Joint Select Committee on Australia's Immigration Detention Network

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My submission addresses principally terms of reference (a), (g), (i-j), (o), (q), (r).

Summary

Refugee flows into Australia, including boat arrivals, will continue notwithstanding control measures:

- nevertheless, continue to make it difficult and costly for people smugglers to get people onto boats.

Refugee Convention obligations are to be honoured:

- Australia could withdraw from the Convention but it would not be practicable politically.

Detention should be abolished:

- it is not an effective deterrent, is punitive, wastes taxpayers' money and human resources, is inherently inhumane, provokes ill feeling, antisocial responses, violence and destruction of property and produces bad mental health outcomes
- siting camps in widely scattered, inconveniently situated, inhospitable localities militates against any sort of labour-efficient and cost-effective, let alone humane, processing
- the very locations suggest punitive governmental and bureaucratic mindsets
- the government has a vested interest in prolonged detention as a deterrent, albeit an illusory and ignoble one.

Australia's refugee system should go back to a blank sheet and start again:

- applicants should be processed on the mainland.

The legal fiction of excision of offshore islands from the migration zone should be scrapped:

- it is contrary to the object and purpose of the Convention: the excised areas are "territory" of Australia for purposes of the Convention.

There should be one non-discriminatory processing regime:

- a common system for both authorised and unauthorised arrivees.

Criteria or definitions for the application of Convention terms and provisions could be enacted.

The expenditure of upwards of $1 billion of taxpayers' money yearly in maintaining the current detention system is insupportable, appalling and ridiculous.

Offshore, including third-country "solutions" are objectionable on legal, political and humanitarian grounds.

- Australia should honour its responsibilities as a good international citizen and not duck-shove them to other countries for expedient domestic political reasons.

Reasons

Very early in the Hebraic tradition the question was raised, "Am I my brother's keeper?" One answer, post-Holocaust, was the Refugee Convention. In 1951 it was an answer framed very much in the Judeo-Christian context: it was to apply only to "events occurring" before 1 January 1951. It envisaged a limited category of "brothers" (Genesis IV.9 saw only one at risk). In 1967 fraternal compassion was potentially universalised by the Protocol. Australia, girt by sea and comfortably weeding out upstart arrivees with dictation tests in Gaelic, undertook to apply non-refoulement globally.

We have just been through a "neo-con" "whatever it takes" phase of disrespecting treaties, instance the UN Charter, Geneva Conventions and the Torture Convention variously disrespected, disregarded, breached, in regard to Afghanistan and Iraq. This contagion spread to Australia and at the political level corrupted its observance of obligations under the Refugee and SOLAS Conventions. The Refugee Convention, specifically, has not been interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", contrary to the Vienna Convention on the Law of Treaties, Article 31. It is well to remind the Committee of the rule *pacta sunt servanda* in Article 26,

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

I submit that good faith is lacking in Australia's application of the Refugee Convention.

Given its genesis, and considering the very different circumstances in which it is now expected to apply, is the very idea of the Convention/Protocol still valid? Could/should Australia withdraw from the Convention? In treaty practice, any party may do so. A party (Australia?) might withdraw from only the 1967 Protocol, leaving the 1951 Convention in force. Effluxion of time means that the latter would be almost devoid of practical application.

In an excess of rectitude a party (Australia?) prepared to wear ignominy in the interest of limiting hypocrisy might withdraw from the Protocol alone or from both it and the Convention itself.

Similarly a party (Australia?) invoking "national interest" might withdraw if it decided that the Convention was too burdensome, onerous, unrealistic, inappropriate, obsolete, etc, in its current circumstances.

The opprobrium of withdrawal might not be worth it, however, since many would argue, with justification, that the obligations of sanctuary, protection and non-refoulement expressed in the Convention are binding in customary international law: the doctrines of territorial and political asylum have a long history. In the main, countries that are not parties, instance in our region Malaysia and Indonesia, do not close their borders and do not refoule.

