



Detention Downunder: New Directions in the Detention of Asylum Seekers in Australia

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Abstract

The detention of asylum seekers has been a key feature of Australia's contemporary response to asylum seekers. In particular, the length and conditions of detention which drew criticism have been a significant aspect of political debate in Australia for more than a decade. In August 2008, the Rudd government announced a new detention model aimed at overturning the former long-term mandatory detention model. After providing an overview of Australia's detention regime and the human rights implications of long-term mandatory detention, this paper discusses the new directions in detention announced by the Rudd Labor Government in August 2008. The government is to be commended on its policies which abolish long-term mandatory detention. The paper then discusses areas which as yet lack clarity including detainees' appeal rights and details of alternatives to detention.

Keywords: Refugees, Asylum Seekers, Detention, Human Rights, Australia, International Law

INTRODUCTION

The concept of the modern state, which developed in the 18th and 19th centuries, is based on unquestioned sovereignty over a demarcated territory³. Nation states have the unquestioned right of control over their defined borders and have traditionally determined what legal, social, political and human rights its' citizens would have. In a world that is more inter-related and globalised, it

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³ Castles S., *Ethnicity and Globalization*, (London: Sage Publications, 2000).

is often argued that the nation state has lost much of its traditional power⁴. However, as noted by Waters (1994)⁵, the nation state continues to retain and to exert considerable control in numerous areas. States continue to define the policies and rules for those within its jurisdiction, but global events and global markets and international agreements and institutions increasingly affect their choices⁶.

The contemporary world is characterised by movements of people. The International Organization for Migration (IOM) has identified the large increase in the movements of people across the world. The IOM notes that there were 191 million migrants in 2005, making up 3% of the world's population. There is an estimated 40 million refugees, 26 million internally displaced people⁷. Contemporary migration is multi-faceted and there are different explanations of why people move: to seek better economic opportunities and lifestyles; to find employment; natural disasters, human atrocities including persecution, war, torture and violence; family-kinship-marriage; and a vision to create a better society⁸.

Since World War 2 there has been a global effort to recognise differences between migration for betterment of life and movement of people based on persecution due to political opinion, ethnicity, and religious belief and so on. This has resulted in the adoption of different regimes and classification of movements of people such as refugees and humanitarian entrants and differing international covenants adopted by signatory nations. Following the end of the Cold War, humanitarian responses to displaced people, refugees and asylum seekers which were practiced by many Western nations were abandoned. The humanitarian responses of the former periods were replaced by those of containment. Immigration controls, border controls, bureaucratic procedures, incarceration and punitive treatment began to be used by many countries, to

⁴ Rubenstein, K., *Australian Citizenship Law in Context*, (Sydney: Lawbook Co, 2002); Sassen, S. 'Beyond Sovereignty: Immigration Policy Making Today', *Social Justice*, Volume 23 No. 3, fall, (1996a) pp. 9-20.

⁵ Waters M., *Globalization*, (London: Routledge, 1995).

⁶ McCorquodale, R. and Fairbrother, R. 'Globalisation and Human Rights', *Human Rights Quarterly*, Volume 21, 1999, pp. 735-766.

⁷ *International Organization for Migration* (n.d.) Facts and Figures, <http://www.iom.int/jahia/Jahia/pid/241> (accessed 29 August 2008).

⁸ Brettell C.B. & Hollifield J.F. *Migration Theory: Talking Across Disciplines*, (New York: Routledge, 2000).

deter mass migration and repatriate “illegal”/unwanted boat people⁹. The nation state has increasingly become focused on border control, rules for entry and exit and in managing national security¹⁰.

The Australian nation state has engaged in harsh measures against asylum seekers, abandoning its former humanitarian approaches¹¹. Detention of asylum seekers became a regular measure. This was accompanied by racist and fear based discourse which resulted in the conjoining of issues of border protection with law and order and war on terror¹². This paper reviews the history of detention policies in Australia and explores the emerging approaches adopted by the newly elected Labor Government. While the new approach is an attempt to return to humanitarian responses, the paper examines key issues and uncertainties in the new policy paradigm.

