Incarcerating refugees

From killing fields to killing time

Anthony Reilly

Punishment usually reserved for the worst criminal offenders in our community is routinely applied to people whose only crime is fleeing oppressive regimes or economic hardship.

Despite the fact that asylum seekers are not criminals and have not been charged with criminal offences, the Australian Government continues to detain all such people who arrive in the country without proper documentation.

The Government argues that the policy of detention is necessary to control our national borders and to act as a deterrent to future undocumented arrivals. Critics, however, express concern over the effect of long periods of detention on already traumatised people, and the substantial economic costs involved. This article examines the arguments for and against detention of asylum seekers and concludes with recommendations for making the policy more humane without compromising Australia's interests.

Detention in Australia's refugee system

Australia has a clear obligation to assist refugees under international law, namely the 1951 United Nations Convention on the Status of Refugees (the Convention) and the 1967 Protocol, to which Australia is a Party. The domestic legislative basis of the program is s.22A of the *Migration Act* 1989 which provides that the Minister may (as opposed to must) determine whether a person is a refugee. This determination is a prerequisite for a number of different visas and entry permits. The definition of refugee is taken from the Convention and Protocol. Australia also has a large

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humanitarian program to provide for those who do not satisfy the definition of a refugee, but still require protection.

There are two classes of refugee in Australia: those granted refugee or humanitarian status overseas and accepted for resettlement in Australia (the off-shore refugee and humanitarian program), and those granted refugee or humanitarian status after arrival in Australia (the on-shore refugee and humanitarian system).

There are two categories of on-shore refugee applicants: those who arrive in Australia with a valid visa and entry permit and those who arrive here illegally. The latter group is comprised largely of people who arrive by boat with no documentation ('undocumented boat arrivals'). In June 1992 there were 21 653 on-shore refugee applications awaiting determination. Only 478 of those applicants were detained. Almost all of those detained were undocumented boat arrivals.[1]

Most of the undocumented boat arrivals in Australia are from countries such as Cambodia, the Peoples Republic of China and Vietnam. They arrive in the waters or coastline of northern Australia after long journeys through the seas of South East Asia. Under present laws they are deemed 'designated persons' and detained in immigration detention centres such as the Port Hedland Reception and Processing Centre. They are usually given assistance to apply for refugee status but are not allowed to apply for release. Many have been detained for years.

Conditions of detention

Conditions in immigration detention centres differ little from those in prisons. In March 1992, the Australian Council of Churches published a report on the Port Hedland Centre. The report noted the following concerns:

no psychiatrist at the centre;

no access for community or support groups (although the centre is called a reception and processing centre, it is virtually a closed detention centre);

- the gates are padlocked and the centre is surrounded by barbed wire;

the Australian Protective Service Staff are dressed in brown/khaki and blue uniforms;

a lack of interpreters on the site;

- a lack of professional torture and trauma counsellors; and
- the extreme isolation of the centre.

Similar problems arise in all the detention centres located throughout Australia, many of which are wings of high security prisons. For example, the immigration detention centre in Brisbane is a wing of the Wacol Remand and Reception Centre. The detention of refugees in such conditions, and indeed at all, places great demands on people who 'by definition . . . are people already under mental stress and may already have been ill treated in their country of origin'.[2]

The power to detain

The power to detain asylum seekers and others who enter or remain in Australia without permission is contained in various provisions of the Act.

Prohibited entrants

Section 88 of the *Migration Act* enables an authorised officer to keep in custody any person who is on board a vessel when that vessel arrives in Australian waters, being a stowaway or any other person whom the officer believes would become an illegal entrant if the person were to enter Australia. The prohibited entrant may be detained until the vessel departs, or until the person is granted an entry permit, or such earlier time as the officer directs.

Undocumented airport arrivals

Section 89 of the Act enables an officer to keep in custody a person who is on board an aircraft in the same circumstances as those delineated in s.88 above. The person may be detained at the airport or another place until the person is removed from Australia or is granted an entry permit.

Unprocessed persons

Sections 54B to 54H of the Act refer to people who have travelled to Australia in a boat or have disembarked at an airport. When an officer supposes that the person would become an illegal entrant on entry to Australia and that it is not possible to decide whether to grant the person an entry permit, the person becomes an 'unprocessed person' and may be taken to a 'processing area'. The unprocessed person may be kept in a processing area until granted an entry permit or becoming a 'prohibited person'. A prohibited person is one who has been requested to leave Australia, or has been refused or has not applied for an entry permit. A prohibited person must be removed from Australia as soon as practicable.

