Submission to the Senate Legal & Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

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Introduction

The Migration Law Program at the Australian National University specialises in the provision of courses which enable people to be registered and work effectively as migration agents across all aspects of migration law and practice. This provides us with particular insights into how migration law and policy operate and impact in a real world setting.

Overview

The mandatory detention provisions in Australia's immigration laws have now been in operation for nearly twenty years. The problems that have occurred over that time are well documented, and many of them have been the subject of past inquiries by this Senate Committee[1], as well as the Joint Standing Committee on Migration[2], the Joint Standing Committee on Foreign Affairs Defence and Trade[3] and the Australian Human Rights Commission[4].

The problems identified across these many inquiries and reports include major harm to individuals, drawn out delays in finalisation of visa claims and in the opportunity for refugees begin settling in and contributing to Australian society, and immense expense to the taxpayer. An obvious example of the sort of negative individual, administrative and financial outcomes which can occur from mandatory detention beyond its application to asylum seekers is the Cornelia Rau case, which was also the subject of an extensive examination by this Senate Committee.

This Senate Committee has also examined detention issues through legislation specific inquiries, such as the one into the government's Migration Amendment (Immigration Detention Reform) Bill 2009, which reported in August 2009. There have also been a number of other private Senator's Bills over the past five years which have sought to achieve similar outcomes to the Bill which is the subject of the current Inquiry.

Given the many other inquiries and reports which have examined the issue of mandatory detention, this submission will not traverse that ground ounce again. However, in the context of the current inquiry, it is particularly relevant to note that the report of the Joint Standing Committee on Foreign Affairs Defence and Trade report of ten years ago, which had a Coalition majority and was Chaired by Liberal Senator Alan Ferguson, recommended that:

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[1] e.g. Administration and operation of the Migration Act 1958, tabled 2 March 2006

[2] e.g. Inquiry into immigration detention in Australia, reports tabled 1 Dec 2008, 25 May 2009 and 18 Aug 2009.

[3] *A report on visits to immigration detention centres*, Joint Standing Committee on Foreign Affairs Defence and Trade, tabled 18 June 2001

[4] e.g. *A Last Resort? The Report of the National Inquiry into Children in Immigration Detention, tabled 13 May 2004*

for asylum seekers who have received security clearances, there should be a time limit on the period that they are required to spend in administrative detention[5]

Provisions of the Bill

This submission supports the expressed intent of the Bill before the Committee, namely to:

- Repeal the excision policy;
- Ensure that detention is only used as a measure of last resort, thus ending the policy of mandatory detention;
- End indefinite and long-term detention;
- Restore asylum seekers rights to procedural fairness; and
- Introduce a system of judicial review of detention beyond 30 days.

Other submissions to this inquiry, along with many other reports in these matters, have detailed the problems with mandatory detention, constraining procedural fairness and by excision policy from a human rights and public administration practices.

This submission emphasises that in addition to those concerns, current provisions and practice significantly impact on the ability of migration agents and lawyers to perform their vital role effectively.

Excessively complex and regularly changing laws and guidelines, wide ranging discretion and constraints on access to clients make it very difficult for migration agents to provide clear advice.

Excision

The existing excision policy provides a clear example of this problem. Not only does detaining asylum seekers in remote places make it difficult for migration agents and lawyers to provide the best advice, the different system of assessment and review which operates for protection visa applicants designated as offshore arrivals compared to other applicants creates extra uncertainty and potential for inconsistency.

Having the law being applied differently in different areas creates unnecessary complexity and uncertainty, adding cost and time to the assessment process. The unanimous High Court decision upholding the appeal by two Tamil asylum seekers – plaintiffs M61 and M69 – detained on Christmas Island[6] demonstrated the inefficiency and inherent unfairness of trying to create two differing systems of assessing claims. The sensible option, purely from a public administration point of view, would be to abolish excision zone provisions of the Migration Act,

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[5] Paragraph 5.93, Recommendation 10, *A report on visits to immigration detention centres*, Joint Standing Committee on Foreign Affairs Defence and Trade, 18 June 2001

[6] *Plaintiff M61/2010E v Commonwealth of Australia, Plaintiff M69 of 2010 v Commonwealth of Australia,* [2010] HCA 41, *11 November 2010*

as this Bill seeks to do.

