



THE UNIVERSITY OF NEW
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FACULTY OF LAW

Committee Secretary
Joint Select Committee on Australia's Immigration Detention Network
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

10 August 2011

Dear Committee Secretary,

Inquiry into Australia's Immigration Detention Network

We welcome the opportunity to provide a submission to this inquiry. Our submission discusses: (a) the ways in which Australia's mandatory detention regime breaches international law, including its impact on children and rights of review; (b) some of the problems faced by asylum seekers residing in the community in accessing rights and entitlements; (c) the role of the courts' supervisory jurisdiction with respect to the outsourcing of immigration detention network contracts to private contractors.

We are available to provide oral evidence to the Committee if this would be helpful. We can address additional matters in the Committee's terms of reference which have not been addressed in this written submission.

Yours sincerely,

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EXECUTIVE SUMMARY

Mandatory Detention

- Mandatory detention of asylum seekers breaches Australia's obligations under international law.
- The Migration Act 1958 (Cth) should reflect a presumption against detention, unless it can be justified in the individual case in accordance with international law.
- The treatment of asylum seekers in detention must be consistent with Australia's international human rights law obligations.
- Detention should be subject to periodic judicial review, and detainees should be released if their detention cannot be objectively justified.
- Asylum seekers must be able to challenge the legality of their detention and have access to an effective remedy.

Children in Detention

- The mandatory detention of children breaches Australia's obligations under the *Convention on the Rights of the Child*.
- For the reasons noted above, children should not be held in immigration detention unless there is a specific reason to do so in the individual case.

Assistance for Asylum Seekers Living in the Community

- If mandatory detention is not abolished, the Community Detention program should be expanded and the entitlements of beneficiaries extended
- Case management support must ensure that asylum seekers are able to meet their basic needs so that Australia does not breach its obligations under international human rights law.

Bridging Visa E

- The restrictive conditions of Bridging Visa E, and the practical impediments to realizing the rights it provides, may render some asylum seekers destitute. This is in breach of Australia's obligations not to subject people to cruel, inhuman or degrading treatment.
- BVE holders should be granted work rights.
- DIAC should ensure that in every case where asylum seekers are granted work rights, they are also provided with a practical opportunity of obtaining work. Better coordination between various government agencies would go some way towards removing the practical impediments to obtaining work which are faced by some Bridging Visa E holders.
- Where families or unaccompanied minors are granted a BVE and released from immigration detention, they should automatically be part of the CAS program.
- All asylum seekers living in the community should be provided with photo identification.

A MANDATORY DETENTION

Under Australia's immigration detention policy, all unauthorized arrivals, including children, are subject to mandatory detention for health, identity and security checks.¹ Apart from Malta,² Australia is the only democratic country to have a system of mandatory detention in place for people who arrive in the country without a valid visa. Deprivation of liberty strikes at the heart of human rights protection, since without liberty a person is unable to enjoy other rights.

International human rights law sets out the limited circumstances in which a person may be lawfully detained and the required standards of treatment during detention. Australia's system of mandatory detention has been strongly criticized for breaching the right not to be arbitrarily detained, set out in article 9(1) of the *International Covenant on Civil and Political Rights*.³

From a human rights perspective, the following features of mandatory immigration detention give rise to the conclusion that it is arbitrary, and thus in contravention of international law:

- It is a blanket policy and there is, accordingly, no consideration of the particular circumstances of each detainee's case;
- It cannot be demonstrated that with regard to each individual there were no less restrictive means of achieving the government's desired outcome;
- The length of detention, particularly in circumstances where it could continue indefinitely, cannot necessarily be justified by reference to a detainee's particular circumstances; and
- The opportunities for review of the lawfulness of the detention are either non-existent or inadequate.⁴

¹ Commonwealth Department of Immigration and Citizenship, *Fact Sheet 82: Immigration Detention* (13 January 2010) <http://www.immi.gov.au/media/fact-sheets/82detention.htm>.

