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Abstract
Australia's migration laws impose harsh penalties on asylum seekers who arrive without the necessary visa. They are immediately put into mandatory detention and can remain incarcerated for a number of years. They are not provided with the resources necessary to present their case in the best possible manner. Australia is violating its human rights obligations under the 1948 United Nations Universal Declaration of Human Rights (UDHR) and the 1954 Convention Relating to the Status of Refugees.1 The Federal Government says that it needs to have strong border protection laws for national security, which is true, but given that Australia does not receive floods of asylum seekers, the laws are inappropriate.

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Mandatory Detention in Australia

Sue Fleet

Australia's migration laws impose harsh penalties on asylum seekers who arrive without the necessary visa. They are immediately put into mandatory detention and can remain incarcerated for a number of years. They are not provided with the resources necessary to present their case in the best possible manner. Australia is violating its human rights obligations under the 1948 United Nations Universal Declaration of Human Rights (UDHR) and the 1954 Convention Relating to the Status of Refugees.[1] The Federal Government says that it needs to have strong border protection laws for national security, which is true, but given that Australia does not receive floods of asylum seekers, the laws are inappropriate.

After World War II, most countries were united in committing to provide compassionate protection to all people escaping persecution. Australia became a signatory to various international conventions, including the Universal Declaration of Human Rights, which affords asylum seekers certain protections and shelter from harm. By introducing laws which mandate the detention of asylum seekers, the Australian Government has violated human rights conventions regarding arbitrary detention, presumption of innocence and the provision of a fair tribunal. The policy of mandatory detention also causes and exacerbates irreparable damage to the mental health of asylum seekers. The UDHR was created to ensure the protection of some of the most vulnerable members of our society—those distraught individuals fleeing for their lives from war and persecution. By detaining asylum seekers arbitrarily, Australia goes against the very intention of the conventions. However, commentators in favour of mandatory detention argue that Australia has the right to choose who shall enter its borders, as a matter of domestic and regional border security. They state that the policy of mandatory detention acts as a deterrent to others considering coming to Australia. Yet, mandatory detention as applied in Australia is in fact the ultimate act of discrimination

and out of proportion to the need to protect the nation's borders from this particular demographic.

Australia's policy of mandatory detention stipulates that all unauthorized arrivals must be detained, regardless of whether they intend to apply for asylum or if it seems likely that the person is a genuine refugee. No consideration can be given to their age, sex, state of physical and mental health or any other factors, or whether it is likely that the person would abscond.[2] It stands to reason that people who have left their homes with minimal belongings and no official documentation, who have travelled over vast distances in unseaworthy boats, from countries which have been at war for many years, have at least a possible claim to asylum.[3] In fact, in 2004 92% of Iraqi asylum seekers were found to be genuine refugees and were granted visas.[4] By mandating the arbitrary detention of asylum seekers, Australia's policy of mandatory detention is, by its very nature, a breach of Article 9 of the UDHR regarding arbitrary detention, and Article 11 which grants the assumption of innocence until guilt is proven.

It is difficult for asylum seekers to prove their case, due to the very limitations that detention imposes. Australia's detention centres are often located in isolated areas, where there is limited access to services. Isolation makes it virtually impossible for asylum seekers to gain access to the services necessary to prepare their defense to a high standard. This is especially true for the offshore facilities on Christmas Island and Nauru, which are part of Australia's 'Pacific Solution', and the detention centre at Baxter in South Australia. It is very difficult for service providers, for example legal, health, educators and interpreters, and for family and supporters, to access the detainees at these centres. Article 10 of the UDHR states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations …' Asylum seekers cannot prepare for their hearing to the full extent that government can, if they do not have easy access to solicitors and interpreters, and if they are suffering from mental health problems, as are a high number.[5] These conditions are further hampered for offshore detainees as they are not entitled to access Australia's legal system.[6] In addition, offshore detainees do not have access to the Refugee Review Tribunal (RRT), which means that they have no way to appeal against a negative decision regarding their refugee status.[7]

Denying asylum seekers the tools to adequately present their case, or appeal a decision, can result in situations where genuine refugees are returned to the dangerous conditions from

which they had fled. This is a perilous state of affairs which will certainly result in the expulsion of 'persons who have the right to be recognized as refugees.'[8] According to Amnesty International, 1158 decisions made by Australian courts were overturned by the RRT between July 2004 and June 2005.[9] Had there not been an avenue of appeal, these people would have been returned to a country where they risk torture or other serious harm. This is a contravention of the internationally accepted principle of non-refoulement.[10] Refoulement can result in tragic consequences, as happened with an Iraqi whose application for asylum in Australia was rejected. After waiting for the decision for 5 years, on a Temporary Protection Visa, he was returned to Iraq, where he was murdered on suspicion of being a spy for the Australian government. This is not an uncommon occurrence when asylum seekers are returned to their country of origin on rejection of their application for refugee status.[11] It is of concern that this person may have been able to prove his refugee status successfully, if he had been provided with the necessary tools and assistance to do so. This shows that Australia's Pacific Solution policy is in direct contravention of Article 10 of the UDHR, by denying access to legal assistance 'in full equality'.

