Plus ca change, plus c'est la meme chose

The more things change, the more they stay the same?

Introduction & Summary

This essay is a highly contemporary investigation of Australia's current policy of mandatory detention for asylum seeker families and children, and demonstrates how this policy is a gross violation of international law. First, Australia's policy of mandatory detention for asylum seekers arriving without a prior visa is briefly summarized. Second, Australia's binding and authoritative obligations under international law are outlined. Third, these benchmarks are compared with the reality of conditions of two case studies visited: Leonora Alternative Place of Detention (APOD) and Port Augusta Immigration Residential Housing (PAIRH). Fourth, a need for heightened accountability in international law with a multi-faceted approach for individuals to exercise their rights in situations where they are deprived of their liberty is proposed. Fifth, alternatives to mandatory detention more in accordance with international law are explored. Sixth and finally, an update of recent policy developments is investigated; suggesting the core of the policy remains unchanged, and much still has to be done to protect families from indefinite, arbitrary detention in harsh conditions.

Australia's policy of mandatory detention: Overview

Australia has had a bipartisan policy since 1994 of mandatory detention under the *Migration Act* for every person who arrives in its territory without holding a prior visa, including for families and children.[1] This detention is not reviewable by a court and continues until either a visa is granted or the person is removed from Australia, in accordance with Sections 189 and 196.[2] A 2005 amendment asserted 'the principle' that children should not be detained, but it is at odds with the core provisions of the *Act* which remain unchanged.[3] The Immigration Minister can only decide *where* and *in what conditions* people are detained, not *whether or not* they should be detained, unless the law is changed.

Who is responsible for Australian immigration detention facilities?

The operation of Australia's immigration detention facilities creates a diffusion of responsibility, restricting accountability. The Department of Immigration and Citizenship (DIAC) maintains oversight of the whole policy's operation; however, it has contracted out detention service provision to private corporations since 1997.[4] So despite not having an obvious connection to detention conditions, DIAC remains implicitly responsible because the private corporations are on its payroll for the services they provide. Serco is responsible for the operation of these facilities[5] and International Health and Medical Services (IHMS) provide general health care services.[6]

These corporations have entered into contracts with DIAC-defined Immigration Detention Standards, but these contracts are not publicly available for review because they are subject to "commercial confidence."[7] Thus, it cannot be independently verified whether these Standards adhere to international obligations.[8] DIAC's discretion alone decides whether these corporations are adhering to their contract, through a combination of fines and financial incentives to abide by the conditions, whatever they may be.

Government, Privatization and Accountability

The question of who runs Australia's immigration detention facilities better -- the government departments or the private sector -- is difficult to answer. The example of publically-run facilities is somewhat limited in the Australian context, as the Australian Protective Service and DIMIA ran them in a brief period of low arrivals when the legislative arrangements for mandatory detention were evolving, from 1990 to 1997.[9] However, in most cases in this period involved prolonged detention of Cambodian asylum seekers for more than two years[10] as "…the nature of detention inadvertently reproduce[d] aspects of the traumatic experience and add[ed]…other trauma."[11]

Internationally, the record of private security corporations running immigration detention facilities is somewhat mixed, not always abiding by the simple assumption that the reduction of detainee rights is necessary to bring higher profits.[12] However, in the Australian context, the lack of independent enforceable scrutiny has meant that conditions in these facilities are often subject to the whims of public opinion and subsequent government department discretion.[13] Therefore, there is no independent mechanism to act as a remedy to enforce international benchmarks, condemning detention conditions to arbitrary decisions from the collaboration of those whose policy it is to detain and those who profit from it.[14]

Australia's obligations under international law

There are binding international treaties which Australia has signed relevant to this context:

- *International Covenant on Civil and Political Rights* (ICCPR, 1966);
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966);
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT, 1987); and
- *Convention on the Rights of the Child* (CROC, 1989).

Furthermore, the non-binding interpretation of international law the United Nations High Commissioner for Refugees (UNHCR) expressed through the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) has widespread legitimacy, equivalent to informal law status.