² Detention is initially for 12 months, but may be extended to 18 months. There is an exception for vulnerable applicants.

³ *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'). See the Report of the UN Working Group on Arbitrary Detention: Visit to Australia, UN Doc E/CN.4/2003/8/Add.2 (2002), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/\\$FILE/G0215391.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/$FILE/G0215391.pdf). See also the views of the Human Rights Committee in the following cases: *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (11 September 2007); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006). See further the comments made by the UN Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, 22 May 2008, UN Doc CAT/C/AUS/CO/3. See also UN Committee on Economic, Social and Cultural Rights, Forty-second session, *Concluding Observations*, (22 May 2009), UN Doc E/C.12/AUS/CO/4, para 30; Committee on the Rights of the Child, *Concluding Observations: Australia*, (2005), UN Doc CRC/C/15/add.268, para 64.

⁴ See the Report of the UN Working Group on Arbitrary Detention (n 3); *A v Australia* (560/1993) 30 March 1997, UN Doc CCPR/C/59/D/560/1993.

Australia also has obligations under article 31 of the *Refugee Convention* not to impose ‘penalties’ on asylum seekers for their illegal entry where they come directly from a territory where their life or freedom was threatened, provided they present themselves without delay and show good cause for their illegal entry or presence.⁵ The *Refugee Convention* does not define the term ‘penalties’, which raises the question whether it encompasses only criminal sanctions, or also extends to administrative penalties (such as administrative detention). Following the UN Human Rights Committee’s reasoning that the term ‘penalty’ in article 15(1) of the ICCPR must be interpreted in light of that provision’s object and purpose,⁶ article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence. An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended.

Measures such as arbitrary detention⁷ or procedural bars on applying for asylum may constitute ‘penalties’.⁸ This is supported by UNHCR Executive Committee Conclusion No 22 (1981), which states that asylum seekers should ‘not be penalised or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful’. Detention may be equivalent to a penal sanction where basic procedural safeguards are lacking (such as no rights to review, or where detention is of an excessive duration). The question is whether, in the individual case, detention is justified by law, reasonable and necessary in all the circumstances.⁹

UNHCR’s Guidelines on Detention suggest that detention ought only to be used:

- on grounds prescribed by law to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents; or

⁵ *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150, read in conjunction with the *Protocol relating to the Status of Refugees* (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (collectively referred to as ‘Refugee Convention’). For commentary on art 31, see Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 264–67.

⁶ *Van Duzen v Canada* Communication No 50/1979, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) para 10.2.

⁷ See Expert Roundtable, ‘Summary Conclusions: Article 31 of the 1951 Convention’ (8–9 November 2001), para 11(a), in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 256: ‘For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied *administratively*, and those ordered or applied *judicially*. The power of the State to impose a restriction must be related to a recognised object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily’ (emphasis added).

⁸ Note Executive Committee Conclusion No 15 (1979) para (i): ‘While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration’.

⁹ Goodwin-Gill and McAdam (n 5) 463.

- to protect national security or public order (and justified in the individual case).¹⁰

1 Rights of review

Section 189(1) of the *Migration Act 1958* (Cth) requires an immigration official or a police officer to detain any person he or she knows or reasonably suspects to be an unlawful non-citizen. Section 196(1) provides that an unlawful non-citizen detained under section 189(1) must be kept in immigration detention until he or she is removed from Australia, deported, or granted a visa. The detention of unlawful non-citizens is therefore prescribed by the operation of legislation and not by an order of a court or administrative authority.¹¹

Article 9(4) of the ICCPR requires that a person be able to challenge the legality of his or her detention before a court. In the case of *A v Australia*, the UN Human Rights Committee stated that ‘every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.’¹² Persons in administrative detention can and do challenge the legality of their detention,¹³ but are generally unsuccessful given that Australia has an extremely limited set of judicially enforceable human rights.