Prior to leaving their homeland, asylum seekers have often been subjected to torture and assault, witnessed the killing of family members and other abhorrent acts. Dr. Aamer Sultan, whilst a detainee awaiting assessment of his application for refugee status, observed that all 36 of his fellow long-term detainees in Villawood Detention Centre suffered from depressive illness.[12] Dr. Sultan described his fellow detainees' mental health issues as manifesting in acute psychotic symptoms of aggressive and persistent self-harming behaviours. He described his shock at the treatment he and fellow detainees received at the hands of the Australian government and detention centre staff, and was in no doubt that is was a profound violation of their human rights. A 1995 survey found that all 17 East Timorese asylum seekers held at Curtin Detention Centre suffered from post-traumatic stress disorder.[13]

Upon seeking help in Australia, asylum seekers should be afforded every available means to assist them to recover. Instead of receiving compassionate and humane treatment, they are placed in detention—a prison-like environment—where staff have not been sufficiently trained to deal with people suffering from the effects of war. Australia's mandatory detention centres are managed by a private company (GSL), which provides security to prisons, nuclear facilities and army bases. It is not expert or experienced in the provision of psychological support

to traumatized refugees who suffer from depression and other mental illnesses.[14]

Most observers agree that priority must be given to the root causes of people needing to flee their countries. Australia does contribute to famine relief and UN peace keeping initiatives, and is represented on human rights issues. Australia also has a very successful humanitarian resettlement program, which is regarded as significant by world standards. However, this program is only open to those people who obtain the necessary permissions to migrate. It does not assist those who need to flee in haste without their official identification, or for whom it is not practical to apply to the Australian Consulate in their homeland for permission to migrate, when to do so could put their lives in further jeopardy. Nonetheless, there are those who argue that mandatory detention is a wise and legitimate method to employ in regard to refugees, because along with our other migration laws it deters people from attempting to claim asylum in Australia. They state that strict border controls are important and maintain 'national security.'[15] The potential risk to national security does warrant the screening of entrants to the country for health checks, prior criminal acts and liaisons with banned organisations. However, it doesn't signify a need for such extremely severe border controls or for mandatory detention. This is particularly true when one considers that Australia admits millions of tourists without such scrutiny (4.8 million in 2004). The screening of tourists is far less insidious than that of migrants and asylum seekers, yet tourists are just as likely to commit crime. Indeed, a tourist has less of a vested interest in Australia than a migrant who hopes to make Australia his or her home. Human Rights and Equal Opportunity Commission (HREOC) figures show that the number of Australian-born prisoners in 2002 was 156 per 100,000, and overseas-born was 146 per 100,000.[16] Further, no asylum seeker who arrived by boat between 2001 and 2002 was assessed by ASIO as a security threat.[17] These figures prove that non-citizenship is not a pre-requisite to criminality, and dispels the 'need for national security' spin.

Contrary to the popular name-tag of 'unlawful non-citizen' now applied to asylum seekers in Australia, it is nonetheless legal to seek asylum in another country, under Article 14 of the UDHR, which states that everyone has the right to seek asylum from persecution.[18] To deny such people protection is a breach of basic human rights, especially when one considers that 9 out of 10 unauthorised arrivals in Australia during 2002–2003 were granted refugee status and 92.8 per cent of Iraqi asylum

seeker children between 1999 and 2003 were eventually found to be genuine refugees.[19] Based on these figures, the initial assumption should be that an asylum seeker is a genuine refugee. Therefore, mandatory detention of asylum seekers is out of proportion to the risk that asylum seekers pose, and is a violation of their fundamental human right to life and liberty.

Endnotes

1 United Nations, (1948), '*Universal Declaration of Human Rights*', http://www.un.org/Overview/rights.html, [Accessed 09 August 2007]; Office of the High Commissioner for Human Rights (OHCHR), '*Convention Relating to the Status of Refugees*', 1954, http://www.unhchr.ch/html/menu3/b/o_c_ref.htm [Accessed 20 August 2007]. This convention was created by the UN General Assembly in 1950 and came into force in 1954. Its intention is to protect the rights and freedoms of refugees.

2 Gleeson, in M. Bagaric, K. Boyd, P. Dimopoulos, S. Tongue and J. Vrachnas, *Migration and Refugee Law in Australia: Cases and Commentary*, Cambridge University Press, Melbourne, 2007, 467.

3 M. Crock, *Protection or Punishment: The Detention of Asylum Seekers in Australia*, The Federation Press, Sydney, 1993, 42. This book was a project of the Coalition for the Asylum-Seekers, which was formed in 1993 by a range of organizations and individuals sharing a concern for the welfare of refugee claimants.

4 Amnesty International, 'The impact of indefinite detention: the case to change Australia's mandatory detention regime,' 2005. http://web.amnesty.org/library/index/engasa120012005 [Accessed 20 & 23 August 2007]. This report assesses Australia's policy of mandatory detention, in particular the effect that an indefinite period of detention can have on the health of asylum seekers. It suggests alternative measures which would "bring Australia's treatment of refugees and asylum seekers into line with its international obligations".

