

UNHCR-IDC EXPERT ROUNDTABLE ON ALTERNATIVES TO DETENTION
CANBERRA, 9-10 JUNE 2011

Summary Report

These notes are a summary of issues discussed and do not necessarily reflect the views of UNHCR, IDC or any individual participant. With agreement from participants, all discussions were conducted pursuant to the Chatham House Rule. The Roundtable was conducted with the financial support of the Australian Human Rights Commission.

I. SETTING THE SCENE

Detention is one of the most challenging issues to face Australia's asylum environment due to the complex interaction and sometimes tensions between humanitarian protection and national security. One of the purposes of the Expert Roundtable was to explore areas of convergence between a State's security concerns, including the effective management of its borders, and its responsibilities to provide protection and humanitarian support for people coming to its borders in an irregular way.

The detention of refugees, asylum-seekers and stateless persons is one of the main gaps in the international protection framework, and there have been significant efforts to promote alternatives to detention at various international fora, most recently at the UNHCR-OHCHR Global Roundtable on Alternatives to Detention in Geneva in May 2011.

The Expert Roundtable outlined the Australian legal and policy settings, monitoring and oversight mechanisms, and NGO perspectives on detention reform. The main objectives of the Expert Roundtable were to explore the expansion of the alternatives presently available in Australia, and to identify potential alternatives to immigration detention in light of international best practices.

The Expert Roundtable was informed by the recent publications of the Co-Chairs: UNHCR's *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1; and IDC's *There are alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 2011, which were officially launched in Australia at the conclusion of the Expert Roundtable.

Challenge

To situate the current situation of mandatory immigration detention in Australia against applicable international standards and alternatives to detention, including good practices employed by other similarly-placed States.

Conclusions: International Context and the Introduction of Priority Concerns

- A solid international legal framework exists for detention standards.
- There is no empirical evidence that detention deters irregular immigration, and deterrence is not a permissible consideration.
- Alternatives are a key starting point to ensure that every decision to detain is a 'risk-based' and individualized process that is used as a last resort, and which is strictly governed by principles of necessity and proportionality of detention.

- It is possible to establish policy and practices that include alternatives to detention that are compatible with the concern of States to manage their sovereign borders and national security responsibilities.
- Treating persons with respect and dignity throughout the asylum or immigration processes contributed to constructive engagement in that process, and improved voluntary return outcomes. Those awaiting an outcome on their asylum process have a very low risk of absconding, as do those who gain support throughout the process.
- There are many useful examples of other States, from which Australia can take best practices. Australia already has some of the better alternatives; however, these alternatives have not been fully implemented.

Conclusions: Domestic Context

- Government policy on detention should not be based on deterrence.
- Australian policy needs to be grounded in risk management rather than deterrence, and should ensure the availability of the person to have their status assessed and reviewed according to law.
- Detention should be assessed on a case-by-case basis and to only result if there is a demonstrable risk to the community which cannot be managed in another less intrusive way other than a deprivation of liberty.
- There are concerns around significant delays in refugee status determination and security assessments; with indefinite detention of those with adverse security assessments, and of those who cannot be returned.
- The necessity of a decision relating to detention should be capable of challenge and effective review.
- The signing of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) may provide the opportunity for additional and important opportunities for monitoring.
- Within the present context of mandatory detention in Australia, if the Government of Australia is unwilling to shift from these legal and policy settings, there is great scope to introduce change in terms of limiting the length of detention and increasing the use of community-based options.

Conclusions: Public Perceptions

- Among the most pervasive and damaging public misperceptions are: that there is an orderly queue; that detention deters migration; that seeking asylum is an unlawful act; and that asylum-seekers will take employment opportunities and welfare resources from Australians.
- Public confidence needs to be built through clear messages and strong political and community leadership; to promote the alternative programmes in existence; to encourage the Department of Immigration and Citizenship and other public offices to provide facts to the public about numbers, populations and the asylum narrative.
- More focus on detention relating to removals, as opposed to on-arrival processing, may contribute to the public confidence.
- There needs to be a change in the use of language around security and detention policy and movement away from a simplified debate. The debate requires greater public leadership which does not adopt mutually exclusive positions on asylum issues (either mandatory detention or open borders).
- Positive public messaging from a broader range of sources, especially through broad-based community engagement, has been successful in improving the quality of the asylum debate and has been effective in exposing the community to asylum issues.