In the absence of such rights of review, detainees can only raise alleged breaches of their human rights with the Commonwealth Ombudsman or the Australian Human Rights Commission. In the case of the latter, if the Commission determines that a breach of human rights has occurred, it has the power to issue recommendations, including that compensation be paid. However, there remains no means of enforcing these recommendations. The lack of judicial oversight of Australia’s detention regime on human rights grounds,¹⁴ and in particular the inability of detainees to challenge the legality of their detention, also breaches the right to an effective remedy under the ICCPR.

Recommendations

In order for immigration detention to be consistent with international human rights law, it must be:

- necessary in the individual case (rather than the result of a mandatory, blanket policy);
- subject to periodic review by the judiciary or another authority, with the power

¹⁰ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, (February 1999) Guideline 3.

¹¹ Note, however, that the constitutional validity of Australia’s mandatory detention scheme has long been accepted by the High Court: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

¹² UN Doc CCPR/C/59/D/560/1993 (3 April 1997) para 9.4 (emphasis added).

¹³ See eg *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

¹⁴ As opposed to procedural grounds, over which the High Courts retains a supervisory jurisdiction. See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133.

- to release detainees if detention cannot be objectively justified;
- be reasonably proportionate to the reason for the restriction; and
- be for the shortest time possible.

The *Migration Act 1958* (Cth) should therefore reflect an automatic presumption against detention. This would enable asylum seekers to remain in the community while their case is being resolved and would require immigration officials to articulate the *specific* reasons why detention is deemed necessary in certain individual cases. Any such detention must be reviewable by a court according to the principles above. These changes would bring Australia into better compliance with its obligations under international law.

2 Children in immigration detention

Article 37(b) of the *Convention on the Rights of the Child* provides: ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’.¹⁵ Australia’s current legislative regime breaches this provision.

In 2005, the government amended section 4AA of the *Migration Act 1958* (Cth) to affirm ‘as a principle that a minor shall only be detained as a measure of last resort.’ In 2008, the government announced its ‘New Directions in Detention’ policy, which included the key value that: ‘Children, including juvenile foreign fishers, and, where possible, their families, will not be detained in an immigration detention centre.’¹⁶ Nevertheless, in 2011, children are still detained in immigration detention centres, which breaches international law and the principles set out in the *Migration Act* and government policy. The CRC is not directly enforceable in Australian courts and will generally amount to no more than a relevant consideration to be taken into account by decision-makers.¹⁷

A comprehensive report by the Australian Human Rights Commission (AHRC) in 2004 found that mandatory detention breaches children’s human rights.¹⁸ It found that children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour, including attempted and actual self-harm (through hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing). Furthermore, some children were also diagnosed with psychological illnesses, such as depression and post-traumatic stress disorder.¹⁹

¹⁵ *Convention on the Rights of the Child* (adopted signature 20 November 1989, entered into force 2 September 1990) 1755 UNTS 3 (‘CRC’).

¹⁶ See Senator Chris Evans, ‘New Directions in Detention: Restoring Integrity to Australia’s Immigration System’ (Speech delivered at Australian National University, Canberra, 29 July 2008) <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> .

¹⁷ See *Re Tracey* [2011] NSWCA 43 (Spiegelman CJ).

¹⁸ Human Rights and Equal Opportunity Commission (HREOC), *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

¹⁹ *Ibid.* See also Derrick Silove, Philippa McIntosh, and Rise Becker, ‘Risk of Retraumatization of Asylum-Seekers in Australia’ (1993) 27 *Australian & New Zealand Journal of Psychiatry* 606; Zachary Steel and Derrick Silove, ‘The Mental Health Implications of Detaining Asylum Seekers’

These reports raise serious questions about Australia's compliance with article 7 of the ICCPR, which requires Australia to ensure that it does not subject people to cruel, inhuman or degrading treatment, and article 10(1) of the ICCPR, which provides: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'²⁰

