time frame of, say, three months—perhaps a little bit longer—where everybody can work to those time frames and allocate appropriate resources to make quick and effective decisions.

Senator HANSON-YOUNG—You spoke quite a bit in your opening statement about the need to see the guidelines in order to ensure that the announcements that were made by the minister are actually implemented by the people making decisions. We have heard a number of witnesses throughout this inquiry saying, 'Yes, let's see the legislation. The sentiment is great, but let's see the legislation.' They are definitely of that view. Do you think that having children in residential facilities is still perhaps detrimental to their safety, health and mental health? I understand that a residential housing facility is different to an immigration detention centre, but, nonetheless, often a child is there—from time to time, they are the only child as well. Do you think that that is still an appropriate way of managing the processing of children who are seeking asylum?

Mr Towle—I think it is absolutely right to have a policy statement that children should not be detained. Solo children, unaccompanied children, can be looked after in some form of appropriate community care. There are all sorts of permutations that you can find, depending on the child and depending on the circumstances. It would be more difficult perhaps on somewhere like Christmas Island where your options are more limited. In our experience you often do not find many unaccompanied children. They are usually linked quite closely to other family members who come along as well. What we do not like to see is split families, where a husband, a father, is kept in some form of detention and a child is let out. It is far better for the protection and the well-being of a child to maintain family unity, wherever that can be done. If that means the child is out and the parent is out, that may be the price that has to be paid, provided there are not overriding questions around security.

My sense with asylum seekers generally is that they welcome the chance to have their claims looked at. They want it to be done quickly. They are not here to cause trouble. Most of the people who have come to Australia by boat over the last few years have been absolutely genuine. They have come from the worst war-torn parts of the world and they are seeking protection. They do tend to cooperate. This is why we really encourage the idea of looking at alternatives to detention right at the front end of the process, rather than after one year or two years down the track.

Senator HANSON-YOUNG—Do you and the UNHCR still consider the residential housing facilities—keeping in mind that that is actually different to community detention—as detention?

Mr Towle—The definition of detention is a slightly movable feast. Any form of restriction on freedom of movement could be seen as a kind of detention. We would want to look at the quality of it. Barbed wire fences, very serious limitations on movement and prison-like environments are absolutely inappropriate. I worked with the Vietnamese boat people in Hong Kong for four years and saw the damage caused by that kind of environment. I do not think we should get too tangled up with community care or residential detention; it is about the quality of the facilities,

the contact with education, family contacts and access to the outside world. I can tell you, that is what keeps a child healthy and alive, not so much the nomenclature of where the child is.

Senator HANSON-YOUNG—A number of witnesses and submissions that we have had thus far, from a broad range of different organisations and interest groups, have said that, yes, it is all very well and good for us to move forward in terms of how we approach those seeking refuge and asylum from today onwards but that there is still a significant group of people, including children, who have been through the detention process, were found to be genuine refugees and are now in the community with limited support; a number of them have serious health conditions and are still suffering trauma from the places they fled, let alone their experience in detention. On top of that, there has been a call for a recognition of what it is that the government should be doing next to support those people and there has been support for the idea of a royal commission. Does the UNHCR have a perspective on that?

Mr Towle—I do not have any views on a royal commission. All I would say is that asylum seekers and refugees who come to Australia are all suffering from various forms of hardship, including some serious psychiatric or physical disabilities, and if they are going to stay in Australia in the long term then they need longer term health care and community care and support. That is in their interests, and it is also in the community's interests to have healthy refugees in the community. It increases the speed of their integration and makes them contribute to Australian society more quickly. We cannot put the clock back for children who have been damaged by protracted detention in the past to fix that, but we can certainly make sure that appropriate health care is in place for them for the future.

Senator HANSON-YOUNG—So, in terms of that, the government does continue to have a duty of care for those people?

Mr Towle—Yes, in the same way that they would with anybody else coming into the community. If the decision is that they are able to stay in Australia then vulnerable people should be given the kind of support they need to help them cope. Refugees do need a little bit of extra care and help; I think that is right.

Senator HANSON-YOUNG—Obviously I know that there are debates in other countries over whether the Australian system is the appropriate one, but are there other countries in the world where that duty of care extends beyond the detention process in terms of settlement support?

