The Edmund Rice Centre's submission to the inquiry into immigration detention in Australia

Executive Summary

- The Edmund Rice Centre (ERC) offers evidence and argument why mandatory detention should be dropped immediately. It is in breach of Australia's legal commitments under the 1951 Convention relating to the status of refugees.
- ERC argues that Australian reception of asylum seekers should embrace a continuum of measures ordinarily based on well-supported accommodation with communities which may, in extreme circumstances, include detention.
- Any decisions concerning which measure to apply in particular cases should only be applied after proper judicial review according to the principles of proportionality and necessity consonant with Human Rights Law.
- Wide community involvement and engagement with Government is the best way to fulfil Australia's commitments under the Convention.

Introduction

The Edmund Rice Centre (ERC) welcomes the recent initiative by the Federal Government represented by the inquiry into immigration detention, a process which is undesirable not only in terms of human rights and our international obligations, but also in terms of efficiency and economy.

Australia recognises its full commitment to fulfil the conditions and goals of the 1951 Convention relating to the Status of Refugees (the 1951 Convention) and the 1967 Protocol (the 1967 Protocol). However, Australia continues to ignore the detail and substance of the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, published in February 1999 (the 1999 Guidelines).

ERC urges the Australian Government to return to substantive compliance with the 1951 and 1967 Protocol by observing the principles and recommendations of the 1999 Guidelines.

The second and most fundamental principle of these Guidelines is that asylum seekers should not be detained because the right **to seek and enjoy** asylum is fundamental to the Universal Declaration of Human Rights. Recognition of that right entails recognition that people fleeing political repression and war often do not have the papers to prove their identity, even less their claims, and often come deeply traumatised by the events that forced them to flee.

The Guidelines state clearly that detention can only be justified if it is applied for the specific purposes of prevention of absconding and ensuring the compliance of the asylum seeker with the proper process of determination of the refugee claim and then only in "exceptional" cases, after every alternative has been exhausted. Other

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purposes, contained within recent Australian Government policy are not justifiable. The Guidelines state quite unequivocally that its use

> "as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country." (Guideline 3)

This is in direct contradiction to some of the stated purposes of the last Government's policy where deterrence is an explicit goal of mandatory detention:

> "The Coalition Government's tough stance on people smuggling stems from the core belief that Australia has the right to decide who comes to this country and the circumstances in which they come. Deterrence has been achieved through excision, boat returns, offshore processing and mandatory detention." ("Stronger Border Protection". Election Policies - Text Version. Liberal Party of Australia (2004-09-27). Archived from the original on 2006-09-18.)

ERC has collected evidence with considerable care which shows that asylum seekers in detention in Australia and Nauru were pressured to discontinue their claims and encouraged to go back either to their country of origin or some third country. For example, Rajab is a young Afghan man who fled from his country because of political and religious divisions in his family and neighbourhood:

> "Like others rescued at sea by the Norwegian ship Tampa, Rajab was taken into detention in Nauru. Describing conditions there, he refers to the lack of legal advice, the poor standard of translations, the constant depression, isolation and uncertainty. When the quality of the food got worse, one Afghan on the staff told him this was a tactic to persuade them to go home. The Afghans, he said, were told by UNHCR and IOM [International Organisation for Migration] staff that they must go back to Afghanistan: *because it is now the policy of Australia to send refugees back. However much your life will be in danger, you won't be accepted.*
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> "Another IOM staff member told them that in another country, refugees unwilling to go home had been drugged and sent back, adding ominously: *So it may happen with you as well*. Finally the death of a young friend in the detention camp convinced him and others to leave Nauru because: one day all will die here like him … The staff of IOM came to me and said *don't resist. They will send you. If you didn't go now, one day they will send you by force.* And really I had lost the hope of life. So I thought better to die in my own country than here." (http://www.erc.org.au/research/pdf/1096416029.pdf, p. 4)

ERC has also gathered evidence that shows that asylum seekers were deported, both forcibly and because they had been so "persuaded" to return and have since had to deal with the very conditions they had told Australian officials that they had fled. Some of them lost the lives of family members, their children or their own as a result. (http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=viewDocument&JAS_Document_id=94)

Others have documented the harm suffered by detainees, especially in the long term and children. For example, in 2005, Peter Qasim, was released into a psychiatric hospital after 7 years in detention. Fortunately, the practice of detaining children has since stopped.