Unaccompanied children are a particularly vulnerable group.²¹ This is reflected in the provisions of the CRC: children without parents are entitled to 'special protection and assistance'²² and a legal guardian of such a child is to make the best interests of the child 'their basic concern' (not just 'a primary consideration', as in article 3(1)).²³ The Minister for Immigration is appointed as the official guardian of unaccompanied children. This involves a conflict of interest and places the Minister at continued risk of breaching the duty to make the best interests of the child his/her 'basic concern'.²⁴

The government recently met its commitment to move the majority of children out of immigration detention facilities into community detention by 30 June 2011.²⁵ As at 7 July 2011, there were 329 children in such facilities.²⁶ Community detention allows children and families to live unsupervised in a designated residence in the community, subject to reporting and other requirements.²⁷ As an alternative to immigration detention facilities, community detention is more likely to support the well-being of children.²⁸ However, the literature indicates that community detention is not without its problems because families living under community detention still face constraints (such as not being able to engage in paid work).²⁹ Lack of adequate facilities in the community and an absence of meaningful activity in which asylum seekers may

(2001) 175 *Medical Journal of Australia* 596; Zachary Steel and others, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' (2006) 188 *British Journal of Psychiatry* 58; Louise Newman, Michael Dudley and Zachary Steel, 'Asylum, Detention and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110.

²⁰ See also Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press, Sydney, 2006).

²¹ *Ibid*; International Detention Coalition (IDC), *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011) 25.

²² CRC, art 20(1).

²³ CRC, art 18(1).

²⁴ HREOC (n 18) 874; AHRC, *Immigration Detention Report* (2008) 79; AHRC, *Immigration Detention and Human Rights*

http://www.hreoc.gov.au/human_rights/immigration/detention_rights.html#4 85; Crock (n 20) 12.

²⁵ Chris Bowen MP, 'Government Meets Commitment on Community Detention' (Media Release, 29 June 2011).

²⁶ United Nations International Children's Emergency Fund, *Why Kids Are Still in Detention* (7 July 2011) <http://www.unicef.org.au/Act/Speak-Out/Why-are-kids-still-in-detention.aspx>.

²⁷ Joint Standing Committee on Migration, *Immigration Detention in Australia: Community-Based Alternatives to Detention: Second Report of the Inquiry into Immigration Detention in Australia* (May 2009) 22 <http://www.aph.gov.au/house/committee/mig/detention/report2/fullreport.pdf>; AHRC, *Immigration Detention Report* (n 24) 79; AHRC, *Immigration Detention and Human Rights* (n 24) 66.

²⁸ AHRC, *Immigration Detention Report* (n 24) 79; AHRC, *Immigration Detention and Human Rights* (n 24) 66; Asylum Seeker Resource Centre, *Community Detention Best for Kids* (30 June 2011) <http://www.asrc.org.au/in-the-news/community-detention-best-for-kids/>; AHRC, 'Commission Welcomes Expansion of Community Detention' (Media Release, 29 June 2011) http://www.humanrights.gov.au/about/media/media_releases/2011/56_11.html.

²⁹ AHRC, *Immigration Detention Report* (2008) 79; AHRC, *Immigration Detention and Human Rights* (n 24) 69.

engage can also pose problems.³⁰ A 2008 report by the AHRC highlighted the adverse psychological effects that detaining children in immigration residential housing and immigration transit accommodation can have.³¹

Recommendations

- Children should not be held in immigration detention unless there is a specific reason to do so in the individual case. This should be the subject of a specific amendment to the *Migration Act 1958* (Cth).
- Any detention must be justified by law, and treatment in detention must be consistent with Australia's international human rights law obligations.

B ASYLUM SEEKERS RESIDING IN THE COMMUNITY

1 Community detention

For the reasons outlined above, we strongly advocate for the abolition of mandatory detention.³² However, failing that, community detention provides a preferable alternative to an immigration detention centre. The insertion of section 197AB into the *Migration Act 1958* (Cth) in 2005 empowered the Minister for Immigration to make a residence determination that an individual in immigration detention could reside at a specified place,³³ instead of in an immigration detention centre. This paved the way for the introduction of the Community Detention program in August 2005, with families and children among the first to be released into the community under the care of Australian Red Cross.

