



9 September 2011

Committee Secretary
Joint Select Committee on Australia's Immigration Detention Network
PO Box 1600
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Submission in relation to the Inquiry into Australia's Immigration Detention Network

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

NSWCCL thanks the Committee for the opportunity to make this submission.

NSWCCL also thanks the Committee for specifically encouraging us to assist current and former immigration detainees to make submissions to the Committee.

This submission will focus on the Government's detention values¹ and the reasons for the riots and disturbances experienced in the immigration detention network.

The writer of this submission's experience includes acting for a period as a legal representative for 7 individuals who were charged with offences arising out of incidents which occurred at Villawood Immigration Detention Centre on 20 April 2011 and the interviewing of those persons.

The writer has also been involved in lodging a complaint with the Commonwealth Ombudsman concerning the transfer of immigration detainees to correctional facilities following the 20 April 2011 riots at Villawood.

Summary

In the writer's opinion, the underlying cause of riots and disturbances in the immigration detention network is simple to identify. It is the injustice immigration detainees face by reason of their mandatory detention, magnified by the conditions of their detention. Injustice as a motivator of action has no parallel in the human psyche. The immigration detention

¹ It is understood that the Government's detention values comprise the statement at <http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>

environment breaks down individual detainees' normal inhibitions against violent, destructive and otherwise wrongful behaviour.

Injustice is inherent and inevitable as a result of application of Key Immigration Detention Values 1 and 2. Further injustice is inherent and inevitable by the Government regularly acting contrary to Key Immigration Detention Values 3 to 7 and the hypocrisy involved in so acting while maintaining rhetorical commitment to them.

It is inescapable that injustice is a core value at the heart of the Government's detention policy. Mandatory detention, which is inherently unjust², and conditions of immigration detention which fail to comply with Key Immigration Detention Values 6 and 7, are deliberately used as a deterrent to would-be asylum seekers.

Accordingly, suicide attempts, self-harming behaviour, riots and disturbances are the inevitable outcome of current Government policy.

The fact that such behaviour continues even after deterrence has been increased (such as the *Migration Amendment (Strengthening the Character Test and other Provisions) Act 2011*) demonstrates the powerful motivating factor of injustice, and the ineffectiveness of deterrence measures.

Submission

At the outset, it is important to note that acts of violence and property destruction by immigration detainees in immigration detention facilities are not to be condoned. Understanding the reasons for riots and disturbances is not equivalent to condoning them.

In properly understanding the reasons for riots and disturbances in immigration detention facilities, it is first necessary to accept that it is legitimate and necessary to look to causes beyond the individual actors who engage in such behaviour. Immigration detainees do not come to Australia intent upon engaging in violent or destructive behaviour. That some eventually do so is a direct result of the circumstances they face following their arrival.

Key Detention Values

A significant proportion of detainees are in detention in circumstances which can be understood as representing a primacy being given to Key Immigration Detention Value 2 (particularly 2a and 2b) over conflicting Key Immigration Detention Values 4 and 5.

These include detainees who are in the following circumstances:

- (a) detainees who are in effective lifetime detention because they have been found to be refugees (and therefore cannot be returned to their country of origin), but have adverse security assessments from ASIO and therefore cannot be granted a visa;
- (b) detainees who are in indefinite detention because they have been found to be refugees but have not been security cleared;
- (c) detainees who have failed the IMR process, but who have appeals before the Courts or are members of a class whose position will be affected by decisions in other cases before the Courts;
- (d) detainees who have failed the IMR process or RRT process, and have made requests to the Minister for intervention on humanitarian grounds;

² The committee should be well aware of the justifications for this statement – refer, for example, to numerous reports of the Australian Human Rights Commission and the UN Human Rights Committee

- (e) detainees who have failed the IMR process or RRT process, but have claims for protection on complementary grounds;
- (f) detainees who have failed all processes but who have communicated to the UNHRC and whose ultimate position is dependent on the outcome of such communication.

In NSWCCCL's submission, it is fundamentally wrong to allow Key Immigration Detention Value 2a and 2b have primacy over Key Immigration Detention Values 4 and 5. In a free society, mandatory deprivation of liberty (other than for a short period) should not be permitted on a "risk assessment" basis. Further, in a free society, persons who are deprived of their liberty should have a proper opportunity to challenge their detention in a Court or Tribunal.

There are several mechanisms available within the Australian legal system which provide a viable alternative to mandatory detention based on a "risk assessment" approach. For example, control orders could be used to manage in the community people who are considered to represent a risk to the community.

The situation of immigration detainees in category (a) above is of particular concern. Included in this category is a family with 3 young children, the youngest of whom was born in detention and is now a year old. The effect of detention on the children is devastating.

Of particular concern is that there is no means to effectively review the adverse security assessments. Australian citizens and permanent visa holders are entitled to a merits review of adverse security assessments in the Administrative Appeals Tribunal.

The Inspector-General of Intelligence and Security (IGIS) recommended in 1999 and again in 2007 that access to the AAT be extended to refugee applicants.³ On 26 May 2011, the Australian Human Rights Commission in its report on Immigration detention in Villawood supported that recommendation.⁴

NSWCCL urges the Committee to recommend implementation of those recommendations.

Further, to the extent that any detention is based on a "risk assessment approach", there need to be robust accountability for the detention decision. There should be a requirement for details of the risk assessment to be provided to the detainee and means for the detainee to challenge the risk assessment.

