Refugee Action Network Newcastle

Committee Secretary
Senate Legal and Constitutional Committees
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To the Secretary, Senate Legal and Constitutional Affairs Committee,

Please find enclosed Refugee Action Network Newcastle's submission to the Inquiry on the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010.* This submission has been prepared in response to the proposed amendments of ending offshore processing and the excision policy, ensuring detention is only used as a last resort and ending long term and indefinite detention. We have provided information, discussion and recommendations in relation to the current excision policy, long term and indefinite immigration detention as well as proposals to bring Australia's asylum laws and policies in line with our human rights obligations.

Our recommendations on this issue have been a result of our firsthand experience on this issue, both as individual activists and through our group's work on these issues. They have been supported by secondary research into what we feel are the key issues in the debate. As an advocacy organisation we feel that our submission provides insight into the issues under discussion by the committee.

We would like to thank the committee for giving us the opportunity to submit. If you have any further questions please contact us using the above details.

Kind regards,

Niko Leka
On behalf of Refugee Action Network Newcastle

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1. Introduction

Refugee Action Network Newcastle (RANN) was formed out of another group, Newcastle NoWar Collective, that had originally formed in protest at the invasion of Afghanistan and Iraq, back in 2001. An asylum seeker advocacy group was also created in response to the Howard government's asylum seeker policies. This group ceased action when the Howard government lost office in 2007. As the present government started to follow similar policies, the Newcastle NoWar Collective held a number of actions in support of asylum seekers.

It was eventually decided to form a group focused on asylum seeker advocacy. RANN's objectives are:

- Educating people about asylum seekers (to dispel the "illegal hordes of invading boat people" myth);
- Networking with other groups – for example Christians for Peace, Amnesty International, political organizations;
- Fundraising to provide asylum seekers with necessary items;
- Sending donated items to asylum seekers;
- Visiting them or supporting visits to them by other organizations.

It is with this interest in refugee policy, RANN writes to support the proposed changes to the Migration Act that are currently before the Committee.

2. Background

Australia's refugee obligations stem from its status as a signatory to the United Nations Convention Relating to the Status of Refugees and the optional Protocol. This forms part of a humanitarian scheme for refugee protection and resettlement.

Refugees are defined by the 1951 Refugee Convention as being unable to avail themselves of the protection of their country due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. This was limited to events occurring before 1951 and only to a European Context. The 1967 Protocol enlarged the Convention's operations by removing this restriction. Australia is a state party to the Refugee Convention, being the sixth country to ratify it and ratified the 1967 protocol in 1973 (Thom, 2002; Department of Immigration and Citizenship, 2009). Australia runs a humanitarian program as part of its UNHCR obligations to resettle people found to be refugees (DIAC).

According to Crock and Ghezelbash (2010), until recently policy regarding refugees has centred on the understanding that border control measures should be tempered by human rights concerns. These include obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). For example, when Prime Minister, Fraser specifically rejected measures such as mandatory detention, return of refugee boats and temporary visas in relation to Vietnamese asylum seekers in the 1970s. This approach has been continuously abandoned since the 1980s, as successive Australian governments have favoured policies of containment and deterrence.

The Tampa crisis led to a toughening of Australia's refugee laws, known as the Pacific Solution. This policy established three main aspects of refugee law in Australia: excision of offshore places from Australia's migration zone, meaning people who landed there were declared offshore entry persons and could only apply for visas at the discretion of the Minister; establishment of offshore detention facilities in Nauru and Manus Island; and 'Operation Relex', which saw unauthorised boats intercepted at sea by Australian Navy boats and escorted back into Indonesian waters (Crock & Ghezelbash, 2010; Crock & Ghezelbash, 2011; Grewcock, 2009).

The Migration Amendments introduced by Senator Hanson-Young seek to legislatively remove brutal features of Australia's immigration laws. These include the excision of offshore areas from Australia's migration zone, restricted access to judicial review, and mandatory detention.

3. Discussion

3.1 Excision of Offshore Areas

As noted above part of the Pacific Solution was the establishing of immigration detention centres on Nauru and Papua New Guinea and the prevention of people categorised as offshore entry persons applying for a visa without the immigration minister's permission. The argument put forward by politicians in favour of offshore processing was that it was an act of self-defence against an organised threat to national security and Australia's identity (Grewcock, 2009). However the "Pacific Solution", of which excision formed a crucial part proved ineffective in deterring asylum seekers. Unauthorised boat arrivals actually increased after the introduction of the Pacific Solution and only started decreasing in 2003 when global asylum seeker numbers started dropping (Edmund Rice Centre, 2009).