International Covenant on Civil and Political Rights (ICCPR)

The *ICCPR* obligates Australia to the following: Article 2 (1) demands non-discrimination in providing rights.[15] Article 7 (1) prohibits torture and cruel, inhuman or degrading treatment.[16] Article 9 (1) prohibits arbitrary detention and ensures the right to liberty. Arbitrary detention is defined as inappropriate, unjust, unnecessary and/or disproportionate to the desired ends sought. Detention that is discretionary and reviewed by a court is less likely to be arbitrary. Furthermore, if detention is used as a first resort without consideration of "less invasive means of achieving the same ends"[17], then it may be thought of as arbitrary. Article 17 (1, 2) states privacy, family and correspondence must not be interfered with unfairly and this right must be protected by law.[18] Article 19 (2) ensures freedom of expression in seeking and receiving information.[19] Finally, Article 24(1) ensures special protective measures for children.[20]

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The *ICESCR* obligates Australia to the following: Article 6 (1) ensures the universal right to work.[21] Article 10 demands "the widest possible protection and assistance" to families with dependent children; special protection and help for pregnant women before and after childbirth; and special measures of protection and assistance for all children without discrimination.[22] Article 12 (1) protects the right of everyone to the best mental and physical health possible.[23] Article 13 recognizes the right of all to education and respects the right of parents to be involved in their child's education.[24] Article 15 recognizes the right of all to freely participate in cultural life.[25]

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The definition of "torture" under the *CAT* includes all suffering (physical or mental) inflicted by means of punishing someone for an act they may have committed, as a weapon of intimidation/coercion based on discrimination of any kind, done the instigation of a public official or their representative.[26] The *CAT* requires absolute domestic legislative enforcement to outlaw torture, constant "systematic" review of the conditions of detention to prevent torture, and prevention of other acts of cruel, inhuman or degrading treatment or punishment.[27]

Convention on the Rights of the Child (CROC)

The *CROC* obligations include non-discrimination for all children to exercise these rights, in particular protection from punishment based on their parents' activities (Article 2) and that "the interests of the child shall be a primary consideration" with age appropriate services for children to be safe and healthy (Article 3).[28] Key values include protecting the pre-eminent role of parents in helping ensure the best possible outcomes for the child's upbringing and development, and their role in helping children exercise their rights (Articles 5, 13, 15, 18:1).[29] States must protect children from

abuse while in its care; the best possible health and education services; assist parents in providing the best possible standard of living, based on the individual circumstances of each child; and provide children rights to recreation and leisure (Article 19, 24 & 28:1, 27:1-2, 31).[30]

The significance of Article 37 obligations in the CROC

Australia, when ratifying the *CROC*, expressed reservations about Article 37.[31] It prohibits children from being tortured or treated in a cruel, inhuman or degrading way; prevents arbitrary detention and only justifies detention of children in accordance with judicial review and for the shortest period of time. It also protects children's innate humanity and dignity in detention based on their individual circumstances, and affords children the right to review any detention before a court.[32]

Informal interpretations of international law

The *United Nations High Commissioner for Refugees Revised Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (the Guidelines) is not binding, yet carries significant legitimacy. It states detention is "inherently undesirable"[33], but notes it is only permitted:

(a) to initially verify identity if unknown or in dispute;

(b) to determine elements of the refugee claim in a preliminary interview *only*,

(c) if a person is proven to be using fraudulent means to mislead states and;

(d) if there is discretionary, individualized evidence a person may be a risk of a criminal offence if released.[34]

The Guidelines also suggest detention must be subject to judicial review[35] and there must be a presumption against detention, which should only be used as a last resort after considering all alternatives first.[36] Detention must not be used as a punitive deterrence measure for illegal entry and it must not be for the entire status determination procedure (Guideline 3).[37] The UNHCR notes the detention of pregnant women should be avoided.[38] Detention facilities, if necessary for longer period, should be run in accordance with the binding obligations aforementioned.[39]

Description of Leonora Alternative Place of Detention (APOD) Facility

Leonora APOD is a disused mining camp in a small remote town, 11 hours drive from Perth, with a population of around 1,000. It has been used for mandatory detention of around 200 people in family groups since June 2010.[40]

It is a collection of cramped portable dongas without much communal space surrounded by opaque residential fencing. Apart from this outer fencing, there is further metal

fencing encircling central areas inside the facility, restricting movement with opaque material preventing people from seeing out and seeing in.[41]

Conditions at Leonora APOD

Despite infrequent excursions, there are no grassed areas for children inside the facility to play in (it is primarily dirt).[42] Detainees were concerned about the impact detention is having on pregnant women and the lack of choice these women can exercise over obtaining specialised treatment for their condition.[43] Adult detainees said they were not provided with any chance to learn English.[44] These detainees are concerned about their inability to perform basic parental responsibilities as Serco staff became an intermediate authority undermining the parent-child relationship.[45]