Key Immigration Detention Values and Cost

NSWCCL notes that the financial cost to the Australian community of adhering to the Key Immigration Detention Values is nowhere considered or acknowledged.

The simple fact is that the financial cost of maintaining Australia's mandatory detention system is unjustifiable on any utilitarian cost/benefit analysis. Any justification for the financial costs of mandatory detention can only be made on ideological grounds.

NSWCCL believes that the general Australian community does not support the continued incurring of the cost of mandatory detention or the ideology which results in such

³ See Inspector-General of Intelligence and Security, Annual Report 2006–2007 (2007), p 12, at www.igis.gov.au/annual_report/06-07/index.cfm; Inspector-General of Intelligence and Security, Annual Report 1998–1999 (1999), paras 89-91, at www.igis.gov.au/annual_report/98-99/asio.cfm

⁴ See www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html at p 12.

expenditure. Evidence of this is to be found in recent media reports,⁵ and the extent of media requests for comment on this issue to NSWCCCL.

In considering the cost of the mandatory detention, one needs to take into account the following types of cost:

- (a) the capital cost of constructing detention facilities and repairing facilities damaged by detainees;
- (b) the cost of operating the detention system;
- (c) the opportunity cost of keeping immigration detainees out of productive activities during their detention;
- (d) the cost to the community of caring for refugees upon their release from detention as a result of incapacity caused by their detention and the reduction in their capacities for productive activities because of their experiences in detention; and
- (e) the cost of compensating immigration detainees who have legitimate compensation claims as a result of their detention.

At the very least, in considering resolution of conflict between different Key Immigration Detention Values (for example, conflicts between Value 2a and 2b, and Values 4 and 5), it is proper to consider cost implications.

Access to justice – Key Immigration Detention Value 6

An aspect of the injustice experienced by immigration detainees is the limitations they face in attempting to access justice.

Only recently has legal aid become available to some asylum seekers who apply to the Courts for judicial review of adverse IMR decisions. Access to legal aid, even for meritorious cases, is patchy. It is significantly harder for detainees in remote detention centres to access legal representation compared to those in Villawood IDC or Maribyrnong IDC. The legal profession itself is largely responsible for arranging representation for asylum seekers in the Courts.

It is important for the Committee to recognise that the Government has largely lost the support of the legal profession in relation to refugee policy because of its refusal to accept principles of justice. The Government's reaction to the recent High Court decision in *Plaintiff M70* powerfully illustrates the government's disregard for justice.

Some sections of the media have recently highlighted the amount of money government spends on legal assistance to asylum seekers. In the writer's experience, the point of these reports was to highlight the general unjustifiable costs of current immigration detention policy. The amount of expenditure in providing legal assistance to asylum seekers is a tiny proportion of the overall cost of detention.

Treating asylum seekers fairly in accordance with the law requires the provision of reasonable means for access to justice.

Conditions of detention – Key Immigration Detention Value 7

In the writer's experience, a major cause of the riots and disturbances in Villawood IDC in April 2011 was the sense of grievance felt by detainees that their situation was unjust, and that there was no-one who would give them a fair hearing.

⁵ For example, see *Million-dollar refugee family caught in perpetual detention*, The Australian 27 May 2011

In view of the inherent injustices involved in the implementation of the Key Immigration Detention Values, these feelings are understandable.

The grievances are multiplied by the difficulties and unfairnesses of the daily routines in the immigration detention centres. An interesting outsider's perspective of the conditions in Villawood IDC is to be found in the blogs of Marissa Ram, a Human Rights Fellow of the Human Rights Center, University of California, Berkeley, who recently undertook an internship with NSWCCCL.⁶ An indication of the sensitivity of DIAC to the publication of such views is that the first posting to Ms Ram's blog was from Sandi Logan, official spokesperson of DIAC.

Measures to maintain the system of injustice

In a free society such as Australia, systems of injustice take effort to maintain.

Two aspects of the detention system illustrate the measures used to maintain injustice in the immigration detention centre.

One is restriction on media access to immigration detention centres and detainees. The excuse most often used is DIAC's duty of care to maintain privacy of the detainees. This excuse is specious. Detainees are often keen to meet with and speak to media. Media are generally willing to take appropriate measures to protect privacy of detainees.

A recent example of DIAC's approach was when a television crew from a major media network sought to film a child being dropped off to school from a detention centre, accompanied by security guards. Even though the parents' consent had been obtained for the filming, and the network had agreed to pixillate the child's face, the guards took the decision to refuse to abort the drop off and refuse permission for the child to attend school on that day. The decision in the circumstances to give primacy to the child's right to privacy (which was not going to be breached at all) over the child's right to education is illustrative of DIAC's attitudes.

The other aspect is general restrictions on access to IDCs. This is most dramatically illustrated by the attempt of a CCL committee member to gain access to Scherger IDC for the purpose of facilitating detainees to make submissions to this inquiry. Details of that incident are contained in a separate submission.

Conclusion

While serious injustice remain at the heart of the immigration detention system, outbreaks of destructive behaviours in immigration detention centres can be expected. Often these will be self-harming behaviours, including suicide and attempts at suicide. Other times they will be disturbances involving the destruction of property or assaults. The root causes are the same, and it is entirely within the government's power to bring them to an end.

Yours faithfully

Stephen Blanks
Secretary, NSW Council for Civil Liberties

⁶ See <http://intheworld.berkeley.edu/author/mram/>