Withdrawal might in some circumstances serve a political purpose but would not obviate in practice the problem of refugee flows. My conclusion on this point, however, is that although withdrawal is

legally possible it is not a political option. I have canvassed it because there are altruists around who would prefer rectitude to hypocrisy and *pacta sunt servanda* sticklers who prefer the rule of law to arrant illegality. Such altruists and sticklers will not have cause to complain if the treaty obligations are honoured.

I take it then that Refugee Convention obligations are a given and are to be honoured.

I take it also that ongoing refugee flows are a given: whatever domestic, bilateral or multilateral arrangements might be achieved, some refugees will arrive, both visaed, whether validly or fraudulently, and unauthorised, whether with documents, valid or fraudulent, or without, both by plane and by boat.

In principle, processing of all applicants for refugee protection should be non-discriminatory. The Convention does not distinguish between refugees as to the manner of their arrival nor possession or validity of documentation: the *discrimin* is well-founded fear of persecution on a Convention ground. What is the justification for treating a Mandaean dripping with gold who arrives through Sydney airport, with a visa, whether valid or fraudulent, more favourably in terms of process than a Hazara peasant with a plastic bangle arriving unauthorised by boat? The former is left at large in the community, with the access to cognates, friends, agencies, support groups, lawyers and employment that that entails, and with the benefit of the full range of processes, review by the Refugee Review Tribunal and appeals to the Federal and High Court. The latter is detained for months under a different restrictive regime, isolated behind razor wire in a geographically uncongenial location, institutionalised and deprived of community support, without privacy, without easy access to lawyers or NGO or support groups, left uninformed of the progress and fate of her application and with a bespoke review instead of the RRT and only a virtually illusory right to seek leave to appeal to the High Court.

“Economic refugees” entering with visas, but knowingly rorting the system by claiming protection after arrival in order to have more time in Australia to work, will be issued with bridging visas and will stay in the community working black for months or years until available reviews and appeals have been exhausted. Are they morally more deserving of a fair go than the Mandaean or the Hazara peasant? Is their economic contribution really enough to offset the enormous cost of their burden on DIAC, the RRT and the courts?

I find it hard to escape the feeling that the whole system of detention is willingly left to be dilatory and sclerotic, that people will necessarily spend months not days detained, as a deterrent to would-be boat travellers. Since it clearly is not an effective deterrent, is punitive, wastes taxpayers’ money and human resources, is inherently inhumane, provokes ill feeling and antisocial responses - at worst violence and destruction of property - and produces bad mental health outcomes, why persist with it? Why stand the enormous cost of running an offshore non-solution? One answer is that many people inside the system have a vested interest in seeing it continue: for a start, a lot of people are making a lot of money out of it – uncomfortable as it might be to have to fly off for days or weeks from Canberra or Melbourne, wherever, to Christmas Island, Scherger or Curtin, wherever, to do a burst of assessments or a stint of guard duty or catering or camp maintenance or escort duty, the travelling allowance adds up nicely and it’s likely to be less boring than being bunkered down at ASIO HQ, or Pearce airbase or Cameron Offices. This is not meant to impute bad motives to the good people servicing refugees, it’s just the way things are – I was a public servant too, once.

Another answer is that the government thinks prolonged detention deters people smuggling and "boat people" (clearly, it doesn't), thinks that this pleases a significant proportion of voters whose support it needs to stay in power and hopes that this will win it re-election. That is, the government also has a vested interest in prolonged detention as a deterrent, albeit an illusory and ignoble one. If this were not so, extra resources for expedited processing could have been, and could still be, thrown at processing in conjunction with streamlined administration. Of course, dispersal of applicants to camps in the most widely scattered and inconveniently situated inhospitable localities conceivable itself militates against any sort of labour-efficient and cost-effective, let alone humane, processing. The very locations suggest punitive governmental and bureaucratic mindsets. This is unworthy.