Refugee Rights Action Network Western Australia (RRAN) visited Leonora APOD with donated toys as gifts for the detainees, which Serco staff reserved the right to screen and subsequently own.[46] After months of confusion, DIAC stated Serco has provided a Toy Library where detainees are provided the chance to play with *some* of the toys donated.[47] Serco staff maintained that the toys were subject to its approval for detainees to use.[48] During RRAN's visit, detainees chanted to Serco staff constantly to allow all members of the group to visit them.[49] Serco only permitted two groups of two representatives for one hour to visit in a restricted supervised setting.[50] Detainees were prevented freedom of movement to visit other RRAN representatives, who remained stranded at the front gate 100 metres away.[51] Serco staff actively interfered and prevented detainees from passing on written correspondence to RRAN representatives who visited beyond the front gate to speak with some detainees.[52] Serco maintains control over all incoming and outgoing mail.[53] The women were also concerned that they could not engage in craft activities like sewing due to Serco's security measures.[54] Since RRAN's visit, allegations of child sex abuse within the facility have emerged.[55]

DIAC's response

Following two separate complaints to DIAC and a further two statements to the Commonwealth Ombudsman, a month and a half after the initial complaint DIAC provided more substantial information about the operation and staffing of Leonora APOD.[56] The concerns of individual agency of detainees, however, have not been resolved.

Port Augusta Immigration Residential Housing - History and Description

Port Augusta Immigration Residential Housing (PAIRH) is around 4 hours drive from Adelaide. The Ellis Close facility was originally used for women and children as an alternative to Baxter Immigration Detention Centre in the Howard era. It was reopened in April 2010 as 60 unaccompanied minors (UAMs) were transferred there from Christmas Island.[57] Some still remain there as of September 20, 2010, according to DIAC statistics.[58]

PAIRH is 8 fully equipped units of mostly families in a closed off residential court, surrounding by housing fencing. Serco staff are permanently onsite but not as prominent as at Leonora. CCTV cameras are on every side fence of the facility. There are some small grassed areas and a small playground for children to play in. In addition, there is a locked recreation area detainees can access with Serco permission.[59]

Conditions at PAIRH - a welcome contrast to Leonora APOD?

There are regular ESL classes twice weekly for detainees on-site.[60] Detainees can cook and care for themselves in autonomous family units and are able to move relatively freely between different units.[61] Excursions are sporadic but do occur subject to Serco and DIAC approval, including a soccer competition the day before the author's visit.[62] Detainees must be accompanied by Serco staff at all times on excursions.[63] The contrast between the more punitive environment and staff at Leonora APOD with Port Augusta IRH was striking.[64] If mandatory detention was perceived necessary to continue in its current form for families and children, this facility is probably a model for the status quo, however flawed it may be.

In spite of some major improvements on Leonora, Port Augusta IRH still has significant shortcomings that violate international law. According to DIAC, all children were to commence schooling at the start of this academic term (October), six months since the facility reopened.[65] Some UAMs are still detained at PAIRH since their arrival in April.[66] One detainee reported the automatic detention of his 14 month old child and family, subject to the Afghan asylum processing freeze for two months, on Christmas Island and PAIRH.[67] Serco denies permission for outside excursions for new arrivals at PAIRH until a 'security screening' has been completed. This took at least 2 weeks for the men interviewed.[68] There are no trained professionals specialized in the treatment of children on-site to organize activities and monitor to minimize the impact detention has had on them.[69] The carers for Life Without Barriers for the UAMs are an exception, although their recommendations are non-binding.[70]

Serco staff are tardy with simple offsite requests from detainees and do not permit detainees to go on excursions to get these items themselves (over a week to two weeks without meeting requests for a USB and electric shaver).[71] There are concerns about arbitrary interference and unethical medical procedures: the on-site IHMS nurse stated when a detainee required a filling "it wasn't in the contract" and only said she could remove the tooth.[72] Despite all the gains on Leonora, they are all arbitrarily subject to the good will of the relevant detention service provider.

The complexities of international law in the Australian detention context

These case studies demonstrate arbitrary interference in detainee life violating international law. However, key accountability gaps remain as Serco, the IHMS and DIAC's responsibilities are somewhat confused. But each party can state (to varying degrees) are *notionally* providing detainees with the chance to exercise their rights.[73]

International law reads as though rights must be *provided* by signatories passively to people, which seems to be a problem in the detention context. In detention, it seems more appropriate to put emphasis on an individual agency centred approach, allowing those deprived of their liberty the opportunities to *exercise* their rights themselves free of unnecessary and unwarranted interference. There is a slight difference between heavy-handedly providing rights in an arbitrary way devoid of individual agency, and permitting individuals the dignity and respect to make their own decisions, as they see fit. The two are different but somewhat interrelated aspects of international law. In essence, they are two sides of the same coin.

