

REFUGEE ADVICE + CASEWORK SERVICE (AUST) INC.



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Mr Tim Watling
Committee Secretary
Joint Select Committee on Australia's
Immigration Detention Network
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Dear Mr Watling,

Thank you for providing the Refugee Advice and Casework Service (Australia) Inc. (RACS) with the opportunity to make a submission to the Joint Select Committee on Australia's Immigration Detention Network (the Committee). RACS would like to respond to a number of the points to be addressed by the Committee.

About the Refugee Advice and Casework Service (Australia) Inc.

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Citizenship (DIAC), donations from the community, an extensive volunteer network and a Management Committee.

RACS' principal aims may be summarised as follows:

- to provide a free, dedicated legal service for individuals seeking asylum in Australia;

- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;
- to provide a high standard of community education about refugee law, policy and procedure;
- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

RACS works with a diverse caseload of asylum seekers in Australia. Traditionally, the majority of our clients have been based in the Australian community. Recently, the majority of RACS' clients have been detained as part of the Australian Government's policy of mandatory detention. RACS' clients in detention comprise both irregular maritime arrivals (IMAs) and community arrivals, who are subject to different application processes and procedures.

RACS provides assistance to IMAs in detention centres by advising and representing clients throughout the Protection Obligations Determination process (POD), which consists of a first level Protection Obligations Evaluation and a review level Independent Protection Assessment. In addition to this on-site assistance, RACS provides telephone advice to detainees.

RACS also assists non-IMA detainees in Villawood Immigration Detention Centre by providing advice and representation for Protection visa applications, interviews with DIAC and subsequent appeals to the Refugee Review Tribunal (RRT) where necessary.

On a daily basis, RACS caseworkers are in contact with asylum seekers detained in numerous immigration detention centres (IDCs) throughout Australia, including Christmas Island, Scherger, Weipa, Curtin, Villawood and Leonora.

More broadly, RACS aims to raise awareness about the issues asylum seekers face and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in accordance with Australia's international obligations. It is within this context that RACS makes this submission.

1. Impact of Detention on Asylum Seekers

1.1 Length and Uncertainty of Length

In RACS' experience, clients in the offshore processing system are in detention for an average of 12 to 18 months from the time of their arrival to the time when their claims are finally determined. This is an exceptionally long period for persons to be detained who have not been accused of criminal activity, who pose a low security threat, and who are highly vulnerable.

In addition to the length of periods in asylum, asylum seekers are enormously affected by the uncertainty surrounding the detention process and the time periods for determining refugee status. RACS' clients commonly express frustration and anxiety about the lack of information provided about each aspect of the decision making process, including expected timeframes, what steps decision-makers take in making decisions, and the order in which cases are assessed or decided.

We have observed particular distress amongst clients who are waiting for security clearances to be conducted by the Australian Security Intelligence Organisation (ASIO). These clients often express despair at the unpredictable, unexplained and extremely long periods of time that these checks can take. Clients commonly complain that there are large discrepancies between the lengths of time that processes take for different people. Many detainees perceive that the processing time is arbitrary, as no explanation is offered as to why this is the case. Detainees are desperate to understand what the processing system involves and why some wait longer than others.

As will be discussed further below, RACS believes that the lengthy and uncertain period of time which most asylum seekers spend in detention has serious impacts on their mental health and is a significant factor motivating feelings of frustration and discontent which lead to security incidents in IDCs.

1.2 Mental Health

In RACS' experience, mandatory detention of asylum seekers has a profoundly detrimental effect on detainees' psychological health.¹ Mental health appears to deteriorate as the length of time in detention increases. RACS believes that insufficient resources are allocated to the treatment and care of those with mental illness, and is informed that there is currently no psychiatrist available to treat detainees on Christmas Island.

¹ For further detail and a medical perspective, see Louise K. Newman, Michael Dudley, and Zachary Steel, 'Asylum, Detention, and Mental Health in Australia' (2008) 27(3) *Refugee Survey Quarterly* 110.

The impact of detention on clients' mental health is sometimes explicitly communicated to RACS' agents, and is also apparent to RACS through observation of our clients' tone, demeanour and ability to communicate and engage with the legal process.

Many common symptoms of mental health disorders we come across are: forgetfulness, confusion, anger, frustration, loss of appetite, poor hygiene, insomnia, anxiety, suicidal thoughts, suicide attempts, and self-harm.