OVERVIEW OF AUSTRALIA’S DETENTION REGIME

In Australia, all unlawful non-citizens have to be detained [s. 189 Migration Act 1958 (Cth)]. An unlawful non-citizen is defined as a person without a valid visa [s. 14 Migration Act 1958 (Cth)]. Australia has been unique amongst other western countries in its vigorous pursuit of detention as a measure of deterrence, which rendered it one of the harshest in the western world¹³.

Immigration detention is normally practiced for a variety of reasons. These include protecting the community from people who pose a health or security threat. Additionally, immigration detention is practiced to ensure that non citizens who are present in Australia in breach of their immigration visa can be removed. In Australia’s case, apart from these reasons, a key aim of immigration detention was directed at deterring future unauthorised arrivals¹⁴. As at 23 March 2000, 3,622 asylum seekers were in mandatory detention¹⁵.

⁹ Richmond, A. H., ‘International Migration and Global Change’ in Hui, O .J, Bun. C.K. & Beng, C. S. (Eds.) *Crossing Borders. Transmigration in Asia Pacific*, (Sydney: Prentice Hall, 1995), pp. 33-48.

¹⁰ Ghosh B., *Managing Migration: The Need for a New International Regime*, (Oxford: Oxford University Press, 2000).

¹¹ Babacan A and Briskman L (eds) *Asylum Seekers, International Perspectives on Interdiction and Deterrence*, (Newcastle: Cambridge Scholars Publishing, 2008).

¹² Babacan H. ‘Patriotism: The Good, The Bad and The Ugly’, *International Journal of Diversity in Organisations, Communities and Nations*, Vol. 3, 2003, p. 363-372.

¹³ Briskman L (2008) ‘Detention as Deterrence’ in Babacan A and Briskman L (eds) *Asylum Seekers, International Perspectives on Interdiction and Deterrence*, (Newcastle: Cambridge Scholars Publishing, 2008), pp. 128-142; McMaster, D. *Asylum Seekers: Australia’s Response to Refugees*, (Melbourne: Melbourne University Press, 2001).

¹⁴ Briskman L. (2008) *op.cit*; Vanstone A, *Parliamentary Debates*, Senate, 10th May 2005

¹⁵ DIMIA Fact sheet No 82: Immigration Detention.

THE HUMAN RIGHTS IMPLICATIONS OF MANDATORY DETENTION

Australia is a party to the *International Covenant of Civil and Political Rights* (ICCPR). Article 9(1) of the ICCPR states that no one shall be subjected to arbitrary detention. Although the use of detention to protect the community from threats is a legitimate purpose under international law, detention for the purposes of deterring prospective asylum seekers is not. Furthermore, detention for the purpose of protecting the community is only legitimate if it can be demonstrated that detention outweighs the deprivation of an individual's freedom. This can only be determined on the merits of each case. In Australia however, the practice has been to routinely detain all unauthorised arrivals for long periods of time.

After complaints about the length and conditions of their detention was made by some of Australia's immigration detainees to the Human Rights Committee, the Committee found that the Australian government was in breach of article 9 (1) of the ICCPR as it failed to prove less intrusive measures (such as sureties) could have been resorted to in order to ensure that complainants were available for removal from Australia (See the cases of *C v Australia*¹⁶, *Baban v Australia*¹⁷ and *Bakhtiyari v Australia*¹⁸). The Human Rights Committee also found that Australia was in breach of article 9 (4) of the ICCPR which requires that anyone who is detained needs to be afforded appeal rights to determine whether their detention is lawful. The lack of proper a appeal mechanism has been a serious deficiency in the Australian law¹⁹.