II. THEME 1: NATIONAL SECURITY AND HEALTH

The session discussed the comparative perspectives of practice from the United States of America and New Zealand in risk management, as well as broader discussions on responses by other jurisdictions to national security and detention policy.

Challenges

To determine the way States should manage the screening of identity, health and security; to consider the best tools for determining who should be detained and who should not; and to identify methods of managing populations in the community.

Conclusions

- Unlike Australia, New Zealand does not have a system of mandatory detention for asylum-seekers who arrive in an irregular manner, and the United States and the United Kingdom release asylum-seekers whose claims are being processed.
- The international models include the presumption that asylum-seekers will not be detained (for example, the US Asylum and “Credible Fear” policy of January 2010).
- The length and type of detention differs depending on its focus. There are three areas of focus: public safety (initial, short-term detention) related to character or obfuscated identity; national security, often related to the possibility of participating in a terrorist act; and deportation or removal of individuals who refuse to comply with a negative visa decision.
- Asylum-seekers are rarely detained for national security reasons. Previous association with terrorist organizations in a country of origin will not automatically pose a threat to the national security of a host country. Despite the much higher number of asylum-seekers in other comparable jurisdictions, those countries do not employ mandatory detention policy settings and indeed, seldom use detention for national security related issues despite their greater proximity to, and risk of, sources of insecurity. Other comparable jurisdictions primarily use detention for the removal of failed asylum-seekers.
- There was a general disquiet that the criteria on which security assessments are made in Australia are extremely unclear, opaque and lacking in any form of meaningful accountability. In view of the serious consequences for those affected by a negative security assessment – including indefinite detention – it is essential that greater transparency be introduced.
- If detention is required for genuine reasons of national security, appropriate measures for procedural fairness can be introduced without compromising the State’s security apparatus. Experience from other State jurisdictions shows that one option could be the establishment of a special advocate model to ensure the detainee has access to redacted versions of any adverse intelligence whilst preserving the sources and integrity of intelligence.
- Whichever purpose underpins the detention, in Australia there should be periodic review by an independent judicial body that is able to assess the legality, necessity and validity of the detention.
- In Australia, there is a conflation of the tests for risk to national security, the decision to detain, and the eligibility to protection visas for those granted refugee status. There needs to be an early and internal risk assessment process, as opposed to the security assessment process for permanent visas.
- Initial internal screening and more effective ‘triaging’ needs to be linked to release mechanisms.
- There needs to be a rule-of-law based approach to the character test. Current law allows for processing in the community in the absence of evidence of risk, but policy does not reflect this.

- Even if security or character concerns are present at the lower scale, alternatives to immigration detention can still be explored, such as conditional release and community-based supervision arrangements. Examples were provided of jurisdictions such as Canada, Germany and Finland that allow the release of undocumented individuals who are complying with identity and security check processes.

III. THEME 2: HUMANITARIAN (INCLUDING PSYCHO-SOCIAL RESEARCH AND PRACTICES)

This session looked at the unique features of community-based alternatives to detention or within detention, and explored whether these features lessen the problems faced by vulnerable groups currently in mandatory detention environments. In particular, the impact of alternative models on the families involved in the UK family removal programme was discussed.

Challenge

To identify the particular humanitarian impact, including psycho-social and other forms of harm, upon those in detention and to determine whether and how this can be ameliorated by community-based arrangements.