In Australia, there are minimum binding standards in domestic law ensuring that prisoners are subject to certain rights and conditions during their imprisonment. There are no such standards in domestic law for detention conditions of asylum seeker families.[74] A final problem with international law is that in the Australian context, it is rarely incorporated in its entirety into Australian domestic law so it has limited effectiveness.[75]

Alternatives

There are alternatives to mandatory detention of children and families in secure facilities more in accordance with international law. The Australian model – first used in 2005 – is "community detention" without direct supervision of a 'designated person' in Residential Determinations under the *Migration Act*, although with significantly restricted rights.[76]

Conditionality is a useful mechanism which balances State concern about risk of absconding while simultaneously protecting the rights of asylum seekers. These conditions on release could include reporting commitments, bail and bond deposits reviewable by a court, guarantors in the community or NGO supervision.[77] NGOs could be further included with the provision of a holistic casework management process, which would be a compulsory component of any community release, in preparing asylum seekers for all possible outcomes regarding their immediate uncertainty and long-term future.[78]

Some States make release from detention conditional on adherence with the asylum application process to act as an incentive for compliance.[79] Furthermore, open reception centres where asylum seekers may be required to be present at certain times while permitted other rights without interference (with a presumption against measures that would disproportionately remove rights) are another alternative to the current closed system. The Danish model is a good example with the Red Cross and specialized staff on hand to run these centres and address detainee concerns. Denmark also makes the receipt of all State assistance conditional on reporting to these centres and/or living there.[80]

Postscript: History Never Repeats?

On 18 October 2010, the Immigration Minister announced the forthcoming release of an unspecified "majority" of children and family groups from secure immigration facilities

by June 2011. The Residential Determination powers to be used are up to the Minister's discretion alone, and the legislative requirement of universal mandatory detention is maintained.[81] Therefore, these asylum seekers will have to rely on the good will of a Minister that has also detained them in harsh conditions throughout the history of the mandatory detention regime.[82] "Community release" is still in practice a form of detention. The Minister and Department set conditions on community detention without independent oversight, which maintain unfair restrictions on liberty but less blatantly than secure facilities. For as long the *Migration Act* authorizes mandatory detention of all and discounts independent review, it remains up to the discretion of the Immigration Minister what the detention arrangements will be for families, UAMs and other children. It is, effectively, unlimited executive power over these people's lives.

The same press conference announced the opening of a new facility for 400 people from family groups at Inverbrackie, 37 kilometres from Adelaide. This facility will operate in a similar manner to the other facilities discussed above.[83] In other recent developments, the Greens have moved an amendment in the Senate to the *Migration Act* to make the indefinite detention of children and families in secure facilities illegal.[84]

Conclusion

Currently, Australia's mandatory detention of asylum seeker families and children is fundamentally inconsistent with international law. This applies both to the decision to detain itself and the conditions in which people are detained. There are currently 691 children in secure Australian immigration detention facilities.[85] There remains a pressing need to address the crux of the issue: no independent binding accountability to prevent arbitrary interference in detainee life. It is not simply good enough to rely on the whims of a detention service provider or government department with ambiguous human rights records, as the recent past demonstrates with gains eroded by arbitrary, unaccountable decision making. Special measures should be implemented in domestic and international law which address the role of corporations in the detention context. Furthermore, a more holistic approach to the rights of peoples deprived of their liberty to use individual agency to achieve their rights rather than being passive recipients of them is critical.

Word Count: 3,211

November 2010

Footnotes

[1] N. Balvin, D. Lusher, A. Nethery & J. Tropea, 'Australia's response to asylum seekers' in D. Lusher & N. Haslam (eds.), *Yearning To Breathe Free: Seeking Asylum in Australia*, Federation Press, Leichhart NSW, 2007, p. 13.

[2] M. Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth)', *Australian Year Book of International Law*, 2006, vol. 25, no.1, p. 276.

[3] Stubbs, *ibid*, p. 285.

[4] S. Kneebone, 'The Australian Story: Asylum Seekers outside the Law' in S. Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law*, Cambridge University Press, Cambridge UK, 2009, p. 188.

[5] Department of Immigration and Citizenship, 'Detention Services Provider Contracts', *Managing Australia's Borders*, Detention Services, <http://www.immi.gov.au/managing-australias-borders/detention/services/provider-contract.htm>, consulted 22 September 2010.

[6] Department of Immigration and Citizenship, *ibid*.

[7] For a time prior to the 2005 Palmer Report, the detention service provider contract was available on the then Department of Immigration, Multiculturalism & Indigenous Affairs (DIMIA) website for external scrutiny. However this practice has now ceased.