The Commonwealth Ombudsman has reported that loss of freedom by immigration detainees was akin to the situation of inmates in prisons and that, with a weaker accountability framework on the part of the detention centres, detainees had far less rights than criminals in prisons (Australian Commonwealth Ombudsman 2001). In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*²⁰, the Full Court of the Federal Court held that the continued detention of people where there was no

¹⁶ *C v Australia* (2002), Communication No 900/1999, 13 November.

¹⁷ *Baban v Australia* (2003), Communication No. 1014/2001, 18 September.

¹⁸ *Bakhtiyari v Australia* (2003), Communication No. 1069/2002, 29 October.

¹⁹ Maley, W. 'Multiculturalism, Refugees and Duties Beyond Borders' in Kukathas, C. *Multicultural Citizens. The Philosophy and Politics of Identity*, CIS Readings 9, Multicultural Research Program, The Centre for Independent Studies Limited, Australian Print Group, 1993, pp. 175-190.

²⁰ *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC.70.

likelihood of removal from Australia in the reasonable future breached fundamental rights recognised by international and Australian domestic law. Unlike the imposition of imprisonment pursuant to criminal law provisions which usually requires exercise of judicial power, the administrative detention of asylum seekers contained virtually no legal safeguards or no judicial scrutiny of the detention of refugees and asylum seekers and of the conditions in detention centres²¹.

Similarly, in its report entitled *Those Who've Come Across The Seas: Detention of Unauthorised Arrivals* the Human Rights and Equal Opportunity Commission (HREOC) highlighted that conditions in detention centres violated internationally recognised human rights instruments including Article 9, Clause 1 of the International Covenant on Civil and Political Rights (ICCPR) and article 37 (b) of the Convention on the Rights of Children (CROC)²². The latter provides that no child shall be deprived of his/her liberty unlawfully or arbitrarily and that the arrest and detention of children shall conform with the law and shall be used as a measure of last resort and for the shortest period of time. Notwithstanding that Australia is a party to the CROC, the common practice was to detain children. In *Re Woolley, Ex parte Applicants M276/2003 by their next of friend GS (2004)*, the Australian High Court held that indefinite mandatory detention as prescribed under the Migration Act 1958 (Cth) was also applicable to children. As at May 2002, there were 144 children in immigration detention in Australia. A further 125 were detained at Manus Island and 238 Nauru²³. As at July 2005, there were a total of 45 children being held in detention facilities across Australia²⁴.

The human cost of long-term detention has been rather compelling. An increasing body of literature has been written on the physical and mental effects of long term immigration detention²⁵. These reports highlight the

²¹ Feller, E. (2002) *The Role of Adjudicators and Judges in International Refugee Protection*, Inaugural meeting of the International Association of Refugee Law Judges, New Zealand, 10 March 2000, www.refugee.org.nz/IARLJ3-00Feller.html, pp. 1-5.

²² Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, HREOC, May 1998.

²³ Nicholas, A.W. 'Protecting Refugees: Alternatives to a Policy of Mandatory Detention', *Australian Journal of Human Rights*, Volume 8 (1), 2002, pp. 69-81.

²⁴ www.immi.gov.au/detention/facilities.htm (- updated weekly).

²⁵ Silove, D. and Steel, Z. *The Mental Health and Well Being of On Shore Asylum Seekers in Australia*, Psychiatry Research and Training Unit, School of Psychiatry, University of New South Wales. 1998; Kyriacou, L. *The Human Face of Australia's Refugee Policy*. Executive

adverse impact of long-term detention on asylum seekers and reveal that detention, especially of people who have already suffered torture and trauma in their own country, has the potential to cause further trauma.

Other research indicated that the standards in detention centres violated Australia's human rights commitments with sub-standard provision of health care and a lack of access to appropriate mental health facilities. The seriousness of the level of mental health problems detention can cause was highlighted by the high numbers of incidents of self-harm and attempted suicide of detainees. Of 300 submissions to the HREOC National Inquiry into Children in Immigration Detention, all submissions (except the Government's own submission) were highly critical of Australia's mandatory detention policy²⁶. The alienation and frustration felt by the detainees were highlighted by numerous incidents of rioting and arson attacks and many detainee children witnessed traumatic events, including detainees sewing their lips together in protest²⁷.