However, asylum seekers in community detention are legally 'detained' in the community without a visa. They have no work or study rights, and must reside every night at their determined place of residence. This needs to be remedied to ensure that all asylum seekers have access to work, education, and other forms of social support.³⁴

2 The Community Assistance Support Program

Following the recommendations of the Palmer³⁵ and Comrie³⁶ Reports, in 2006 the Community Care Pilot was established. This provided complex case management to extremely vulnerable individuals and families within the immigration system but who are residing lawfully in the community.³⁷ Following the success of the Pilot, the

³⁰ Michelle Dimasi, 'Back to the Mainland', *Inside Story*, 18 March 2009 <http://inside.org.au/back-to-the-mainland/>.

³¹ AHRC, *Immigration Detention Report* (n 24)79; AHRC, *Immigration Detention and Human Rights* (n 24) 63, 82.

³² See generally IDC (n 21).

³³ See *Migration Act 1958* (Cth), s 5(1),.

³⁴ See the recommendations of Joint Standing Committee on Migration (n 27).

³⁵ Palmer Report, 2005, <http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf>.

³⁶ Comrie Report, 2005, http://www.immi.gov.au/media/publications/pdf/alvarez_report03.pdf.

³⁷ For example, those suffering from severe mental or physical health conditions or the effects of torture or trauma; those at risk of suicide, violence, domestic violence, or child abuse; the elderly; the destitute.

program was extended nationally in July 2009 and re-named the Community Assistance Support (CAS) program. The key difference between Community Detention and the CAS program is that individuals within the CAS program reside in the community *with* a valid visa³⁸ and may or may not have entitlements to work (and consequently access to Medicare) or study. They are also responsible for securing their own accommodation. Red Cross Caseworkers assist participants in the CAS program as far as possible in this regard but have no ability to enter into a lease arrangement or to fund accommodation, as they do under the Community Detention program. Significant numbers of individuals within the CAS program remain at risk of becoming destitute or homeless, despite receiving assistance, due to their extreme vulnerability. This places Australia at risk of breaching its obligations under international human rights law not to subject individuals to cruel, inhuman or degrading treatment.³⁹ This is discussed in more detail below (see Bridging Visa E).

Recommendations

- If mandatory detention is not abolished, the Community Detention program should be expanded and the entitlements of beneficiaries extended.
- Case management support must ensure that asylum seekers are able to meet their basic needs so that Australia does not breach its obligations under international human rights law.

3 Bridging Visa E: Access to entitlements

Bridging Visa E (BVE) is a temporary visa that enables asylum seekers to remain lawfully in the community while their application for refugee protection is being processed, or while they are seeking review that application (whether by the Refugee Review Tribunal or through ministerial intervention).⁴⁰

BVEs have been widely criticized for the restrictive conditions attached to them. Many asylum seekers face poverty and homelessness as a result of these conditions.⁴¹ In 2006, the Senate Legal and Constitutional Affairs Committee, in its inquiry into the administration and operation of the *Migration Act 1958* (Cth), concluded that its main concern with BVEs was the ‘financial hardship faced by asylum seekers, particularly those with families and children, who are granted a BVE with no work rights and inadequate access to basic services’.⁴² Work rights may be granted where a

³⁸ Asylum seekers released into the community from immigration detention are usually granted a Bridging Visa E.

³⁹ ICCPR, art 7.

⁴⁰ Commonwealth Department of Immigration and Citizenship, *Bridging Visas: Information Form 1024i* <http://www.immi.gov.au/allforms/pdf/1024i.pdf>. While BVE may be granted to people in a range of different circumstances, this submission focuses on the BVE as it applies to asylum seekers.

⁴¹ AHRC, *Factsheet: The Impact of Bridging Visa Restrictions on Human Rights* (10 July 2008) http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visas_factsheet.html.

⁴² Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958* (2 March 2006) http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/Migration/report/c08.htm.