Designated persons

Sections 54J to 54U refer to people who arrive in Australian territorial waters after 19 November 1989 and before 1 November 1993 without visas, who are in Australia, and who have not presented a visa or entry permit. Such persons are referred to as 'designated persons'. They must be kept in custody and may only be released for the purposes of being removed from Australia or when granted an entry permit. They may only be removed on request, if they do not apply for an entry permit or if refused an entry permit.The designated person class appears to include boat arrivals who have not entered Australia as well as boat arrivals who have entered undetected. 'Designated persons' are prohibited from applying for release from custody.

Illegal entrants

Section 92 of the Act enables an officer to detain an illegal entrant in custody. The illegal entrant must be brought before a prescribed authority (magistrate) within 48 hours. The prescribed authority may order the release or authorise a person to be detained for no more than seven days. The Minister or Secretary (in practice, a compliance officer) may order the release of a person in custody at any time.

Deportees

Section 93 of the Act enables an officer to detain any person against whom a deportation order has been issued. Although a prescribed authority may not order the release of a deportee, the Minister or Secretary has a discretion to order a deportee's release.

The practice of detention

Because of the provisions cited above, it is often difficult to know under what section a person is detained. In practice however, the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) distinguishes between undocumented arrivals on the one hand, and those who entered Australia with proper documentation but later became illegal on the other.

A person who becomes illegal after entering Australia legally may be arrested and detained. After arrest they are provided

with the opportunity to apply to remain in Australia, including applying for refugee status. If they so apply, they are usually released on certain reporting conditions until the application has been determined. If they do not apply, they are usually released on the provision of a surety of release, which is forfeited if they abscond before departure.

The more likely a person is to abscond, the higher the surety of release. Applicants must also purchase a one way ticket to another country and report to DILGEA as required. Even deportees (apart from criminal deportees) are usually released, subject to the above conditions.

The situation is very different for people who arrive without documentation and later apply to remain in Australia. Undocumented boat arrivals are usually detained under the 'designated persons' provisions. People who arrive on aeroplanes will be detained as 'unprocessed persons'.

Although only 'designated persons' must be detained, in practice all undocumented arrivals are detained until they are granted an entry permit or deported. For example, two asylum seekers travelled from Papua New Guinea to the Australian border late last year. By the time they were discovered, they had physically entered Australia. Instead of being declared designated or unprocessed persons, they were declared illegal entrants and deportation orders were issued against them. They were detained in the Brisbane Remand and Reception Centre until February of this year when they were deported. Their application for release was refused on the ground that the circumstances of entry and subsequent application to enter Australia indicated a strong desire to remain here and, therefore, they could not be trusted to honour conditions of release.

The distinction between undocumented arrivals and those who become illegal after entry has resulted in the absurd situation where refugee applicants:

> are categorised according to how they entered (or did not 'enter') the country. This statutory categorisation determines . . . whether the applicant will be detained . . . It is inequitable and arguably disadvantages those potentially most in need of protection (i.e. those not able to use regular modes of travel).[3]

As noted by Arthur C. Helton of the Lawyers Committee for Human Rights (about the United States system):

> There is no rational justification for subjecting undocumented excludable aliens to a rule of detention while all other aliens, documented or not, can be considered for release on an individualised basis . . . Excludable aliens cannot rationally be viewed as more likely to abscond than other aliens . . .[4]

International law and the detention of refugees

The policy of detention of asylum seekers as it currently operates in Australia contravenes international human rights law with respect to the detention of asylum seekers. Article 31 of the Convention provides:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory . . . where their life or freedom was threatened . . . enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
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> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The United Nations High Commissioner for Refugees (UNHCR) has issued a resolution with respect to the matter. The UNHCR Executive Committee advised that it:

> (a) Noted with deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention . . . by reason of their illegal entry or presence in search of asylum . . .
>
> (b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only 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 to protect national security and public order . . .
>
> (c) Recommended that detention measures taken in respect of refugees and asylum seekers should be subject to judicial review.[5]

The detention of refugees in Australia goes far beyond what is necessary to protect national security, verify identity, or determine the elements on which the claim to refugee status is based. The detention is long term, and despite efforts by the Government to speed up the determination process, there has been little reduction in the long waiting periods asylum seekers face while their applications are determined.

Further, the authorities make no attempt to screen criminal aliens or other security risks from the remainder of the arrivals. The policy of detention is universal – factors such as health, age, bona fides, and previous experience of trauma or persecution are not considered. The mere fact of arrival without documentation is alone sufficient to require detention.

I recall the absurd situation in 1992 of a compliance officer in Brisbane expressing relief when a Polish woman who was in the very late stages of her pregnancy was safely airlifted to Port Hedland Detention Centre after a long and stressful flight. The regulations did not allow her to be admitted to the nearest hospital or allow her to recuperate after the birth, nor did the officer appear to contemplate such a possibility. The universal detention of undocumented arrivals in such conditions clearly breaches the above human rights provisions.