The excision policy created a diplomatic disaster in the region, where Australia was perceived to accord greater priority to its domestic concerns than broader regional issues (Penovic & Dastyari, 2007). As pointed out by Penovic and Dastyari "offshore processing not only compromises Australia's relationship with its Pacific neighbours, but also erodes Australia's commitment to human rights. It is contrary to the constructive role played by Australia in the formulation and ratification of UN human rights instruments."

This rejection of human rights also fed into the system of geographical discrimination regarding where asylum seekers landed. It was the case that people held in these offshore detention facilities were not subject to Australian law. This meant that their detention was not subject to independent scrutiny by the Ombudsman, people held here had no access to migration advice or lawyers and no right to judicial review (Penovic &Dastyari, 2007; Grewcock, 2009; Marr & Wilkinson, 2004). Penovic and Dastyari state that these people were treated differently for arbitrary reasons that fit in with the central aim of deterrence.

In November 2010 the High Court of Australia found that offshore entry persons are entitled to assessment and review that was procedurally fair and that those conducting the assessment are bound by Australian law.[1] This case also made it clear that the decision makers are bound by other aspects of Australian law (Crock & Ghezelbash, 2011). This case held that asylum seekers can assert a limited right to natural justice. This case held that asylum seekers can assert a limited right to natural justice. The Court held, at paragraph 74 " that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power".

We acknowledge that this decision did not render the two tier system of processing nor the excision policy unlawful. However, RANN'S view is that this natural justice is best served by ending the excision policy and processing all asylum seekers in the same manner.

Accordingly RANN supports the amendment to end offshore processing, with a view to having all refugees arriving in Australia being processed on the mainland using the same assessment process regardless of the method of arrival.

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[1] Plaintiff M61/2010E V Commonwealth of Australia & Ors; Plaintiff M69 of 2010 v Commonwealth of Australia & Ors [2010] HCA 41.

3.2 Long-term and Indefinite Detention

Mandatory detention, resulting in long-term and indefinite detention is unnecessary, overly expensive and is not in line with a humanitarian-based refugee program.

As at 4 February this year, 6 330 people had been held in immigration detention longer than one month. (Senate Legal and Constitutional Affairs Committee Estimates Hearings, 2011). There are 1038children in detention as at 6 May this year (DIAC 2011).

The circumstances of detention have been linked to increased mental health issues in detainees. Ongoing detention, indeterminate in length, leads to mounting stress and tension, which often results in depressive illness and thoughts of despair and helplessness (Amnesty International, 2007). This is of particular concern in the case of children.

An Inquiry by the Human Rights and Equal Opportunities Commission (HREOC) in 2004 found that the conditions of detention had overwhelmingly detrimental effects on children. The Inquiry found that the mental health of children is affected by long term detention. The institutionalisation of children, in a living environment where they are surrounded by fences, razor-wire, locking and unlocking gates and detention officers increases the risk of mental health problems. There is evidence that the safety of children in detention was threatened by exposure to riots, demonstrations, acts of self-harm, hunger strikes and assaults that occurred within detention centres. The Inquiry found security measures used in front of children included detention staff wearing riot gear and carrying batons and shields, head counts, tear gas, water canons, with insufficient consideration of the impact of these measures on children. The evidence suggests that there is a strong link between detention and incidences of developmental delay, depression and PTSD. Furthermore, these cannot be treated in detention because the environment is one of the major causes of the problems.

In one interview conducted by HREOC an unaccompanied Afghan boy stated how immigration detention is worse than prison: “I can tell you that things are very, very difficult for us. I can say that you can never call that place a detention centre. It was of course a prison and a gaol. Even in prison you know at least for how long you will be in prison, but in a situation like that we did not know what was happening next.” (HREOC, 2004, p.81).

RANN visited Villawood Immigration Detention Centre on 14 September, 2010. Our first impression upon arriving was of guards, big fences and the hostile manner of Serco staff. It was more akin to visiting Silverwater Remand Centre. We were required to hand over our phones and drivers licence.

Our first visit was to a Tamil man who had been persecuted within detention by both detainees and guards because he was gay. He fearful of an impending transfer away from the little support network he had, down to Melbourne. He was housed in the family area of small two or three bedroom residences. We weren’t allowed inside; we could only sit in the garage. We were told there were cameras, and if we went in the guards would come very quickly. He cooked us lunch, but had to bring it out to us.