In 2001, three enquiries into detention recommended that there be efforts made to reduce the time spent in detention, to improve the physical environment in the detention centres and that non-detention alternatives are investigated for children²⁸. Despite all the above critical reports, there was not a change to the bi-partisan policy of mandatory detention²⁹.

Notwithstanding the repeated criticism of mandatory detention in numerous reports and investigations, Australia's harsh legislative detention regime was upheld in many Australian High Court cases. For example, in the cases of *Al Kateb v Godwin (2004)*³⁰, *Minister for Immigration, Multicultural and*

Committee of the UNHCR Programme Annual Meeting, 2002; Human Rights and Equal Opportunity Commission, *Inquiry into Children in Immigration Detention* www.hreoc.gov.au/human_rights/children_detention/html; Australian Commonwealth Ombudsman, *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres. Report under s. 35A of the Ombudsman Act 1976*, March 2001; Briskman, L., Latham, S., & Goddard, *Human Rights Overboard: Seeking Asylum in Australia*, Scribe, Melbourne, 2008; Flood, P., *Report of the Inquiry into Immigration Detention Procedures*, 27 February 2001.

²⁶ HREOC (1998) *op.cit.*

²⁷ Kyriacou (2002) *op.cit.*

²⁸ Joint Standing Committee of Foreign Affairs and Trade, *A Report on Visits to Immigration Detention Centres*, 18 June 2001; Australian Commonwealth Ombudsman (2001) *op.cit.*; Flood (2001) *op.cit.*

²⁹ Mares, P. *Borderline. Australia's Treatment of Refugees and Asylum Seekers*. University of NSW Press Ltd, Sydney, 2001

³⁰ *Al Kateb v Godwin* (2004) 219 CLR 562

*Indigenous Affairs v Al Khafaji (2004)*³¹ and *Re Woolley, Ex parte Applicants M276/2003 by their next of friend GS (2004)*³², it was held that immigration detention, even if indefinite in nature would be upheld so long as the Minister for Immigration retained a discretion to eventually remove or deport the detainee from Australia.

NEW DIRECTIONS IN DETENTION

After the release of the Palmer and Comrie Reports³³, the Howard government was forced to initiate some changes to Australia's detention practices. Although the changes improved some aspects of immigration detention system such as the reduction of overall numbers in detention through the issuing of bridging visas, the reforms were generally superficial and failed to fundamentally reform the system as all unlawful arrivals continued to be subjected to mandatory detention³⁴.

The Rudd Labor government was elected on a platform which amongst other matters included its commitment to reforming Australia's asylum policies. In May 2008, the government ended the Temporary Protection Visa (TPV) which had been introduced under the Howard government in 1999. The TPV was used as a deterrence measure by the Howard government. Asylum seekers who arrived on Australia's shores were detained for long periods and then granted a three year TPV to face an uncertain future.

In August 2008, the Rudd government announced that the policy of long-term mandatory detention would be abolished and that Australia's detention policy would be guided by a number of principles³⁵. Although short term mandatory detention was essential for effective and efficient border control, detention will be resorted to as a last resort and that the Department of Immigration will in future need to justify why a decision to detain was made³⁶.

³¹ Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji (2004) 219 CLR 664.

³² Re Woolley, Ex parte Applicants M276/2003 by their next of friend GS (2004) 225 CLR 1.

³³ Palmer M. J, *Inquiry into the circumstances of the immigration detention of Cornelia Rau*, July 2005, Commonwealth of Australia; Comrie, N (2005) *Inquiry into the Circumstances of the Vivian Alvarez Matter.*, Commonwealth of Australia.

³⁴ (see Taylor. S 'Immigration Detention Reforms: Small Gain in Human Rights', *Agenda*, Volume 13, No. 1, 2006, pp. 49-62 for a detailed discussion).