[8] In the recent 2010 Australian Human Rights Commission's report on immigration detention in Christmas Island, the Commission noted elements of the contract in its findings, indicating some familiarity with provisions of the contract provided by DIAC. Despite this, the contract is still unavailable in a totally transparent manner for ongoing external scrutiny. Australian Human Rights Commission, *2010 Immigration Detention on Christmas Island Report*, 29 October 2010, <http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.html> , consulted 1 November 2010, p. 62.

[9] Australian National Audit Office, 'Management of Detention Centre Contracts - Part A: Department of Immigration and Multicultural and Indigenous Affairs', Auditor-General, Performance Audit, Audit Report no. 54 (2003-2004), Canberra, <http://www.anao.gov.au/uploads/documents/2003-04_Audit_Report_54.pdf>, consulted 21 September 2010, p. 11.

[10] A. North & P. Decle, 'Courts and Immigration Detention: "Once a Jolly Swagman Camped By The Billabong"', *Australian Journal of Administrative Law*, 2002, vol. 10, no. 1, p. 12.

[11] R. Becker & D. Silove, 'The Psychological and Psychosocial Effects of Prolonged Detention' in M. Crock (ed.), *Protection or Punishment? The Detention of Asylum Seekers in Australia*, Federation Press, Sydney, 1993, p. 90.

[12] M. Flynn & C. Cannon, 'The Privatization of Immigration Detention: Towards a Global View', Global Detention Project, September 2009, Graduate Institute (Geneva), <http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf>, consulted 23 September 2010, p. 2. This paper demonstrates the complexity of factors (beyond the profit motive) influencing private corporations in their running of immigration detention facilities.

[13] Some notable examples of this include the appalling nature of the treatment of detainees at Woomera detention centre (involving forcible riot squads teargassing detainees and children sewing their lips together in protest) in the early 2000s while Australian Corrections Management were contracted to provide their care, as public opinion and Australians stood indifferent or opposed to providing asylum seekers rights. Following the public outcry of the unlawful detention of an Australian permanent resident Cornelia Rau in 2005, neglect from GSL and IHMS (including wilfully ignoring her mental illness) resulted in more departmental oversight and an increase in the provision of standards for detainees.

[14] Despite being informed on elements of the contract, the Human Rights Commission (the closest thing to ongoing external scrutiny) expressed concerns about inconsistencies of conditions with the contract's provisions regarding religious services, staff treatment of detainees, excursions outside the detention environment and opportunities for education and recreation, amongst many others. Furthermore, the Commission's advice is non-binding at present. One key measure it advocates is for the ratification of the *Optional Protocol of the Convention against Torture*, which would establish ongoing independent scrutiny with special powers to ensure international standards are adhered to. Australian Human Rights Commission, *op.cit.*, p. 63.

[15] *International Covenant on Civil and Political Rights* (ICCPR), 19 December 1966, United Nations General Assembly Resolution, New York, <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>, consulted 10 October 2010, p. 1.

[16] ICCPR, *ibid*, p. 3.

[17] *C v Australia*, United Nations Human Rights Committee Case No. 900, 1999, paragraph 8.2. Quoted by O. Field & A. Edwards, *Alternatives to the Detention of Asylum Seekers and Refugees*, United Nations High Commissioner for Refugees, Legal and Protection Policy Research Series, April 2006, <http://www.unhcr.org/refworld/docid/4472e8b84.html>, consulted 3 October 2010, p. 10.

[18] ICCPR, *op.cit.*, p. 6.

[19] ICCPR, *ibid*, p. 6.

[20] ICCPR, *op.cit.*, p. 7.

[21] *International Covenant of Economic, Social and Cultural Rights* (ICESCR), 16 December 1966, United Nations General Assembly Resolution, New York, <http://www2.ohchr.org/english/law/pdf/cescr.pdf>, consulted 28 September 2010, p. 2.

[22] IESCR, *ibid*, pp. 3-4.

[23] IESCR, *op.cit.*, p. 4.

[24] IESCR, *ibid*, pp. 4-5.

[25] IESCR, *op.cit.*, p. 5.

[26] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), 10 December 1984, United Nations General Assembly Resolution, New York, <http://www2.ohchr.org/english/law/pdf/cat.pdf>, consulted 26 September 2010, p. 1.

[27] CAT (Articles 4, 11, 16), *ibid*, pp. 1-4.

[28] *Convention on the Rights of the Child* (CROC), 20 November 1989, United Nations General Assembly Resolution, New York, <http://www2.ohchr.org/english/law/pdf/crc.pdf> , consulted 26 September 2010, p. 2.

[29] CROC, *ibid*, pp. 2, 4-5.

[30] CROC, *op.cit.*, pp. 5, 7-9.

