

Submission No. 25  
Date Received.....

**REFUGEE ADVICE + CASEWORK SERVICE (AUST) INC.**



Level 8 Suite 8C  
46-56 Kippax Street  
Surry Hills NSW 2010  
AUSTRALIA

Phone: (02) 9211 4001  
Fax: (02) 9281 8078  
Email: admin@racs.org.au  
Http://www.racs.org.au

RECEIVED  
15 JUL 2008  
BY: MIG.....

Committee Secretary  
Parliamentary Joint Standing Committee on Migration  
Department of the Senate, Parliament House

15 July 2008

Dear Senate Committee

**Re: Inquiry into Immigration Detention in Australia**

Thank you for the opportunity to make a submission on immigration detention in Australia. The Refugee Advice and Casework Service (Australia) Inc (RACS) is Australia's oldest specialized legal service for asylum seekers and refugees, established over 20 years ago. RACS provides free immigration advice to asylum seekers in immigration detention (with a focus on Villawood) and in the community, under a contract with the Department of Immigration and Citizenship. In 2006-07, RACS assisted 1,300 people from 69 countries of origin, including 40 new clients in detention.

Based on its long experience in representing asylum seekers in detention, RACS would like to highlight its ongoing concerns about Australia's system of mandatory detention as it affects asylum seekers, including by prejudicing their ability to legally claim asylum. We acknowledge that the 2005 amendments to immigration detention were a significant step forward in relation to treatment in detention, the principle of "last resort" detention of child detainees, and the enhanced review procedures through the Ombudsman. Nonetheless, considerable room for improvement remains.

**Arbitrary Detention**

Although immigration detention is permitted in principle by international law, Australia's system of *mandatory* detention can, in individual cases, breach Australia's obligation under international human rights law to guarantee freedom from *arbitrary* detention (ICCPR, article 9). The UN Human Rights Committee has identified repeated cases of arbitrary immigration detention in Australia. Even lawful detention may be arbitrary if it is unreasonable,<sup>1</sup> which occurs where it is unnecessary or disproportionate.<sup>2</sup>

<sup>1</sup> Human Rights Committee, *Van Alphen v the Netherlands* (1990) No. 305/1988

<sup>2</sup> *Toonen v Australia* (1994) 1 PLPR 50.

## **Permissible Grounds of Detention**

RACS believes that Australia should apply UNHCR's *Revised Guidelines on the Detention of Asylum Seekers* to limit detention to cases where it is genuinely necessary, rather than applying its existing indiscriminate policy of mandatorily detaining all asylum seekers. Guideline 2 establishes the presumption that asylum seekers should not normally be detained. Guideline 5 then sets out limited exceptions, accepting that detention is permitted only if it is necessary:

To verify an asylum seeker's identity;

To determine elements of an asylum seeker's claim (that is, the essential claim, rather than a full merits consideration of all facts while a person remains detained);

To deal with cases where required documents have been destroyed;

To protect national security or public order.

These grounds ensure that Australia would not interfere unnecessarily with freedom from arbitrary detention, while permitting detention in limited cases where it is justifiable. Very few asylum seekers pose any risk to the Australian community and there is usually little reason to detain asylum seekers after their identity is established and their asylum claim is notified to the authorities.

## **Review of Detention**

Substantive judicial review of the grounds for detaining an asylum seeker is not available under Australian law, in breach of the obligation to provide full judicial review of the reasons for detention and the right to an effective remedy (including compensation for unlawful detention) under the ICCPR. Australian courts are limited to reviewing whether a detainee arrives unlawfully, but have no power to decide whether it is necessary and proportionate to detain a particular person in their individual circumstances.

## **Conditions of Detention**

International law standards also govern the conditions of detention and require the protection of human rights of detainees. Accessibility is an integral problem in relation to the conditions in detention facilities, including access to education, recreation, legal services and religious facilities, and access by media personnel. The privatization of detention facilities has also raised questions about transparency in the management, particularly given the secrecy provided by commercial confidentiality between the government and contractors. The benefits of public scrutiny and transparent public administration cannot be underestimated in avoiding inhuman or degrading treatment.

HREOC has reported that detainees see the arbitrary and indefinite deprivation of their liberty as causing the most distress. This raises serious concerns surrounding the effects of indefinite detention on the mental health of detainees. The practices of solitary confinement and segregation pose significant risks to both physical and mental well-being of long-term detainees. The use of solitary confinement in the case of suicide victims appears to only exacerbate the situation and often signals an appropriate situation requiring consultation with doctors and/or psychologists. Despite the Immigration Detention Standards forming part of the Government's contract with detention facility management, solitary confinement has been inappropriately used as a control mechanism to discipline detainees.

## **Alternatives to Mandatory Detention**

Alternatives to mandatory detention in the form of community release schemes may circumvent the traumas experienced by those placed in detention for long periods of time and mental, which are even more acutely felt by those suffering from mental illness. There is a variety of appropriate alternatives to mandatory detention of asylum seekers. Community based alternatives to immigration detention exist in most countries that accept refugees and asylum seekers. These operations provide a wealth of comparative experiences that ought to be considered in developing future alternatives, and demonstrate that policy based alternatives have produced positive outcomes elsewhere.

Community release programs protect asylum seekers and refugees from the physical and mental harm caused by mandatory and often prolonged detention. By releasing asylum seekers who do not pose sufficient reason for detention, neither Australia's national nor border security would be jeopardized. A rigorous and stringent process of monitoring could ensure compliance with conditions of release. This may include regular reporting, restrictions on residence, provision of sureties or bonds, electronic monitoring, or open accommodation centres. A long-term community detention program is more fiscally sound than mandatory detention policy, which is extremely expensive.

In the EU, US, UK, Canada and New Zealand, detention is only permitted in restricted circumstances and judicial and procedural safeguards are stronger. Canada, for instance, has been a model of an achievable asylum determination system that allows full review rights as well as protection under the Charter of Rights and Freedoms.

## **The Need for Complementary Protection**

One reason why some asylum seekers spend long periods in detention is because Australia lacks any system of complementary protection for those who are not strictly refugees but who nonetheless require human rights protection on other grounds (such as freedom from return to torture or cruel, inhuman or degrading treatment). The introduction of a complementary protection visa category in Australian law would enable such people to be processed much more quickly, in contrast to the current situation where their claims can only be assessed on a discretionary basis and at the very end of the determination process through a s 417 application. The lack of complementary protection unnecessarily prolongs the time spent in detention, causing unnecessary and unjustifiable harm to detainees and seriously wasting public revenue.

Please be in touch if you require any further information.

Yours sincerely

**Dr Ben Saul**  
*President, RACS Management Committee*

**Ms Katie Wrigley**  
*RACS Caseworker*