Conclusions

- Immigration detention has a negative impact on the health and wellbeing of individuals concerned, both during and after the detention period. The detention of large numbers of refugees and asylum-seekers at remote and isolated facilities throughout Australia, in particular, has had a significant psychological impact on the short and long-term health and well-being of the detainees.
- Geographical isolation further restricts their access to essential legal and social assistance, particularly those suffering from torture or trauma and other vulnerable cases.
- Significant delays in the determination of refugee status and completion of security assessments has led to protracted detention which further compounds the deterioration of the psycho-social health and welfare of refugees and asylum-seekers, and has caused an alarming incidence of suicide, self-harm, violence and abuse, destruction of property, and rioting in the immigration detention facilities.
- The psycho-social effects of prolonged detention are significant, and give rise to long-term social and community costs after release, which is inevitable for many given that most asylum-seekers in detention will be determined to be refugees.
- Community detention ameliorates these effects by allowing for a smoother transition to the community upon grant of refugee status and making voluntary departure more likely in the event of denial of refugee recognition.
- The UK does not detain unaccompanied children, families with children, women who are 24-plus weeks pregnant, those requiring 24 hour medical care, victims of trafficking, and those with evidence they are victims of torture.
- The UK has developed assisted return, required return and ensured return programmes as alternatives to detention for families with children.
- Australia has many good community-based practices which have had a positive impact on refugees, asylum-seekers and stateless persons. The existing alternatives, established both in Australian law and policy, could be utilized more fully and effectively at every level and linked to an early and effective release mechanism.

IV. THEME 3: INTERNATIONAL AND NATIONAL REFUGEE AND HUMAN RIGHTS LAW

International legal standards of detention were reviewed, along with an analysis of the extent to which current Australian policy and legislation meets these standards. The session also included an explanation of the obstacles to effective legal practice caused by detention.

Challenges

To consider how Australia can better meet its international obligations; and to appreciate the positive flow-on effect this would have on the RSD process.

Conclusions

- Refugee displacement is never orderly and seldom takes place through ‘regular’ immigration channels, using travel documents and visas. International refugee law specifies that the act of seeking asylum is not unlawful or criminal (even if an asylum-seeker relies on services of criminalized international entities, including people smugglers).
- Australia is not meeting its obligations under Article 9(4) of the ICCPR to allow proceedings in court to challenge the lawfulness of detention and to request release if unlawful. It should be possible to challenge the proportionality and necessity of detention.
- The current policy is overly risk-averse given the low rate of absconding, which renders the blanket mandatory detention policy disproportionate.
- Detention imposes barriers to communication, access, and creates psycho-social effects which limit the claimant’s engagement in the refugee status determination process.
- Early legal advice, whether in detention or the community, is critical to ensuring procedural fairness to asylum-seekers. With timely and sufficient access, a lawyer can engender trust and confidence, break down practical and cultural barriers, as well as elicit coherent and accurate claims. Access to early legal representation impacts significantly on the quality, fairness and efficiency of the refugee status determination process.
- Following the High Court of Australia decision of M61/2010 and M69/2010 (11 November 2010), more information is needed about the right of offshore arrivals to gain access to judicial review. There are constitutional questions about how claimants will access it, as well as whether they will have legal aid and competent legal representation to make it a real remedy. Perversely, the remedy of judicial review may also prolong significantly the period in detention.

V. RECENT RESEARCH INTO ALTERNATIVES TO DETENTION

Summaries of the UNCHR and IDC research publications were provided in this session. The principal findings were presented from UNHCR’s *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1 and IDC’s *There are alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 2011.

Challenges

To understand the empirical research from a range of countries and their different political, legal, logistical and geographical settings; and to consider the how these good practices may be incorporated into law, policy and practice in Australia.

Conclusions

- The IDC's Community Assessment and Placement model, or 'CAP' model, integrates international best practice by identifying five steps governments take to prevent and reduce unnecessary detention. These steps are to presume detention is not necessary; screen and assess the individual case; assess the community setting; apply conditions in the community if necessary; and detain only as a last resort in exceptional cases.
- The most successful programmes incorporate initial screening but have good case management and provision for early legal advice.
- Alternatives that involved NGOs often had better outcomes.
- Alternatives can mean lower costs, increased compliance and better health/well-being for individuals.

VI. THEME 4: RESOURCES AND ADMINISTRATION

In this session, the human and financial costs of detention and community arrangements were considered.

Challenges

To identify an appropriate methodology to measure the human and financial costs of placements in immigration detention facilities as compared with community detention and other community-based arrangements; and to ensure consistent and accurate calculation of detention, and detention-related costs.