A number of our clients have developed serious psychological conditions while they have been in detention. This contrasts starkly to the condition of RACS' onshore Protection visa applicants who remain in the community. These clients are far more able to recover from past trauma, heal themselves physically and psychologically, and integrate and establish themselves in the Australian community.

RACS is also concerned that the psychological health of many of our clients impacts their ability to articulate their protection claims and engage with the POD process undertaken by DIAC. For example, psychological illness often hinders memory and the clarity with which clients express their thoughts. This can result in inconsistencies or variations in clients' evidence, which is frequently used as a ground for reaching a negative decision by decision-makers, because it is said to undermine the applicant's credibility. However, in our experience, prolonged psychological distress, rather than lack of credibility, is often the more probable explanation. On this basis, RACS believes that the mandatory detention of IMAs can prejudice the proper assessment of claims for asylum.

1.3 Vulnerable Groups

The uncertainty and length of periods in detention compounds detainees' pre-existing vulnerabilities caused by past trauma, separation from family and community members and the difficulties associated with living in a foreign country.

RACS acknowledges the Government's recent focus on removing children from immigration detention into community detention, and notes that, as of July 2011, 60% of children in detention were in community rather than secure facilities. RACS urges the Government to continue these efforts to ensure, as an absolute minimum, that no children continue to be detained in IDCs. Furthermore, we submit that whilst community detention is preferable to detention in IDCs, a far more humane and efficient solution would be to allow children and families applying for Protection visas to apply concurrently for bridging visas and reside in the community throughout the determination process.

In addition, RACS submits that there has been inadequate focus on identifying highly vulnerable adults in detention facilities and offering them the requisite protection and treatment.

1.4 Riots and Unrest

Whilst RACS does not condone violence and unrest in IDCs, disobedience amongst detainees is unsurprising, given that long term detention exacerbates mental health problems, and leads to feelings of frustration, hopelessness, anger, boredom and a lack of information.

RACS has observed that asylum seekers in detention express frustration when good behaviour is not recognised, and when some applications appear to be expedited to protect those threatening serious unrest or self-harm.

1.5 Recommendations to Address the Impact of Detention on Asylum Seekers

In section 4 below, we outline our principal recommendation that the policy of mandatory detention should be significantly curtailed such that detention is only imposed for the purpose of conducting identity checks. However, in the absence of such changes taking place, RACS recommends the following actions to reduce the impact of detention on asylum seekers:

- That the community detention system be significantly expanded to ensure that vulnerable persons, in particular persons with mental health problems, are not detained;
- That greater funding be allocated to provide increased mental health support to those requiring assistance, in particular specialised torture and trauma care;
- That DIAC and ASIO provide greater information to detainees about decision-making and security check processes in order to alleviate their significant distress; and
- That those who demonstrate good behaviour in detention be rewarded in order to reduce unrest and violence in IDCs.

2. Impact of Detention on Access to Legal Services

2.1 Remoteness and Quality of Legal Services

The detention of asylum seekers, especially in remote locations, requires legal representatives to engage in 'remote lawyering', involving communication over the phone through an interpreter, rather than face-to-face discussions. This makes it difficult for applicants to establish rapport with their agents, and makes communication more difficult, less frequent and more time consuming. This in turn negatively affects clients' ability to present their claims for protection in the most effective manner, resulting in omissions or misunderstandings that could prove fatal to applicants' claims.

In addition, RACS has some concerns surrounding the use of freelance migration agents by some IAAAS providers. In order to reduce the IAAAS cost and time commitments of travel to remote IDCs, some IAAAS providers pay freelance migration agents to attend interviews and review hearings on the provider's behalf. Freelance agents have not contributed to the preparation of applicants' submissions and are unlikely to be as familiar with applicants' claims as agents who prepare the submissions and attend in person. Therefore, whilst outsourcing may reduce IAAAS providers' costs, RACS believes it may not be in the best interests of the client.

In combination, these factors are likely to result in lower quality services, as remoteness makes it difficult for lawyers to establish meaningful and productive working relationships with their clients.

2.2 Face-to-Face Time with Agents

The amount of time lawyers have face-to-face with their clients to prepare for the POD process is limited to a very short period. A statement may need to be obtained in one or two hours. This is in contrast to RACS' experience of working with community clients where it takes an average of four to six hours to prepare a comprehensive statement.