Mr Towle—Australia is like other countries. I am from New Zealand myself, and post-arrival settlement service support is very strong in New Zealand and in Australia. I know the government put aside a significant amount of money in the last budget for post-settlement support of refugees, whether they come in through the resettlement quota or as spontaneous asylum seekers who get refugee status later. Certainly my impression is that the government clearly understands the importance of providing psychosocial, health, education and other forms of support to settled refugees in Australia, particularly those who are vulnerable, including separated or unaccompanied children and women. Solo-woman households need special care and attention. My impression is that resources are being allocated to that kind of work. It is an enormous challenge, but I think the issues are being addressed well.

Senator HANSON-YOUNG—Do you think, though, that there are people who have been through that process who have legitimate claims for increased support because of the detention process they went through? They might have fewer problems if they had come through a humanitarian program as opposed to going through the mandatory detention process. Can you see that there is, perhaps, a claim there for children who are suffering mental health issues because they were held in detention for five years?

Mr Towle—I think that looking forward we do not need to maintain the distinction. There are children who have been damaged by virtue of their experiences before they arrived, while they arrived and maybe even since they arrived in Australia. I think care needs to be allocated on the basis of need, not on the basis of the distinction that I think that you are maintaining there.

Senator HANSON-YOUNG—The other concern that I have is in relation to the different categories of bridging visas, in particular category E which is quite restrictive in terms of people's access to services, support and also their work entitlements. So, even though they have been acknowledged as refugees and are able to live in the community, they are relatively restricted in terms of their access to services that perhaps other people on different visas would be able to use in terms of getting their lives sorted out again. Do you have a particular view? We have removed temporary protection visas, and that is great, but if we have people on these bridging visas that are quite restrictive, how do we manage those people? How do we work to ensure that we are not disadvantaging them any further?

Mr Towle—That is an issue much broader than the refugee question. We are pretty satisfied that those people who have refugee status get the kinds of rights that now allow them to get on with their lives in Australia. The abolition of the TPV system was a huge change in that direction, because that did away with very painful separation from families. We welcome that. That means that any refugee in this country is now able to get on with their lives, family unification can be triggered and access to the variety of health, welfare, education and work opportunities can roll out. I may be wrong on this but my impression is that the transitional visas apply less to refugees than to other kinds of people whose removal is still pending but detention may not be appropriate. It is not really an issue of as much concern to us, although I know it is to other groups domestically.

Senator HANSON-YOUNG—Just following on from that, the category of people that I was particularly thinking about is people who are not able to prove their identity. They have been held in detention for a significant time and they have been given a bridging visa but they are still considered stateless, so they do not have access to the same services and perhaps entitlements as others, simply because they have come from a place where they cannot prove their identity. That to me is a concern. It should not matter whether you come from Sudan or Eritrea; you should still be entitled to the same rights if you are seeking asylum.

Mr Towle—I would tend to agree with that. The problem with identity is that, if you do not know who they are, there may be questions in this day and age about releasing them completely and freely into the community. That is why I think you need to have a nuanced approach. Just because someone does not have a document to prove their name and their date of birth does not mean they pose a threat to security and it does not mean that they cannot be let out. It might be very apparent, even if they do not have a document to say they are from Sudan, that they may be from Sudan—the language they speak, the way they look, their understanding of cultural values

will show you that is where they are from without that document. I think that is the value of an individualised risk assessment process, which the government has now announced in policy terms, because it allows you to look at cases, one by one, rather than these broad, brushstroke assessments and assumptions that because you come from region X or country Y you therefore pose a threat to national security or to the community. Having the onus now shifting to the department to make those assessments is positive. We hope we will see less and less, but you will always see cases like that: stateless people unable to prove who they are. That is where the balance comes in between allowing someone to keep going on with their lives freely and the threat to the nation and community. Finding that balance is very important.

Senator EGGLESTON—I have just a few questions. Australia assesses migrants fairly thoroughly before they come here on their medical histories, criminal records and security issues, so I think it is not unreasonable for Australia to seek to assess unauthorised arrivals in the same manner. That usually implies a period of detention. What do other countries do? We detain people to assess them. Which other countries do that?

Mr Towle—Each country uses a similar kind of starting assumption—that, if you have come in without documentation, we do not know who you are and there has to be some kind of containment on your freedom of movement until we have a clearer picture of who you are. I think every country starts with that and perhaps has different options as to what they do next. Across the Tasman, New Zealand does the same thing: if you come in without a document, you can be detained.