‘compelling need to work can be demonstrated’.⁴³ Without work rights, asylum seekers are unable to access Medicare⁴⁴ and are at significant risk of being unable to support themselves.

The significant changes to the BVE announced by the Rudd Government in 2007 have not been properly implemented in practice. In theory, while BVE holders have entitlements to work and to Medicare, obstacles such as the lack of photo identification (discussed below) and the short duration of BVEs prevent them from accessing healthcare or gaining employment in practice.

Placing asylum seekers in situations where they are unable to work and are not receiving sufficient social assistance may place Australia in breach of its obligations under article 7 of the ICCPR. In the UK, the courts have found that the removal of subsistence support from asylum seekers resulting in their destitution was a breach of these rights.⁴⁵ While the House of Lords acknowledged that there is no general public duty to house the homeless or provide for the destitute, it said that the State does have such a duty if an asylum seeker ‘with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life’.⁴⁶

Recommendations

- BVE holders should be granted work rights.
- DIAC should ensure that in every case where asylum seekers are granted work rights, they are also provided with a practical opportunity of obtaining work.
- Where families or unaccompanied minors are granted a BVE and released from immigration detention, they should automatically be part of the CAS program.

⁴³ This is satisfied where: (a) a person is severe financial hardship, or (b) been nominated or sponsored by an employer for a substantive visa on skills grounds and appear to meet the requirements of the visa: see Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia: Report 2* (2006) Appendix F, available at

<http://www.aph.gov.au/house/committee/mig/detention/report2/appendixF.pdf>. Present policy, however, is to grant work rights to people who apply for a protection visa while on a current visa, or who can show good cause why they delayed their application. These rights will remain during primary and all review stages, including ministerial intervention: see A Just Australia, ‘Asylum Seeker Policy Reform: 2008 Progress Report’, available at <http://www.ajustaustralia.com/resource.php?act=attache&id=354>.

⁴⁴ See Joint Standing Committee on Migration (n 43) Appendix F.

⁴⁵ See for example, *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540; *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66.

⁴⁶ *Adam* (n 45). We note the helpful recommendations of the Joint Standing Committee on Migration’s report of 25 May 2009 on the bridging visa regime: Joint Standing Committee on Migration (n 43) xxiii–xxiv <http://www.aph.gov.au/house/committee/mig/detention/report2.htm>. These recommendations go some way towards creating a more humane visa system that seeks to address many of the problems outlined above.

4 Practical concerns affecting legal entitlements: Absence of photo identification

There are a number of practical issues that can affect asylum seekers' ability to access their visa entitlements. An example of this is a lack of photo identification. Providing all asylum seekers living in the community with photo identification would not be a difficult thing to do. Nevertheless, the absence of this simple measure means that many asylum seekers face major practical difficulties, which in turn may result in violations of their human rights.

Most asylum seekers released into the community do not have photo identification. Bridging visas do not include photos either. Without photo identification, an asylum seeker cannot open a bank account into which to receive their basic living allowance. This, in turn, means that receiving a basic living allowance from Australian Red Cross becomes a difficult process both for the service provider and the asylum seeker.

Within the CAS program, asylum seekers are responsible for securing their own accommodation. However, without photo identification, it is impossible to enter into a formal lease arrangement or to establish basic utilities such as an electricity account.⁴⁷ Although share accommodation may be appropriate for single people, it is generally inappropriate for unaccompanied minors and families. This means that some of the most vulnerable groups are placed at risk of homelessness and destitution.

Similarly, if an asylum seeker is released from immigration detention on a BVE and is granted work rights, he or she will also become eligible for Medicare. However, without photo identification it can be incredibly difficult for an asylum seeker to successfully apply for, and receive, a Medicare card. The authors understand that in recent years a Memorandum of Understanding was signed between Medicare and DIAC to try to address this issue. However, experience suggests that the agreement has not filtered down to the service-level required to implement the change. This issue needs to be addressed systemically.