As a result, it is difficult for an agent to extract from a client the level of detail that would ordinarily be appropriate in making out the various grounds for protection under the Refugee Convention, and increases the chance of omissions and miscommunication. An unfortunate consequence is that the questions asked throughout the POD process are based upon an incomplete picture. This further explains why a significant percentage of preliminary decisions are overturned on review, unnecessarily extending an applicant's time in detention.

2.3 Mental Health and Access to Legal Services

From a legal perspective, the mental health effects of mandatory and prolonged detention have an alarmingly negative effect on an applicants' legal case. As mental health deteriorates, applicants are less and less able to effectively engage with the POD process, which relies on accurate and detailed recall of past (often traumatic) events, in order to be found to be credible by a decision-maker. RACS reiterates that the depression and anxiety experienced by many applicants during detention awaiting the outcome of their cases results in poor memory and concentration, anger, frustration, and indignation. These negative emotions have an enormously detrimental effect on our clients' abilities to present their claims properly. Some of RACS' clients have reached states of such serious mental illness, frequently at the appeal and review stages of their protection determination, that we have professional concerns about their ability to give instructions and to understand their situation.

Further proof that the deterioration of clients' mental health impacts the progress and course of the protection determination process is provided by DIAC's Protection Support Section's 'Analysis of IMR Overturns from January – April 2011', which found, at page 8, that:

"It is important to note that the psychological state of clients and the supporting evidence provided by medical practitioners was a contributing factor in the overturn of 25 per cent of cases sampled."

This analysis demonstrates not only the significant impact of mental illness on the determination process, but the importance of supporting evidence, including psychological reports, provided by medical practitioners. RACS is concerned that despite the acknowledgement of the extent of mental illness and its impact on the determination process, insufficient action has been taken to alleviate mental health pressures or ensure that supporting evidence is provided to interviewers and reviewers for consideration. In particular, RACS notes that IAAAS funding does not cover the cost of psychological reports, and that the cost of these reports may be prohibitive for some providers. This means that psychological reports are not requested in all circumstances where they may be appropriate, and that some applicants experiencing mental health complications are unable to present all relevant information and are disadvantaged as a result.

2.4 Communication

Communication between migration agents and clients is often inhibited by a lack of infrastructure, as well as inadequate telephone facilities and communication systems at some centres. In RACS' experience, communication systems vary greatly between detention facilities. It can be very difficult for agents to find out how to contact clients in various places, and for clients to understand how they can contact their agents and access phone lines and interpreter services.

RACS acknowledges that some centres have recently made significant improvements to these systems. In particular, Curtin IDC has improved its communication policy and has new procedures which include a dedicated diary manager to book phone calls between agents and clients. Despite this improvement, clients in Curtin IDC may still have to wait up to one week to speak with their agent. This adds to the frustration and confusion experienced by detainees about the process. Furthermore, RACS notes the potential for video conferencing to vastly improve the connection and communication between agents and their clients, recognising that non-verbal communication is an important part of human interaction which facilitates understanding and trust building.

RACS notes that SERCO staff are, in general, very helpful, especially given the number of clients they service. However, communication with clients is often complicated by uncertainty and confusion about the roles and responsibilities of SERCO and DIAC officers at different IDCs.

2.5 Recommendations to Address the Impact of Detention on Access to Legal Services

In addition to the recommendations outlined above, RACS recommends that:

- IAAAS funding be extended to cover the cost of psychological reports;
- IDCs establish uniform communication protocols and make these publicly available;
- IDC infrastructure and communication facilities be upgraded to allow greater phone access for detainees across all centres; and
- Video conferencing facilities be established in all IDCs, allowing 'face to face' consultation and reducing the stress clients experience when communicating through a phone interpreter to their agent.

3. Assessment of Protection Claims

Many of the concerns raised by RACS above, including length and uncertainty of time in detention, mental health complications, inadequate recognition and accommodation of vulnerable persons, inadequate access to legal services and lack of information and awareness about the application process, apply equally to the assessment of protection applications. In addition to these issues, RACS would like to highlight a number of key concerns.