The question is: what is the quality of detention? Some reactions are to put people into a medium security prison alongside convicted felons. That, in our view, is completely inappropriate, but if you can have an alternative which has some limitations on freedom of movement, such as reporting conditions, but also allows people to continue with some form of dignity in their lives then that is the sort of balance that we need to look for. Referring to my opening remarks, that is where we felt that there have been significant improvements with the new policy announcements, because we think it has moved in the right direction of trying to find where that balance lies.

Senator EGGLESTON—We heard at a hearing in Perth the other day that detainees in Port Hedland might prefer to be in the Roebourne Regional Prison rather than the Port Hedland Detention Centre. I found that hard to accept because of the kind of people one would generally find in a jail. You then suggested separation of assessment for health risks from security, criminal and identity issues. I do not disagree with that. I think that is quite a reasonable proposal, and I presume other countries do that.

Mr Towle—Yes.

Senator EGGLESTON—One of the things I noted in the material we have before us is that article 31 of the 1951 United Nations Convention relating to the Status of Refugees prescribes the entitlements of:

… refugees who—

are—

coming directly—

note the word 'directly'—

from a territory where their life or freedom was threatened in the sense of article 1 …

Many of our unauthorised arrivals are Muslims who come through Malaysia or Indonesia. What is the legal situation then under this article 31 in terms of coming directly from an area of persecution—say, Afghanistan or Iraq?

Mr Towle—It is a very important question. There is an assumption that asylum seekers should really apply for asylum at the first reasonable opportunity. It is not a legal principle at all, but there is an assumption that every country should offer protection but that you should not be able to forum-shop and travel around the world looking for the best place where you want to end up. The problem for Australia is that, between the places of conflict today and where Australia is situated down here in the South Pacific, there are very few countries that have signed the refugee convention. If you take Iraq, Afghanistan, Sri Lanka and perhaps Burma to some extent as the countries that are really producing refugees these days, you would be hard to put to it to find any refugee convention state between those places and Australia. There is nothing in South-East Asia at all. UNHCR fills the gap a little in Indonesia, as you know, and in Malaysia, but those countries do not have any regulatory framework at all to protect refugees. The problem for us is how we keep the gates open here for those who need it but also encourage states further up the people movement chain, if you like, to do the right thing there. That is something that is a long-term work in progress for us. Article 31 hints at those kinds of issues.

CHAIR—Is there progress in the Indonesian parliament along those lines?

Mr Towle—There is progress. As I understand it, there have been pledges that, I think, by 2010 Indonesia will sign the refugee convention, but I understand it is a long, slow, complicated process both politically and legally. Of course, it is not just a matter of signing the convention; it is then a matter of putting in place the regulatory framework to do the job properly, and that is also something that is pretty tough.

Senator EGGLESTON—There is only one other question I would ask. You may have said this already, because I arrived late. Have you inspected the new Christmas Island facility, and do you have any comment about the adequacy of services and facilities there and access to advice for refugees?

CHAIR—That is in the transcript already, because he did comment on it. I feel obliged to give Mr Zappia a shot.

Senator EGGLESTON—All right. I did arrive late.

CHAIR—That is okay; you gave us the caveat.

Mr ZAPPIA—Mr Towle, thank you for the submission. I have one simple question. At least in the response to the last question, you referred to other countries. My question is simply this: is there a country that you would suggest has a model system of dealing with refugees?

Mr Towle—No, I do not think there is one model system. I think every country will cut and tailor its response according to its own country. Every country is situated in a different place. I can tell you that New Zealand has a very, very good asylum system which is probably due to the fact that it is 2½ thousand kilometres away from major refugee flows. It has the luxury of many things that you would not have here in Australia. What we would encourage is to look at the best practices from other states to see what does and does not work and then adapt it according to the national context of Australia. We have a lot of experience in dealing with these issues around the world and we are very happy to share our views on what does work or may not work in the future. I think we are on the right track with these changes over the last six months. There have been some good movements. There is still work to be done. The key area where work needs to be done is on developing the regulatory and legal frameworks around which these decisions will be taken. The clearer it is the easier it is for everybody to work within it.

CHAIR—Thank you very much for your attendance.

Mr Towle—Thank you very much for your time.

Resolved (on motion by **Senator McEwen**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.11 pm