When we left to go to the next unit, we had to go through even more rigmarole. We had to put everything we had with us into lockers- and were not allowed to take anything in. It felt as if we were criminals, and as if we were visiting other criminals.

We had to go through a scanner, and then bodily scanned, through airlock-style doorways, through another set of two locked doors, before finally being in a large enclosure - a cross between goal and a zoo. We could see people on the other side of the wire.

The asylum seekers were mainly Sri Lankan, but some were from different places and two from an area between Iran and Iraq. Some of these people were facing their third rejection of their application. They were lovely people, gentle- but worried. They'd lost families, suffered torture, been bombed and now were in an agony of waiting to find out what their fate would be. One Tamil said how his family were all killed, his village destroyed, yet DIAC said to him it was "no problem." They just didn't understand. Another Tamil told me how his village had also been destroyed and the Red Cross were unable to trace his family yet his visa application was rejected.

They told horror stories of life on Christmas Island. These included stories of many people with wounds and in pain who were untreated. We heard of a man who spent all day banging his head against a wall. Of another who had a broken leg, and was unable to walk so going to the toilet was agony for him. The toilets were filthy, always awash….that the showers were only available for an hour for everyone to have a shower in that time. How just before the Ombudsman and the Australian Human Rights people visited, the prettied the place up and then took everything away the moment they'd gone.

Many of them can't sleep because of nightmares. They told how in Villawood, if the guards see them up at night it gets noted- "everything gets noted- and if they don't like it, that's it, they transfer you to Stage One (high security)". Their treatment for insomnia is cigarettes and Temazepam.

Not one of them could offer us an explanation as to why their visa applications had been rejected. They simply did not know.

We left, and as we were catching the train we received a text from the person who'd organised the visit. The first man we had seen, who'd been fearful of transfer to Melbourne the next day, had just been taken off to the airport. That was it - no warning, no time to say goodbye.

When we reached Newcastle, we felt exhausted, demoralized, angry, ashamed, despairing. And for what? These people were not criminals. They came asking for our country's help and should not have to live for months or years on end in intolerable conditions, waiting for a decision about their application.

RANN is also aware of issues resulting from remote detention and the difficulty in providing adequate services as well as with the use of private contractors to run Immigration Detention Centres. These issues need to be addressed legislatively.

3.3 Conforming to Human Rights Norms

As noted above, many aspects of Australia's detention regime have been criticised by the international community for failing to conform with human rights norms. One argument is that Australia's migration laws be subject to regular post enactment review in order to assess their operation and impact (Francis).

The *Human Rights (Parliamentary Scrutiny) Bill 2010* is currently before the Parliament. It is argued that its adoption will have a similar effect as a system of post enactment review.

The Bill recognises Australia's human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. It then establishes a Parliamentary Joint Committee on Human Rights which has the task of preparing a compatibility review for all legislative instruments in accordance with Australia's human rights obligations.

This procedure, if adopted, will impact all future legislation relating to refugee policy and law. RANN submits that this will bring such policy and law into line with human rights norms, which have been an issue.

4. Conclusions

As a signatory of the Refugee Convention Australia has a responsibility to protect asylum seekers and refugee policy should focus on the rights of these highly vulnerable people (Edmund Rice Centre). Australia nominally runs a humanitarian program for refugees. However this is currently undermined by its treatment of those who arrive in Australia or in excised areas seeking asylum. The policy of a two tier processing system depending upon where people land should be abolished, along with the excision policy. This is the only way to ensure procedural fairness. Furthermore, there are significant issues relating to mandatory detention. RANN has visited Villawood Immigration Detention Centre and witnessed the horrific conditions that asylum seekers live in. These centres are more like a gaol, than a processing centre. Therefore we wholeheartedly support the Bill's call for detention to be limited to 30 days for initial processing and reasons given if extended beyond that period. Human rights have been topical in Australian policy over the last two years. RANN supports the introduction of the *Human Rights (Parliamentary Scrutiny) Bill 2010* particularly in its interaction with the *Migration Act* and amendments to it. Australia must implement these changes in order to truly be able to call its policy a humanitarian program.

5. Recommendations

5.1 That the Amendment be passed into law as soon as practicable.

5.2 That the Amendment be reviewed with attention being paid to:

- Ensuring no children are kept in detention
- That detention is indeed, a matter of last resort
- That the principles be utilised to close down remote detention centres in favour of community residence with processing being conducted in major cities
- That if breaches of the amended Act and its principles are made by government agencies and their contractors, of measures required to ensure compliance.

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