Detention and national security

The Australian Government has an obligation to protect Australia's borders from invasion and a right to control entry by non-citizens. At the same time it has an obligation to ensure that the right to seek asylum is protected. Both interests can be protected without the need for universal detention of asylum seekers.

In 1990 the United States Immigration and Naturalisation Service (INS) authorised the commencement of a Pilot Parole Project to operate for a period of 18 months. The aim of the project was to determine the consequences of releasing undocumented asylum seekers into the community instead of holding them in detention centres. An INS review of the project undertaken in February 1991 found:

> inter alia, that those cases released with the assistance of community groups in New York achieved high rates on reporting compliance and immigration court appearances.[6]

The project was so successful that on the 20 April 1992 the INS decided to reimplement it and expand it to all Service detention facilities. The INS reported that:

> By adopting the Parole Project, the Service will be able to detain those persons most likely to abscond or pose a threat to public safety.[7]

The project relies on interviews conducted by trained officers to ascertain the person's bona fides and ensure they are not criminally dangerous or likely to abscond. An applicant for release must meet the following criteria:

1. The person's true identity has been determined with a reasonable degree of certainty.
2. The allegations in the person's asylum application . . . or in the case of a person who has requested asylum upon arrival at a port of entry, the statements made by the person in support of his or her request for asylum . . . appear to be credible and to provide substantial support for the application or request.
3. The person does not appear to fall within any of the following categories:
   a) Any person who . . . participated in the persecution of any person . . .
   b) Any person who has been convicted of an aggravated felony . . .
   c) Any person who may be regarded as a danger to the security of the United States.
4. The person has legal representation . . . and/or a place to live and employment or other means of support.
5. The person agrees to the following:
   a) to contact the appropriate local INS office each month . . .
   b) to appear at all hearings . . . and/or all interviews with the Service; and
   c) to appear for deportation, if the person is ultimately ordered excluded; and
   d) to report for detention if the person fails to comply with the above requirements, or if the alien is convicted of any felony or three misdemeanours.[8]

If the asylum seeker meets these criteria, she/he may be released. There is no reason why a similar release program could not work in Australia. The program protects the Australian community by screening undesirable elements. At the same time it ensures that genuine asylum seekers will not be penalised by long-term detention simply due to the circumstances of their arrival, thus protecting the right to seek refuge from persecution.

The economic costs of detention

The cost of a release program would be significantly less than the cost of detaining all undocumented arrivals.

Most of the costs associated with operating a release program already exist in operating detention centres – the costs of staff, food and accommodation for detainees, interpreters and legal assistance. Indeed many of these costs would be reduced. The major difference between the two approaches is the capital costs associated with detention centres. Also, with isolated detention centres such as Port Hedland there are costs in transporting DILGEA staff, lawyers and interpreters to the centre.

Last year DILGEA was questioned about the costs of maintaining immigration detention centres by the Senate Estimates Committee. The questioning revealed that the total cost of the custody and care of the 294 detainees in the Port Hedland Detention Centre for the period 1991 to 1992 was $7.922 million – or $27 184 per person. DILGEA was unable to provide a breakdown at the time of where the money was spent, although around $1.3 million dollars appeared to be capital costs. The Government also announced on the 18 August 1992 that an additional $1.578 million had been provided for security-related improvements and additional guarding for the centre. With respect to the other centres such as the Villawood Detention Centre in Sydney, Mr Sullivan of DILGEA stated that the average cost of detention was about $200 per day – equal to $73 000 per person per year! DILGEA was unable to provide a figure for the total cost of running these centres however.

A release program would avoid the costs of unnecessary detention set out above. The savings would be significant and could be directed to employing additional DILGEA staff to speed up the processing of the backlog of refugee applications.

Detention as a deterrent

When the Minister for Immigration, Local Government and Ethnic Affairs introduced the 'designated persons provisions' to the House of Representatives, he justified the detention of asylum seekers on the following grounds:

> I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in that country and expecting to be allowed into the community. [Hansard, 5.3.92, p.2371]

The issue of whether detention deters future asylum seekers has not been explored or researched in any form that I am presently aware of. Neither has the Government produced material to justify its belief that detention deters future asylum seekers from travelling to Australia.

Personal experience of refugee applicant clients, however, suggests that the prospect of detention would not have prevented them from travelling here. I recently had to advise a client that if he applied for refugee status he faced the prospect of long-term detention. He advised me that he was prepared to remain in custody for as long as it took to obtain refugee status, provided he did not have to return to his country of origin. In any case, the fact that most of the 'boat people' who travel to Australia from south-east Asia and southern China are prepared to endure long and dangerous trips through the open seas in small fishing boats with no guarantee that they will even land in Australia suggests that the prospect of detention will not deter them from leaving their country of origin.