The culture within those organisations carrying out detention has been severely criticised by Commissioner Palmer (http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf) after several people were illegally held in detention and even deported from Australia.

Detention is also an extremely expensive exercise, as many others have documented elsewhere (http://www.onlineopinion.com.au/view.asp?article=3302). The cost to taxpayers is very large indeed, and would be very significantly less if community-based accommodation alternatives were used. In 2001, ERC made some estimates of costs, both of mandatory detention and of alternative, community-based, options:

> "Fact: Asylum seekers claims need to be assessed for legitimacy. Australia is the only Western country that mandatorily detains asylum seekers whilst their claims are being heard. Asylum seekers are not criminals and detention should be minimal. At a cost of $104 a day per head the policy of detention is very expensive. Community based alternatives to mandatory detention can be found internationally and within the current Australian parole system.
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> "A select Committee of the NSW Parliament has costed alternatives to incarceration including home detention and transitional housing. The average cost of community based programs are (per person, per day): Parole: $5.39. Probation: $3.94. Home Detention: $58.83. These options are clearly more economically efficient, and much more humane." ("Debunking the Myths about Asylum Seekers, Just Comment, September 2001. http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=viewDocument&JAS_Document_id=64)

Furthermore, cost is used as a sword over asylum seekers' heads. ERC here would offer just one small example. Detainees are charged for their own detention. Asylum seekers who are released are notified of the expense they have incurred and must come to some arrangement with the Government to pay off debt. For example, Mahommed was released on a temporary protection visa that did not allow him to work after 475 days in detention and was then informed that he owes the Commonwealth $63,749. Those who are granted refugee status may have the debt reduced or cancelled at the discretion of the Minister for Finance, but if it is not, they will find it almost impossible to pay it off or to borrow money because they have a large debt registered against them. Such indebtedness also stands as an effective bar against them sponsoring any family members to come to Australia. Those who are deported also have the debt registered against their names, and it becomes sufficient reason to refuse them any other type of visa to Australia. Since the Government can hardly be hopeful that those debts be paid, the purpose of charging them must be related to some combination of deterrence for those thinking of trying to go to Australia and punishment for those who have dared to do so without the Government's permission. This is far from respecting the right "**to seek and enjoy asylum**".

These severe abuses of fundamental human rights all cluster around the central abuse represented by mandatory detention: that policy has spawned further abuse as well as the degradation of the integrity of the agencies charged with carrying it out. This is the central element of the creation and maintenance of an abusive departmental culture.

The current mandatory detention policy in Australia is wrong because:

- It is mandatory, i.e. applied to **all** asylum seekers who arrive in Australia without permission;
- It is harmful to all detainees;
- It has no limitation in time and has been used to detain people for very long periods causing very serious harm;
- It is used abusively (in the sense of abuse of their Human Rights as established by accepted Human Rights Law) as a deterrent to possible asylum seekers;
- It is used abusively to punish those who have gained Australian territory without the Government's permission;
- It is used as a method of "persuasion" to convince asylum seekers to withdraw their claims and to leave Australia, at times to their own peril.

Along with HREOC (http://www.hreoc.gov.au/Human_RightS/asylum_seekers/inspection_of_mainland_idf.html#41) and many other organisations both within Australia and Internationally, ERC calls for mandatory detention to be scrapped immediately.

Alternatives

Once Australia recognises that detention should not, cannot be used as a deterrent to asylum seekers and still hold that it respects human rights, detention may still remain as a measure that can be applied in "exceptional circumstances" as part of an overall policy which fulfils Australia's obligations under the 1951 Convention. However, such a policy must have other ordinary means to accommodate asylum seekers while their claim to be refugees is being determined. There is a variety of measures used in other countries to successfully respond to the two major aims that a detention regime could legitimately claim, i.e.

- prevent absconding and
- ensure compliance by claimants to the entire refugee status determination process.