Recommendations

- All asylum seekers living in the community should be provided with photo identification. The Victorian Government's *Keypass*⁴⁸ system provides a useful model to address the situation of photo identification.⁴⁹ Alternatively, an identification card could be provided by DIAC, as is currently the case for

⁴⁷ Electricity providers require new customers to establish a direct debit payment method from a bank account or, alternatively, an up-front payment of \$200–\$300 to open an electricity account. Most asylum seekers living in the community cannot afford such a deposit.

⁴⁸ See <http://www.keypass.com.au/>. By allowing an endorser to testify to the applicant's identity, this system has provided significant assistance for asylum seekers residing in the community for more than 12 months, as well as those granted permanent visas following ministerial intervention (under section 417 of the *Migration Act*). An endorser must be an Australian citizen adult, have known the applicant for at least 12 months, and be currently employed as one of the following: a Police Officer; Doctor; Dentist; Teacher; Solicitor; Barrister; Pharmacist; Accountant; or Veterinary Surgeon. *Keypass* does not require an applicant to reside in Victoria and applications can be made from anywhere in Australia.

⁴⁹ While this model is suggested as an efficient system to remedy the concern, it is acknowledged that to work effectively, it would need to be extended to asylum seekers who have resided in the community for less than 12 months.

C OUTSOURCING IMMIGRATION DETENTION CONTRACTS TO PRIVATE SERVICE PROVIDERS

The final section of this submission comments on the judiciary's supervisory jurisdiction with respect to outsourcing immigration detention network contracts to private contractors.

Previous governments attempted to preclude judicial review of decisions about refugee status through the use of privative clauses in the *Migration Act 1958* (Cth). The High Court held that privative clauses cannot exclude the 'entrenched minimum provision of judicial review' provided by section 75(v) of the Constitution,⁵⁰ which provides the High Court with the jurisdiction to provide remedies of mandamus, prohibition and injunction against 'an officer of the Commonwealth'. The question remains whether a privative clause would be effective to exclude review of the same task performed under contract with the government by a private third party. The High Court expressly declined to answer this question in *M61/2010E*.⁵¹

Matthew Groves has recently noted the importance of this issue and considered how the High Court may go about resolving it, with particular reference to the changes to judicial review wrought by the court's decision in *Kirk*,⁵² which held that the Supreme Court of NSW retained a supervisory jurisdiction over an inferior court despite the express provision to the contrary of a privative clause. Professor Groves has argued:

If such new principles can be justified by concerns about 'islands of power immune from supervision and restraint', one must question what other islands the High Court should have within its sights. If the apparent disparity between the level of constitutional protection accorded to State and federal courts was thought too great to tolerate, and the need to judicial supervision over State executive and legislative activity thought worthy of constitutional recognition, it is arguable that the same considerations should apply to the use of outsourcing. If nothing else, *Kirk* makes clear that the High Court will not countenance legislation that seeks to limit the supervisory jurisdiction of the courts. Why then, should it allow governments to use contracting out in a way that might introduce similar limitations? It should not. If the High Court is concerned by the exclusion of supervisory review, the device by which that supervision is sought to be excluded should not matter.⁵³

There is much force in this argument and it is hard to imagine that the High Court would tolerate the executive government outsourcing decision-making for the purpose

⁵⁰ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, para 103 (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

⁵¹ *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133, para 51.

⁵² *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

⁵³ Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 *Public Law Review* 3, 7.

of making it immune from judicial review. The High Court has not yet needed to resolve this issue. However, its decisions in *Kirk* and *M61* make it evident that the High Court is extremely reluctant to allow the judiciary's supervisory jurisdiction to be nullified by legislative or executive design or practice.

We do not have any specific recommendations to make on this point other than to note that we would favour extending judicial review to entities which exercise public power, whether or not they are 'public' entities, either as a matter of common law or by legislative amendment to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁵⁴

⁵⁴ See the recent submission made on behalf of the Gilbert + Tobin Centre of Public Law to the Administrative Review Council:
http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Submission_GregWeeks_%201July11.pdf.