Conclusions

- There is a need for research on correct and accurate cost and a clearer methodology.
- Any community detention model implemented will need to consider the effectiveness of adopting a "welfare approach", in which financial and accommodation assistance is provided, or a "work rights approach", in which limited assistance is provided in favour of self-sufficiency. The availability of housing or ability to attain gainful employment will be relevant considerations.
- A welfare approach may be more expensive than a work rights approach (especially where start-up costs are involved or the programme is risk-adverse with 24 hour care); however, in the medium-longer term cost savings may be achieved.
- Detention costs include the maintenance of facilities whether they are full or not and the remoteness of locations increases costs very significantly; community housing models can be tailored to the fluctuations of actual numbers and more cost effective. Detention-related costs also need to be considered, including the human costs, ongoing impact to vulnerable asylum-seekers and medical treatment relating to post-traumatic and psychosocial harm relating to the actual detention.
- Housing may be limited, and asylum-seekers will be in competition with low-income families. There may be an advantage in working with Australian State and Territory Governments to see how transitional housing for the homeless sector is treated differently.
- Support in the community after refusal of a claim may make removal and informed decisions about judicial review options more likely.
- It may be possible to introduce a greater range of visa options which provide more options for community release than are presently available, as an alternative to detention. These temporary visa options may also impose limits on lodging subsequent substantive claims to prolong their stay in Australia. Community detention may be a preferred option for unaccompanied minors who require additional welfare and support (as compared to the grant of work rights).
- It is important to recognize that asylum-seekers arriving by boat, the majority of who are recognized as refugees, comprise the significant proportion of Australia's detainee population,

and detention is largely unrelated to responding to irregular, non-refugee migrants. There is a need to shift away from an unlawful non-citizen approach to a refugee-focussed approach to irregular arrivals in Australia as an issue of reception and humanitarian response, which encourages future settlement and self-reliance outcomes.

VII. ALTERNATIVES TO DETENTION

This session explored in more detail the alternatives to detention in various countries around the world. Discussion looked at requirements on an individual, monitoring mechanisms, supervision, bail and surety arrangements and ‘case resolution’ models.

Challenges

To identify alternatives to and within detention which emphasize a risk-based approach to detention, based on clear and transparent criteria to complete identity, health and security checks relating to release into the community, and the implementation of graduated restrictions on freedom of movement, where necessary, which prevent, rather than react to, long-term detention; and to ensure that assessments of vulnerability are made in a timely and robust fashion.

Conclusions

- Refugees and asylum-seekers in comparative jurisdictions were, in general, not detained for the purpose of determining their risk to national security and asylum-seekers with vulnerable and complex cases removed from detention expeditiously. The Australian Government should consider implementing an early internal risk assessment process, linked to provisional and conditional release mechanisms for vulnerable groups and those who meet identity, health and public safety checks, and an expansion of the existing triaging process to enable early security screening within the detention framework.
- Australia already has in place most of the models found in the international survey but the key? is to find the political ‘space’ for Government to implement many of the good practices already identified and to ensure these are injected early as part of a preventive and effective release mechanism – before damage is done to those affected by detention.
- Provisional release for low-risk cases could build on existing bridging visas, or be based on a new temporary visa model with transitional work and stay rights. Conditional release could draw on international models and apply to medium-risk arrivals, whereas an expanded version of the existing community detention system could apply for higher-risk individuals. However, the type of alternative (within or to detention) which is most appropriate in any particular case depends on the individual circumstances and requires effective monitoring and oversight.

VIII. DISCUSSION ON KEY ISSUES

Challenges

To bring together the discussions of previous sessions to identify strategies for improved conditions and for promotion of alternatives; for an Australian-tailored answer to screening tools and risk assessment; current challenges in relation to particular caseloads; and managing public perception.

Conclusions

- There needs to be an internal, front-end, quick assessment of public safety and security concerns.
- There needs to be a clearer definition of national security, with a higher threshold of threat than currently exists.
- There needs to be a transparent process around cases involving classified information.
- The codification of the current policy values into law is important to ensure the future development of alternatives.
- There needs to be a strong message to the public that asylum-seekers and detention are not inextricably linked, that detention does not deter, and that detention should be a last resort. This can be balanced with the message that detention occurs where it is necessary, and thus meet public safety and political concerns.
- Australia's approach to immigration detention should be shifted from an approach that emphasizes their status as unlawful non-citizens (requiring control and welfare) to one that emphasizes their refugee status (requiring settlement and self-reliance). The approach to detention for arrivals should be distinguished from the approach to detention for removals.

UNHCR Regional Representation
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International Detention Coalition
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