The dangers in seeking to have protection visa applications assessed outside of the protections built into the standard process in the Migration Act was a key reason why the attempt by the previous to extend this regime, via the Migration Amendment (Designated Unauthorised Arrivals) Bill, generated significant concerns in the Committee inquiry into this Bill[7], and was one of the few government Bills not supported by the Senate during the time when the Coalition parties had a majority in that chamber.

Detention

The open-ended nature of mandatory detention has enabled the enormously significant decision about whether or not to take away a person's freedom to be made via a totally administrative process. Not only does this reduce transparency and accountability, it can enable such decisions to be heavily influenced by political factors. Enormous variations in the type of treatment and conditions provided to people, as well as the key factor of whether or not they remained detained, can occur without any change in the law or any recourse to Parliament.

The most obvious example is this under section 195A of the Migration Act, which provides the Minister with the power to grant a visa to a person who is in immigration detention if the Minister considers it to be in the public interest, whether or not the person has applied for a visa. Whilst this power is non-compellable, it in effect means that a Minister could decide today that all protection visa applicants released from detention after a certain period of time, without any change needing to be made to the law.

Mandatory detention is bad not just because it is has led directly to significant harm and trauma being inflicted on refugees, and cost enormous amounts of public money. It is also bad public administration practice. As a general principle, mandatory detention, as with mandatory sentencing, weakens the separation of powers by reducing the independence of the judiciary. Bureaucrats should not be making decisions as to whether or not a person is jailed for a prolonged period of time - and nor should politicians.

It is also bad practice because it allows for wide variations in how the law is applied. This has been demonstrated very clearly over the last few years since the change of government at the 2007 election. The announcement of the government's seven 'detention values' signalled a significant shift in how the existing law would be administered. Migration agents and lawyers from around the country reported a change in how DIAC interpreted the law and a change in attitude in the treatment of individual cases. This has subsequently changed and has swung very clearly back towards pre-2008 practices. There will always be some need for discretion in decision making, but it should not be able to vary too widely without changes to the law, whether it to be to the primary act or at the level of regulations.

[7] Report tabled June 2006

Whilst only a minority of migration agents and lawyers deal with asylum seeker issues or clients in detention, those that do face not only some of the most challenging aspects of migration practice but are also operating in an environment where negative outcomes or mistakes can have very significant human consequences.

As part of the ANU's Migration Law Program, we examine how best migration agents can be prepared for practice and how they fare after completing our courses and entering into practice. It is clear that the lack of certainty and continuing variability in how the law will be applied is a significant difficulty faced by migrant agents and lawyers.

An example of the lack of certainty and changing interpretations is the 'new detention values' announced by the former Minister for Immigration, Senator Chris Evans, in 2008. The government stated that their new detention values would "fundamentally change the premise underlying detention policy"[8]. This change has not occurred, not least because the changes were not incorporated in law. This is why legislative change in this area is so crucial, to improve certainty in how our migration law is applied.

Migration agents and lawyers reported varying examples of how these new values were or weren't being applied. Part of the difficulty in this is that the "seven key immigration values" announced by the Minister at the time could be seen to be potentially contradictory. For example, value 1 states that "mandatory detention is an essential component of strong border control", whilst value 4 stated that "the length and conditions of detention …. would be subject to regular review" and value 5 stated that "detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time".

It is unreasonable to expect migration agents and lawyers who seek to advise often highly vulnerable and traumatised clients to have to work in such an uncertain administrative environment. Relying on Ministerial instructions is not sufficient in such an important area of law which involves whether or not people are deprived of their freedom.

Whilst this submission supports the goal of this Bill to ensure that detention is only used as a last resort and for the shortest practicable time, it acknowledges the concerns raised in other submissions[9] to this inquiry that this section of the Bill could be improved. As stated above, the greater certainty in how the law will be interpreted the better for migration agents and lawyers and the clients they advise, the better. The amendments suggested by Professor Penelope Mathew in her submission would improve the Bill in this regard.

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[8] "New Directions in Detention – Restoring Integrity to Australia's Immigration System". Speech delivered at Australian National University, Canberra, 29 July 2008

[9] See submissions 12, 14 and 20