³⁵ New Directions (2008) <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

³⁶ *Ibid.*

Unlawful arrivals who posed an unacceptable risk to the community or who refused to comply with their visa conditions would be subjected to mandatory detention. All unauthorised arrivals would be initially detained to be screened for health, identity and risk purposes and released upon successful completion of this task. The notion of indefinite and arbitrary detention was rejected by the government and the conditions, length and appropriateness of the services and accommodation provided in detention would be regularly reviewed³⁷.

The detention of children which had outraged the Australian community will also be abolished. Where possible, children and their families would not be detained in immigration detention. Children who are accompanied by family members will be accommodated in a community setting or immigration residential housing³⁸.

The government needs to be commended for these long awaited reforms which are likely to change the premise which underlied Australia's detention policy for nearly two decades. Rather than being a first option aimed at deterring, punishing and as a consequence, dehumanising unauthorised arrivals, detention under the Rudd government appears to directed at the development of a more humane detention model, directed at the provision of a strong border security and a risk based approach to the detention of asylum seekers. On face value, these appear to be the hallmarks of a "modern risk management approach"³⁹ which are compatible with Australia's obligations under international law and which reflect the values of any democratic country.

Given the recent announcement of the new detention policy, some matters are not as yet clear. The government's announcement's appear to comply with the UNHCR's *Revised Guidelines on the Detention of Asylum Seekers* so that detention will be enforced when all avenues have been exhausted and in exceptional cases with health, fear of absconding and threat to the community being the key determinants. This ensures that arbitrary detention will not be imposed and asylum seekers freedom will not be unnecessarily interfered with. It is unclear whether the Commonwealth Ombudsman will be empowered to review cases of persons who have been in immigration detention for lengthy periods. Further, for those who have been detained in immigration detention, an annual HREOC inspection of each detention centre with a compulsion on

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

part of the government to abide by the HREOC's recommendations would go a long way to provide transparency and address any problems in detention centres and compliance with the standards based on the UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*.

In the new policy, the Immigration Department will be required to justify why a person should be detained. This is a definite improvement on the previous detention regime under which judicial review for detention based decisions was not available under Australian Law [ss. 189, 196 Migration Act 1958 (Cth)], thereby constituting a clear breach of Articles 9(1) and 9(2) of the ICCPR, the UNHCR's Detention Guidelines and Article 16 of the Convention Relating to the Status of Refugees 1951. Although it has been announced that the Immigration Departments' detention decisions are to be reviewed regularly⁴⁰, what criteria will be used to determine this matter, by whom the review will be conducted and whether appeal rights to a court of law will be available in the event of dispute, have not as yet been clearly laid out.

Whether a person poses a risk of any nature also needs to be available to independent review by the Courts. The length of time a person is detained for suspicion of their unlawful status also needs to have time limits placed upon it. For example those detained under such circumstances should either be released within a specified period of time (such as 48 hours) or be brought before a magistrate every 7 days until their identity and immigration status is ascertained. This reflects the regime which operated in Australia before September 1994.

On the question of specific time limits, other countries such as Canada, New Zealand and Sweden impose specific time limits on detention, after which time the immigration bodies need to justify in court that continued detention is warranted. In Canada's case this is further strengthened by the Charter of Rights and Freedoms 1982 which also applies to asylum seekers.

The government's commitment to broadening alternative detention strategies, including community housing and community based options also lacks clarity for the time being. Many countries in the European Union, Canada and New Zealand have taken up appropriate alternatives to mandatory detention. Community based alternatives to detention centres which will prevent the re-traumatisation of asylum seekers.