[31] Specifically, Australia takes issue with the obligation to separate juveniles deprived of their liberty from adults. The exception Australia takes to this provision allows it to continue the mandatory detention of family groups. Australia has argued in the past this is in "the best interests of the child." W. Schabas, 'Reservations to the Convention on the Rights of the Child', *Human Rights Quarterly*, May 1996, vol. 18, no. 2, p. 480.

[32] CROC (Article 37), *op.cit.*, p. 10.

[33] UN High Commissioner for Refugees (UNHCR), *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (the Guidelines), 26 February 1999, Geneva, <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>, consulted 20 September 2010, p. 1.

[34] UN High Commissioner for Refugees, *ibid*, Guideline 3 (Exceptional Grounds for Detention), p. 4.

[35] UN High Commissioner for Refugees, *op.cit.*, Guideline 5 (Procedural Safeguards), p. 6.

[36] UN High Commissioner for Refugees, *ibid*, Guideline 3 (Exceptional Grounds for Detention), p. 3.

[37] UN High Commissioner for Refugees, *op.cit.*, Guideline 3, pp. 4-5.

[38] UN High Commissioner for Refugees, *ibid*, Guideline 8 (Detention of Women), p. 8.

[39] UN High Commissioner for Refugees, *op.cit.*, Guideline 10 (Conditions of Detention), p. 10.

[40] At the time of its opening, the then Immigration Minister Chris Evans stated Leonora APOD would be transitional, temporary facility operating for around 6 months. 5 months, an election and a ministerial reshuffle later, new Immigration Minister Chris Bowen visited the facility recently and proposed a more permanent arrangement. ABC News, 'Leonora shire says detention centre benefits the town', 3 November 2010, <http://www.abc.net.au/news/2010-11-03/leonora-shire-says-detention-centre-benefits-the/2322450>, consulted 4 November 2010.

[41] Author's inspection and visit to Leonora APOD, August 15, 2010.

[42] *The Australian*, Photo Gallery, 'Leonora detention centre', June 2010, <http://www.theaustralian.com.au/news/gallery-e6frg6n6-1225875146977?page=1>, consulted August 12, 2010, photo 5. The media were permitted access to inspect the facility before it opened.

[43] Refugee Rights Action Network Western Australia interview with Tamil man, 15 August 2010. He made a special plea for the group for these women to live in the community.

[44] Refugee Rights Action Network Western Australia interview with group of Afghan men, 15 August 2010. In response to complaints, DIAC replied that "…instructional classes are being sourced" and "English as a Second Language classes…will increase when further infrastructure developments are completed." This begs the question why Leonora APOD was used so hastily if it was no ready to meet these obligations. DIAC cited "infrastructure developments" as reasons for recreational and self-catering shortcomings as well. Personal correspondence between author and DIAC Assistant Secretary for Irregular Maritime Arrivals Branch, 5 October 2010.

[45] Refugee Rights Action Network Western Australia interview with Iranian woman, 15 August 2010. Detainees said they had lost their ability to provide for children. Serco staff are reported to be belittling parents to undermine their authority before their children. This women expressed ongoing concern at losing the right as parents to be the chief people involved in the provision of their child's rights to education, health and play, as Serco and DIAC become the ultimate arbitrary authority to decide these rights in the detention context.

[46] Author's inspection and visit to Leonora APOD, *op.cit.*, August 15, 2010.

[47] Personal correspondence between author and DIAC Assistant Secretary for Irregular Maritime Arrivals Branch, 5 October 2010. After months of persistent RRAN pressure, DIAC has recently (November 1) informed RRAN that these toys will be distributed to the children by Serco so they can properly own and play with these gifts as they see fit free from interference. However, this is Serco's responsibility -- not DIAC's -- and this is yet to be independently confirmed by detainees that they have (in fact) received their gifts.

[48] An example of this occurred during an interview a RRAN representative had with a Tamil man. She reported her child was offered a toy to play with by a Serco staff member whilst inside the visiting area at Leonora APOD. Yet a detainee child in the same area was denied the same opportunity at the same time by a Serco staff member. The child visiting refused because she thought it was unfair that she could play yet the other children could not. RRAN interview with Tamil man, 15 August 2010.

[49] Author's inspection and visit to Leonora APOD, *op.cit.*, August 15, 2010.

[50] RRAN representatives visit report of Leonora APOD, August 15, 2010.

[51] Author's inspection and visit to Leonora APOD, *op.cit.*, August 15, 2010. The author was a part of the group not permitted beyond the front gate of the facility.

[52] RRAN representatives visit report of Leonora APOD, August 15, 2010.