3.1 Processing Time

As noted above, a typical RACS client will be in detention for an average of 12 to 18 months while they exhaust all avenues of appeal. As an example, they may wait two to three months for a Protection Obligations Evaluation (previously an RSA) interview after arriving in Australia, one to eight months for this preliminary decision to be handed down, another four to eight months for an Independent Protection Assessment (IPA) (previously an Independent Merit Review (IMR)) and a further one to six months for an IPA decision. If they are successful on review, they may wait a further few months before they are released from detention pending their security clearance. If they seek to write to the Minister, or seek judicial review of the secondary decision, they may wait further months also.

RACS notes that the length of stay in detention is largely dependent on the decision making processes at preliminary and then review levels. RACS notes in this regard that the recent efforts to streamline this process by the creation of the POD may go some way towards eliminating these delays.

RACS welcomes efforts of the IMR panel to implement an equitable interview allocation system, whereby applicants are allocated IMR interview dates according to the length of time spent in

detention. However, RACS notes the vast inconsistencies in the decision-making times between different reviewers.

3.2 Assessing Security Risks

RACS is concerned by the length of time detainees spend in detention following the determination of their status as refugees whilst they await the outcome of their security clearances. The delay, confusion, anxiety and lack of information surrounding the process causes increasing dismay and discontent amongst detainees. Further, detainees are unable to challenge, question or request a review of ASIO processing times until they have already waited one year for their ASIO clearance, and there is no stipulated maximum time period for completing this assessment.² This denial of review rights leads to further stress, uncertainty and powerlessness.

3.3 Recommendations to Improve the System for Assessing Protection Claims

In addition to the recommendations above, RACS recommends that:

- A maximum time frame be set for reviewers, as a target, similar to the 90 day system at the RRT;
- Where applicants are in detention, resources be re-allocated to prioritise the expeditious completion of security assessments;
- The Government legislate to require ASIO complete security assessments for applicants in immigration detention within a specific time-frame;
- Following expiry of the stipulated period, ASIO should be required to provide information regarding the delay and an expected time for completion; and
- ASIO delays should be subject to independent review.

4. Policy of Mandatory Detention

4.1 Violation of Human Rights

RACS submits that the policy of mandatory detention of IMAs and people without immigration clearance is anathema to the core principles of Australia's legal system and human rights principles broadly. Australia's mandatory detention policy flouts Australia's obligations under the International Convention on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CROC) and the Refugees Convention.

² See http://www.igis.gov.au/complaints/tips/tips_immigration.cfm, accessed 11 August 2011.

4.2 Distinction between Irregular Maritime Arrivals and Onshore Arrivals

RACS submits that the existence of a separate system for processing asylum seekers who arrive by boat without a visa compared to those who arrive by plane with a visa is inequitable and unjustifiable. In RACS' view, the offshore processing system is not an appropriate and proportionate way of achieving the objective of protection of Australia's borders.

From RACS' experience of representing and advising IMAs during the assessment of their claims, the offshore processing system appears to be convoluted, costly and administratively burdensome for all parties involved. Section 46A of the *Migration Act 1958* (Cth) prevents IMAs from applying for a Protection visa until the Minister decides to 'lift the bar' to allow such an application. The POD process, which includes the primary stage Protection Obligations Evaluation and the review stage Independent Protection Assessment, is the process by which the Department of Immigration and Citizenship determines whether a recommendation should be made to the Minister to lift the bar. In practice, the POD process contains many similarities to the onshore Protection visa application process and it can take a significant length of time. Applicants are required to remain in mandatory detention throughout this process.

By contrast, asylum seekers who apply for protection from within the community, who may have arrived in Australia on false documents or concealed their motivation for travel in order enter Australia, are not subject to mandatory detention. The effect of this is that there are two dramatically different classes of asylum seekers in Australia. RACS believes that distinguishing between asylum seekers based on their mode of arrival violates the principle of equal protection before the law.

RACS notes the Australian Government's 'New Directions in Detention' Policy, which states that immigration detention is to be used as a last resort and for the shortest practicable period. RACS believes that the mandatory detention of IMAs during the process of assessing their protection claims and further character checks is inconsistent with this policy.