Thus the argument that detention acts as a deterrent to future arrivals has little basis in the Australian context. It should not be forgotten either that protection for refugees is a basic human right. Policies designed to avoid the consequences of a genuine commitment to that right should not be tolerated.

Conclusion

In 1992 the Refugee Council of Australia published a series of recommendations concerning the detention of asylum seekers in Australia.[9] Basically, they recommend as follows:

- the Government's practice of detaining asylum seekers should be abolished;
- detention should only be used under special defined circumstances such as to establish the identity of the claimant or if the claimant is found by a magistrate to be a risk to the community;
- minors should not be detained under any circumstances;
- there should be regular judicial review of a decision to detain an asylum seeker;
- conditions of detention are to meet certain standards;
- no detainees should be held in penal institutions.

The recommendations, if adopted, would create a more humane and cost-effective approach to dealing with undocumented boat arrivals than the current practice of universal detention. They would also allow the Government to control entry into Australia without penalising genuine asylum seekers for exercising their basic right to seek protection from persecution.

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Judges ordering legal aid

> Despite anything in the *Legal Aid Commission Act* 1978, the Legal Aid Commission of Victoria must provide legal representation in accordance with an order under sub-section (2).
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> [cl.27(3) *Crimes (Criminal Trials) Act*]

The *Crimes (Criminal Trials) Act* is concerned primarily with a series of procedural reforms designed to reduce the length of criminal trials. The legislation was passed by the Legislative Council on 26 May 1993 but the relevant sections have not yet been proclaimed although this is expected to occur in the near future. While some of these proposals[5] may create difficulties for unrepresented defendants, s.27 of the Act threatens the independence of the LACV and will have a disastrous impact on Victorian legal aid, particularly when combined with the foreshadowed funding cuts. Supreme and County Court judges will be given the power to order the LACV to provide assistance to an accused where the court is satisfied that it would otherwise be unable to ensure that the accused will receive a fair trial and the accused is unable to afford the full cost of legal representation.

The section raises fundamental questions about the LACV's ability to determine priorities for the provision of legal assistance as well as guidelines for the implementation of those priorities. The Commonwealth Government, which provides 55% of Victoria's legal aid funding has, in recent times, expressed concern at the increasing share of the legal aid dollar consumed by criminal trials. This Act will no doubt cause the Commonwealth to further reflect on the escalating refusal rate for applications and increasingly stringent guidelines for assistance in family law matters in particular.

No guidelines are provided for judges in relation to the exercise of this discretion. It should also be noted that the section enables judges to order the Commission to provide assistance 'on any conditions specified by the court'. Does this include the general terms of legal assistance which apply to all legally assisted matters? Can a court override these?

One unintended consequence of the legislation could be to encourage defendants charged with indictable offences triable summarily to elect to go to trial in the hope that the court will order representation for them. In the past, defendants facing such charges have often considered they would be better served by having the charges against them heard in the County Court but have been effectively prevented from exercising this right by the LACV guideline that limited assistance in such cases to a summary hearing unless there were exceptional circumstances.

Conclusion

Despite denials from the likes of LACV Chairman, Peter Gandolfo,[6] the legal aid system is in crisis. Increases in average costs per case, lack of funds for implementation of the Criminal Trial Delay Reduction Program, declining Solicitors Guarantee Fund revenue, the impact of the *Dietrich* ruling and an increasing number of 'mega-cases' have all contributed to the current difficulties. The return to a legal aid system dealing in the main with criminal law cases will dilute the focus which legal aid should have on assisting people to positively assert their rights.

The independence of the Commission has been attacked by the *Crimes (Criminal Trials) Act*. This attack is all the more extraordinary given the strong recognition which is regularly given to the need for an independent legal system; an independent judiciary and independent legal profession. It will be a tragic state of affairs if, when faced with a greater need for legal aid, the Government responds by reducing the total funds available to legal aid and palming the problem off to a bureaucracy stripped of its independence and unable to provide a comprehensive legal aid system across Victoria.

References

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3. Evans, R., 'Legal Aid at Breaking Point', Law Institute Journal, May 1993, p.344.
4. Legal Aid Commission of Victoria, Thirteenth Annual Report, 1991-92, p.6.
5. See s.4 (requirement that the accused file a statement of defence disclosing elements of the offence charge which are admitted and those which are not admitted at least 7 days before the trial), s.5 (broad pre-trial decision-making powers given to judges), s.19 (power for the court to order either party or their legal adviser(s) to personally pay costs if they unreasonably fail to comply with the legislation), and s.26 (amendment of the *Sentencing Act* 1991 permitting the accused's lack of remorse (indicated by refusal to admit the truth of documents filed by the prosecution and subsequently failing to seriously contest the proof of those matters at the trial) to be taken into account by the court when imposing sentence).
6. Evans, R., above, p. 344.

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9. Refugee Council of Australia, above.