[53] Personal correspondence between author and DIAC Assistant Secretary for Irregular Maritime Arrivals Branch, 14 October 2010.

[54] RRAN interview with Iranian woman, *op.cit.*, 15 August 2010.

[55] J. Jerga, "Detention centre 'ripe for abuse' ", AAP, September 19, 2010, <http://news.smh.com.au/breaking-news-national/detention-centre-ripe-for-abuse-20100919-15hnt.html>., consulted September 20, 2010.

[56] Personal correspondences between author and DIAC Assistant Secretary for Irregular Maritime Arrivals Branch, 5 & 14 October 2010. DIAC continued to justify the detention of pregnant women at Leonora and asserted the arbitrary interference in detainee freedom of expression was a "misunderstanding" from Serco, which it would seek to correct by "remind[ing] Serco of the policy arrangements regarding written communication."

[57] M. Moscaritolo, '60 young asylum seekers arrive in Port Augusta', *The Advertiser*, April 21, 2010, <http://www.adelaidenow.com.au/news/south-australia/young-asylum-seekers-arrive-at-port-augusta/story-e6frea83-1225856138033>, consulted April 23, 2010.

[58] Personal correspondence between author and DIAC Assistant Secretary for Irregular Maritime Arrivals Branch, 2 November 2010. It is difficult to fully verify the complete demographics of the detainee population at any specific facility, as DIAC does not usually provide information beyond men, women and children for specific facilities. However, a recent DIAC response to correspondence (2 November) from the Assistant Secretary for Irregular Maritime Arrivals states the total number of UAMs and the locations where they are detained across the detention network, but not how many are at each individual facility. As of October 1 (the most recent statistics), UAMs remained at PAIRH after most were transferred to the Melbourne Immigration Transit Accommodation in early September (ABC News, 'New asylum seekers moved to Port Augusta', September 3, 2010, <http://www.abc.net.au/news/2010-09-03/new-asylum-seekers-moved-to-port-augusta/2246460>, consulted October 1, 2010). These UAMs have been replaced by some pregnant women, according to the same statistics.

[59] Author's visit and inspection of Port Augusta Immigration Residential Housing (PAIRH), 20 September 2010.

[60] Author's interview with Afghan man, 20 September 2010.

[61] *Ibid*.

[62] Author's interview with Iraqi man, 20 September 2010.

[63] *Ibid*.

[64] Author's visits and inspections of Leonora APOD and PAIRH, 15 August 2010 and 20 September 2010.

[65] By way of comparison, most children detained at Leonora APOD have attended school outside the detention environment since late July. The on-site DIAC case manager at PAIRH gave assurances that all the children were to commence school at this time to the author, yet detainees have informed the Asylum Seeker Resource Centre (ASRC) that DIAC is continuing to deny primary school education to children as of 29 October 2010. Personal correspondence with ASRC, 29 October 2010.

[66] Author's interview with Afghan boy detained at Melbourne Immigration Transit Accommodation, 23 October 2010. He raised concerns of recent self-harm amongst the remaining UAMs at Port Augusta. More positively, he stated there were arrangements for the UAMs (primarily older 15-17 year old males) at Port Augusta to attend the local secondary school when he was detained at that facility.

[67] Author's interview with Afghan man, *op.cit.*, 20 September 2010. Taylor noted at the time "…superimposing processing freezes will increase the likelihood that the detention of those who are affected will cross the line…to being arbitrary before their status is determined and they are released or removed." S. Taylor, 'The asylum freeze and international law', *Inside Story*, Institute for Social Research, Australian National

University, 14 April 2010, <http://inside.org.au/the-asylum-freeze-and-international-law/>, consulted October 14, 2010.

[68] Author's interviews with Afghan man and Iraqi man, *op.cit.*, September 20, 2010. This seems somewhat bizarre and excessive, considering DIAC's strict criteria to ensure those who are detained at Immigration Residential Housing facilities are perceived to be a low-risk security threat of absconding. A more likely explanation is Serco's staff are too few in number to meet the ration of people detained to designated supervisor staff for excursions. This has been the case at other facilities such as Darwin APODs like the Asti Hotel. National Communications Branch, Department of Immigration and Citizenship, 'Fact Sheet 83 -- Immigration Residential Housing', 28 May 2009, Canberra, <http://www.immi.gov.au/media/fact-sheets/83rhps.htm>, consulted October 25, 2010. * *Since updated 18 February 2011*

[69] Author's visit and inspection of PAIRH, 20 September 2010.