The situation has gone past the point where there is any worthwhile political mileage for the government, re-election being apparently a lost cause, in continuing the "race to the bottom" with the opposition. Better to salvage honour, write a new narrative and set a principled, rational course for the future.

The expenditure of upwards of $1 billion of taxpayers' money in maintaining the current detention system is appalling and ridiculous.

Australia's refugee system should go back to a blank sheet and start again. Applicants should be processed on the mainland.

By all means make it difficult and costly for people smugglers to get people onto boats: no doubt DFAT, DIAC, AFP, ASIO and ASIS are already doing a lot. The place and time to stop boats is back in port before they take people aboard, not on the high seas or at the edge of the territorial sea or exclusive economic zone. One has to recognise that there is a "beggar my neighbour" or NIMBI element in doing so: we are in effect expecting the port state to host any refugee that is stopped from boarding a boat. There is a strong beggar-my-neighbour element in the mooted arrangements with Malaysia: we, a so-called developed country with a Wunderkind economy and full employment, will take a net 3,200, leaving Malaysia, a so-called developing country, with 90,000 – "not our problem"!

It is and will continue to be our problem: I take it as a given that whatever arrangements might be made some people will still come by boat. They might come to anywhere on the mainland, to Melville Island or Boigu or Lord Howe. It might be the turn of Kenyans or Taiwanese or Vanuatuans. They won't necessarily just be the ones we are currently fixated on in Indonesia and Malaysia.

One suspects also that there is an element of opportunistic convenience in the arguments that people must be prevented from "putting their lives at risk on leaky and unseaworthy boats". Many such boats have made it OK and many desperate people will continue to find the risk acceptable. At face value the prevention argument is commendable but it can also be seen as code for objecting to the passengers as people, as "queue jumpers" and other pejoratives.

My first concern is that there should be one non-discriminatory processing regime. The legal fiction of excision of offshore islands from the migration zone should be scrapped. It is contrary to the letter and purpose of the Convention: the excised areas are "territory" of Australia for purposes of the Convention.

It may be that the common regime would be less generous than it is now for “authorised” arrivees and more generous than it is now for unauthorised arrivees but it should be the same for both. It should not be premised on detention; rather, it should be premised on time-limited provisional residence in the community contingent on establishment of the identity, bona fides and claims to protection of the applicant. I can envisage that mandatory reporting and an electronic/GPS tracking system could be part of it. To reduce the cost to the community and consolidated revenue, employment should be permitted and access to education be permitted, indeed be required to be provided, to school-aged children. Social security and other entitlements at an appropriate standard would be prescribed. The Convention itself lays down minimum standards, variously most favoured nation, national and alien treatment, in different areas; these should be respectfully, and not grudgingly, applied.

The Migration Act has grown around detention willy nilly in response to perceived stresses and political exigencies: some original sections such as s91 and s268 have spawned an alphabet soup of offspring - up to s268CZH; and the Act is now almost as much a mess as the detention system.

It is a surprising feature of the Act that it gives little attention to defining or clarifying elements of the grounds for identifying who is a refugee. The Federal Court went through a somewhat activist period rather expanding the grounds in favour of applicants, often to the chagrin of Ministers, who responded by truncating Federal Court jurisdiction but not by legislating definitions of Convention terms. A party has some latitude to interpret treaty terms in good faith consistently with the Treaties Convention and to enact criteria or definitions for their application. This might properly be done regarding, for example –

- Onus and standard of proof of “well founded” and “fear”
- Disqualifying factors regarding transit of third countries; lack, inadequacy or falsity of documents; bad faith; irrelevance of economic circumstances in country of origin
- “Social group”.

It follows from my submissions above that the Malaysian ‘solution’ is objectionable on legal, political and humanitarian grounds. *Semble* the Manus Island and other offshore ‘solutions’. Asylum seekers arriving in areas of Australian jurisdiction are Australia’s responsibility. We should honour our responsibilities as good international citizens and not duck-shove them to other countries for expedient domestic political reasons.