In applying any measure, in order to be consistent with the fundamental context of Human Rights Law, the tests of proportionality (the good achieved by the measure should at least outweigh any harms it may cause) and necessity (prove that the measure is in fact necessary to achieving the stated goal).

According to UNHCR sponsored research, Field and Edwards (LEGAL AND PROTECTION POLICY; RESEARCH SERIES; Alternatives to Detention of Asylum Seekers and Refugees. Ophelia Field with the assistance of Alice Edwards. Published by UNHCR. http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=4474140a2 [Alternatives]), experience in other countries as well as Australia offers strong evidence that the single most significant element in achieving success under these two criteria is where the measures, whatever they be, are applied: in destination rather than transit countries. The reason is because asylum seekers have a clear interest in gaining legal residence in those countries and therefore of complying with the determination process. Australia is a destination country. Field and Edwards write:

> "The information in this study confirms the rather common sense conclusion that compliance of asylum seekers prior to receipt of a final decision on their claim is not a significant problem in the world's major 'destination' countries. People go to extreme lengths to enter these territories and to access their asylum systems, and have no obvious reason to disregard or abandon such systems so long as they have any hope of gaining legal status or some right to remain. The evidence suggests that alternatives to detention, including unrestricted stay in the community, are likely to achieve high rates of success in 'destination' States, at least until the final pre-removal stage, if applicable." (Alternatives 90)

Field and Edwards discerned 12 general methods in use around the world (Alternatives 80). Another factor they found to be important in achieving success was when asylum seekers had ample access to competent legal representatives (Alternatives 94). Where claimants were families, there were very low rates of absconding and high rates of compliance probably due to further incentives to remain inside the system such as provision of free health care and education (Alternatives 96). This experience was, for example, borne out by the experience in Greece where there is clear evidence that, despite being a transit country, the provision of adequate reception assistance in a very open accommodation system was very effective in raising the rate of procedural compliance. (Alternatives 112)

Evidence from the Vera Institute in the US shows that detention was not necessary for those with pending decisions for them to continue to appear at hearings, nor did they need close supervision. (Alternatives 99)

Most significant is the experience of the Hotham Mission research in Melbourne which showed that of 200 asylum seekers (including 111 families) who were tracked living in the community with Class E bridging visas, not one absconded during the two year period between 2001-3. This was despite the fact that 31% of them had been detained previously, 55% had been waiting for a determination for four years or more and 68% were found to be either at risk or in fact homeless. (Alternatives 104)

Where claims are found to be unsubstantiated and the determination is not to recognise refugee status, deportation may become the end result. Some countries increase the level of control over such claimants in those situations, others do not. Again, the Hotham Mission study in Melbourne provides very significant data in this respect. In the same study, mentioned above, of those who, living within the community who were finally rejected, 85% left Australia voluntarily within the 28 days allowed them. The other 15% were taken into detention and forcibly removed. There were none who absconded. (Alternatives 144)

In short, Field and Edwards recommend, as does ERC, that a continuum of measures and strategies be used with proper and timely judicial review applying the principles of proportionality and necessity to each decision. Asylum seekers come to this country from a variety of situations and in varying circumstances and no one measure will be appropriate for all. Families require different supports compared to single adult males, those with severe trauma require greater support. Those who have received a negative determination may require closer supervision. However, to repeat, any change of measure must be made only after satisfying the tests of proportionality and necessity.

Contrary to current common practice in Australia, asylum seekers should be allowed to live within ordinary communities and should have access to supports to do so. They

should have access to free basic health care and education. They should be allowed to work, if that is possible, in order to maintain their own sense of dignity as well as be able to contribute to their own maintenance, to the local community and the Australian economy. They should not be burdened with debts: debts that they have little chance of paying without undergoing further severe hardship, debts which deny them access to other rights of participation and freedom of movement, debts which deny them any possibility of reuniting with their families.

There is no legitimate reason for mandatory detention and very little reason for any sort of detention. Asylum seekers ordinarily should be provided with accommodation within ordinary communities. There is significant experience of just how successful these types of arrangements can be and expertise in wide collaboration, including ERC itself, in making such arrangements work.

ERC would be available to participate in future public hearings on this matter.

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