The vast majority of IMAs in detention are eventually found to be refugees to whom Australia owes protection obligations under the Refugees Convention.³ There is no evidence to suggest that IMAs pose a greater threat to Australian national security than other asylum seekers or onshore visa applicants, many of whom are permitted to remain in the community even though they too have not yet completed comprehensive security checks. Only a very small proportion of

³ Senate Legal and Constitutional Affairs Committee, Answers to questions on notice, Immigration portfolio, Additional Budget Estimates, 9 February 2010, Questions 30 and 32, accessed 4 August 2011: For example, of the 1254 claims assessed on Christmas Island between 1 July 2009 and 31 January 2010, only 110 people were found not to be refugees following the preliminary DIAC interview. This equates to an approximate success rate of 91%. http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/diac/32_qon.pdf and http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/diac/30_qon.pdf

IMAs found to be refugees during the POD process are refused protection on character or security grounds.

Given the high likelihood of refugee claims being satisfied, low security risks, and the suitability of bridging visas and community residence for other persons awaiting determinations, the policy of mandatory detention of IMAs is, in RACS' view, unjustifiable.

4.3 Expansion of Community Detention

RACS acknowledges that the announcement of the Minister for Immigration and Citizenship, Chris Bowen, on 29 June 2010, to transfer a significant number of families and unaccompanied minors to community detention, is a notable improvement. This announcement demonstrates that there are practical and viable alternatives to mandatory and prolonged detention in IDCs.

RACS encourages the Government to make greater efforts to ensure that other vulnerable groups are also granted the option of community detention, for example people with mental illness and people with disabilities.

4.4 Cost of Detention to Australian Society

In the sections above, we have outlined our view that the system of mandatory detention has devastating impacts on the health and wellbeing of asylum seekers in the offshore processing system. However, in addition to the enormous human cost of mandatory detention, the financial cost of maintaining Australia's mandatory detention policy is enormous.

As discussed above, RACS believes that mandatory detention beyond an initial limited period for the purpose of security assessment is unnecessary because the flight risk of Protection visa applicants is very low. Consequently, RACS believes that the substantial cost of detention is not warranted.

As noted earlier, the vast majority of IMAs in detention are eventually found to be refugees to whom Australia owes protection obligations under the Refugees Convention.⁴ In light of the impact which detention has on the mental health of detainees, the policy of mandatory detention ultimately creates a substantial burden for the Australian community in terms of resettlement, integration and medical costs. Immigration detention funding could be far more efficiently allocated to much needed services for refugee community support programs, counselling, education and health programs.

⁴ Senate Legal and Constitutional Affairs Committee, Answers to questions on notice, Immigration portfolio, Additional Budget Estimates, 9 February 2010, Questions 30 and 32, accessed 4 August 2011: For example, of the 1254 claims assessed on Christmas Island between 1 July 2009 and 31 January 2010, only 110 people were found not to be refugees following the preliminary DIAC interview. This equates to an approximate success rate of 91%. http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/diac/32_qon.pdf and http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/diac/30_qon.pdf

4.5 Recommendations Regarding the Policy of Mandatory Detention

In respect of the policy of mandatory detention in general, RACS recommends that:

- The policy of mandatory detention of IMAs and people without immigration clearance be abolished;
- Should this recommendation not be accepted, RACS recommends that the Government legislate to restrict mandatory detention to a maximum of thirty days, during which time identity, health and security checks can be undertaken. Where this assessment demonstrates that the person is not a threat, the person should be released into the community to be monitored throughout the remainder of the determination process. Detention should only be used only as a last resort in circumstances where a person poses an unacceptable security risk to the Australian community that cannot be managed in another way;
- Should this recommendation not be accepted, RACS recommends that community detention programs be significantly expanded to encompass all detainees who do not pose security threats, with priority given to vulnerable persons;
- The distinction between onshore and offshore asylum seekers should be removed, and the s46A bar on IMAs making Protection visa applications should be abolished. If an IMA raises prima facie protection claims, they should be allowed to make an application for a Protection visa and be entitled to apply for a bridging visa, consistent with the approach taken for unlawful non-citizens who apply for Protection visas from within the migration zone;
- The Government should legislate to enshrine the rights of children by amending Australia's immigration detention laws to reflect Australia's obligations under the Convention on the Rights of the Child; and
- The Australian Government's 'New Directions in Detention' Policy should be enshrined in legislation to give full legal protection to the rights of asylum seekers.

Please do not hesitate to contact RACS on (02) 9114 1600 if you require any further information or assistance with any aspect of this submission.

Yours sincerely,

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Per:

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