⁴⁰ *Ibid.*

The United Nations Report into *Alternatives to Detention*⁴¹ provides a wealth of comparative experiences and models adopted by 33 countries. It also demonstrates that community based alternatives not only provide better health outcomes for refugees and asylum seekers, but are more cost effective than detention centres. Further, the provision of adequate accommodation and material and settlement support during the asylum determination process was essential to ensuring compliance⁴². Accordingly, it is important that community based alternatives to detention enable freedom of movement and facilitate the participation of asylum seekers in the community. It is imperative that asylum seekers also receive access to healthcare, education and work rights as well as the full range of settlement services available to immigrants.

In May 2008, the Australian Parliament's Joint Standing Committee on Migration began to conduct an *Inquiry into Immigration Detention in Australia*. Amongst many matters, the government is examining the criteria to be applied to determine the length a person should be detained in immigration detention and the criteria to be applied to release a person from immigration detention after health and security checks have been completed. Options for alternative community based immigration detention and comparison to international practices is also being examined. As at the date of writing this article, the government had not released its report⁴³. The authors anticipate that the final report of the Parliamentary Joint Standing Committee on Migration will shed some light into the alternative pathways that will be adopted as well as the other areas discussed in this paper.

The government rightfully acknowledges that the key to preventing people smuggling lies in Australia's ability to engage in cooperation and capacity building with its northern neighbours. The government also admits that conflict and natural disasters leaves a real potential for large numbers of people to be targeted by people smuggling operations⁴⁴. Notwithstanding this acknowledgement, the question remains whether the Australian and other western governments are doing enough in this area. The question also remains open as to whether future Australian governments will re-introduce long-term mandatory detention if faced with a situation where there are increased numbers of so called 'unauthorised' arrivals on Australia's shores.

⁴¹ Field O & Edwards A, *Alternatives to Detention of Asylum Seekers and Refugees*, UNHCR, 2006, www.unhcr.org/protect

⁴² *Ibid.*

⁴³ Joint Standing Committee on Migration (2008), *op.cit.*

⁴⁴ New Directions (2008), *op.cit.*

The absence of a bill of rights in Australia which constitutionally guarantees rights to individuals greatly increases such possibility. Unlike Australia, the *Canadian Charter of Rights and Freedoms (1982)* provides a reference point for the treatment of asylum seekers whereby the rights under the Charter also apply to the refugee determination process. Accordingly, the subsequent *Immigration and Refugee Protection Act 2002* also had to comply with international human rights instruments ratified by Canada. In New Zealand, the United Nations Convention on Refugees and its Protocol was annexed to the *Immigration Amendment Act 1999*, which serves as a basis for reflecting international standards and informing the Immigration Act. In addition, the *New Zealand Bill of Rights Act 1990* aims to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

CONCLUSION

This paper has reviewed the policy of detention adopted by the Australian Government over the last decade. The paper has reviewed the changing landscape in responding to asylum seekers by the newly elected Rudd Government and the welcome trends towards humanitarian responses to those seeking asylum. The paper highlighted some of the uncertainties and major issues that need to be clarified including the review processes, alternative and community based detention and the settlement/service supports which need to be availed to those who are seeking asylum in Australia. The authors are encouraged by the change in direction and view that these approaches are better aligned with Australia's obligations under international covenants that it is signatory to, forming the first steps to ensuring that asylum seekers in Australia can apply for asylum without fear of penalty or punitive treatment.

International Instruments and Legislation

Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (UNHCR)

Convention Relating to the Status of Refugees 1951 (Refugee Convention):
Office of the High Commissioner for Human Rights UNHCR: www.unhcr.ch/html/menu3/b/o_c_ref.htm.

Convention on the Rights of the Child 1989: Office of the High Commissioner for Human Rights UNHCR: www.unhcr.ch/html/menu3/b/k2crc.htm.

International Covenant on Civil and Political Rights 1966: Office of the High Commissioner for Human Rights UNHCR: www.unhcr.ch/html/menu3/ba_ccpr.htm

Migration Act 1958 (Cth)

Migration Act 1958 (Cth)

Charter of Rights and Freedoms 1982 (Canada)

New Zealand Bill of Rights Act 1990 (NZ)