[70] Under Australian law, the Minister for Immigration is simultaneously the guardian, visa grantor and detainer of all unaccompanied children seeking asylum without a prior visa in Australia. It has been argued that this conflict of interest negates the obligation to ensure in all actions, "the best interests of the child shall be a primary consideration." F. Martin & J. Curran, 'Separated Children: A Comparison of the Treatment of Separated Child Refugees Entering Australia and Canada', *International Journal of Refugee Law*, October 2007, vol. 19, no. 3, p. 463.

[71] Author's interviews with Afghan man and Iraqi man, *op.cit.*, September 20, 2010.

[72] Author's interview with Afghan man, *op.cit.*, September 20, 2010.

[73] Although outcomes may be different, detainees have some form of access in some cases (however inadequate it may be) to education, excursions, health care and recreation. The key metaphor here is the recreation area at PAIRH or the Toy Library at Leonora: the rights are said to be provided, but they are subject to other's approval and not able to be exercised without that arbitrary interference. One could argue this is an indirect violation of international law by flagrantly disobeying the right to abide by the spirit of its provisions.

[74] Australian Human Rights Commission, *2009 Immigration Detention on Christmas Island Report*, October 2009, <http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html>, consulted 1 November 2010, p. 22.

[75] Australian Human Rights Commission, *ibid*, p. 23.

[76] The restrictions on rights include refraining from engaging in paid work, seeking DIAC approval for unpaid voluntary work and having people stay at their residence, ineligibility for Medicare and an inability to undertake study. Living allowances are

restricted so detainees are often reliant on charity goodwill. The conditions can vary in restrictiveness, depending on the discretion of the Immigration Minister or his representative, but these are the core restrictions. Australian Human Rights Commission, *Immigration Detention Report*, December 2008, <http://www.hreoc.gov.au/human_rights/immigration/idc2008.pdf>, consulted October 16, 2010, p. 68-69.

[77] Amnesty International, *Irregular Migrants and Asylum Seekers: Alternatives to Immigration Detention*, United Kingdom, 2009, POL 33/001/2009, <http://www.amnesty.org/en/library/info/POL33/001/2009/en>, consulted October 5, 2010, p. 4.

[78] International Detention Coalition, 'Case management as an alternative to immigration detention: The Australian Experience', June 2009, <http://idcoalition.org/wp-content/uploads/2009/06/casemanagementinaustralia.pdf>, consulted September 20, 2010, p. 5. Interestingly, before the current surge in boat arrivals, DIAC were experimenting with community care pilots for a select sample of immigration detainees. Unfortunately, it seems this project has been either highly scaled back or abandoned.

[79] Field & Edwards, *op.cit.*, p. 33.

[80] Field & Edwards, *op.cit.*, p. 31.

[81] C. Bowen & J. Gillard, 'Joint Press Conference with PM: Parliament House Canberra', Transcript, Minister for Immigration and Citizenship, Media Centre, 18 October 2010, <http://www.minister.immi.gov.au/media/cb/2010/cb155741.htm>, consulted 9 November 2010. This situation is a case of déjà vu. Ironically, the introduction of the 2005 provisions for Residential Determinations came after public pressure for the prolonged detention of children and family groups from the public and Coalition backbenchers. This led to the release of all children and women from secure detention within a year. In 2010, the numbers of children and families detained in secure immigration detention facilities almost reached the peaks detained during the Howard era, due to the surge in arrivals and the return of arrangements to hold these groups in secure detention facilities. With the new political paradigm of minority government following the election, the Greens were placing increasing pressure on the Immigration Minister to take action on children and families in detention.

[82] This has ranged from the initial extremes of harsh, punitive, remote high security closed detention centres with adults to subsequent remote supervised medium-security closed detention facilities to community detention, back to medium-security closed detention facilities and now seemingly back to community detention for some asylum seekers.

[83] Department of Immigration and Citizenship, 'Inverbrackie Alternative Place of Detention - Frequently Asked Questions', Detention Services, Facilities, Inverbrackie

Bulletin, Canberra, 2 November 2010, <http://www.immi.gov.au/managing-australias-borders/detention/facilities/inverbrackie-bulletin/_pdf/inverbrackie-factsheet.pdf> consulted 5 November 2010.

[84] Y. Narushima, 'No out for child asylum seekers', *The Age*, 29 October 2010, <http://www.theage.com.au/national/no-out-for-child-asylum-seekers-20101028-175uv.html>, consulted 29 October 2010. Early indications are both the Government and the Opposition will oppose this Bill. The Immigration Minister cites the Residential Determinations power as the best option.

[85] Department of Immigration and Citizenship, 'Immigration Detention Statistics Summary', Community and Detention Services Division, 8 October 2010, consulted 9 November 2010. These statistics are the most recent provided by DIAC. * *since removed*