5 D. Silove, Z. Steel and R. Mollica, 'Detention of asylum seekers: assault on health, human rights, and social development', *The Lancet*, 357, 5 May 2001, 1436-1437. This article criticises Australia's policy of mandatory detention and includes a case study written by a doctor who is a former detainee. It looks at the negative effect that detention has on the health of detainees and provides possible alternatives.

6 S. Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection?',' *International Journal of Refugee Law*, 8(3-4), September 2006, 696-721. Kneebone's article looks at whether Australia's Pacific Solution provides effective protection to asylum seekers and concludes that effective protection is not provided, in particular in relation to processing arrangements.

7 Crock, *op cit.*, 57.

8 OHCHR, op cit., Article 33.

9 Amnesty International Australia, Submission to the Senate Legal and Constitutional Legislation Committee, 2006, 7-8. http://www.amnesty.org.au/__data/assets/pdf_file/30834/AIA_Subn_unaut-horisedarrivals_220506FINAL.pdf, [Accessed 01 August 2007]. This was Amnesty's submission against the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, which subsequently was not passed by Parliament. The submission provides a strong case against mandatory detention, based on various human rights grounds.

10 UNESCO, 1948.

11 Amnesty International, *op cit.*, 2005.

12 Sultan, cited in Silove et al., op cit., 1436.

13 D. Silove and Z. Steel, 'The mental health implications of detaining asylum seekers', *MJA—The Medical Journal of Australia*, 175, 2001, 596-599. The authors discuss the effect that detention has on asylum seekers who have previously been exposed to trauma or torture. It provides statistics to support the authors claims that detention may exacerbate the poor mental condition of detainees.

14 Human Rights & Equal Opportunity Commission (HREOC), 'Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention', Report No. 35, 2006. http://www.humanrights.gov.au/legal/hreoca_reports/hrc_report_35.html, [Accessed 01 September 2007]. This report is the result of an investigation into GSL's treatment of a detainee in Villawood Detention Centre. The report found that GSL had violated the complainant's human rights.

15 Bagaric et al., *op cit.*, 23.

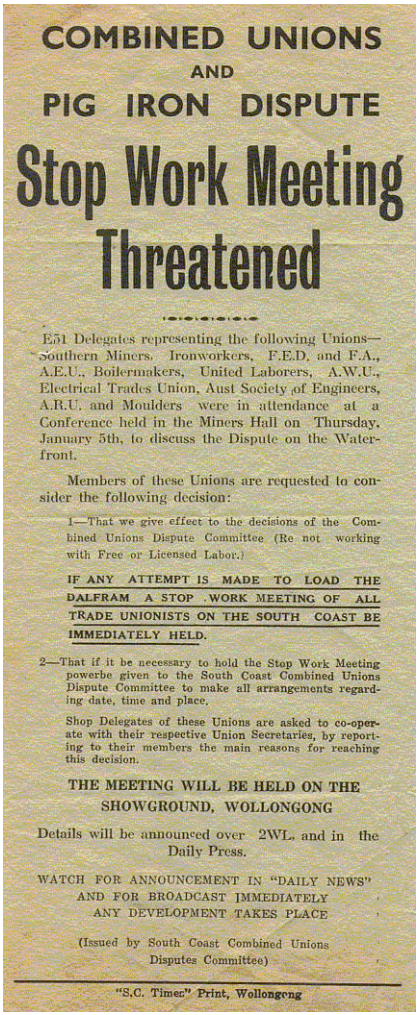
16 Human Rights & Equal Opportunity Commission (HREOC), *Some Questions and Answers about Refugees, Migrants and Indigenous Peoples in Australia, face the facts*, HREOC, Sydney, August 2005. Issued to celebrate the 30th Anniversary of the Racial Discrimination Act 1975, this edition draws on laws made by Parliaments, government policies, statistics collected by the Australian Bureau of Statistics, and academic research.

17 Richardson, cited in V. Lesnie, *op cit.*, 3

18 P. Christie and R. Sidhu, 'Governmentality and 'fearless speech': framing the education of asylum seeker and refugee children in Australia,' *Oxford Review of Education*, 32(4), September 2006, 450-465. The article considers mandatory detention and the provision of education to children in detention centres in Australia. It explores the ethics of the 'repressive and violent practices' that occur in detention facilities.

19 DIMIA, cited in V. Lesnie, *A Last Resort? National Inquiry into Children in Immigration Detention*, Human Rights and Equal Opportunity Commission, Sydney, 2004, 3. This report arose out of an investigation into Australia's treatment of children held in

immigration detention and concluded that the mandatory, indefinite detention of children had resulted in breaches of the children's fundamental human rights. C.f. Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), *Managing the Border: Immigration Compliance 2004-05 edition*, [Accessed 23/08/07]. http://www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-introduction.pdf (Accessed 23/08/07). *Managing the Border* is a collection of the department's statistics and information on border security.



COMBINED UNIONS
AND
PIG IRON DISPUTE

Stop Work Meeting Threatened

E51 Delegates representing the following Unions—Southern Miners, Ironworkers, F.E.D. and F.A., A.E.U., Boilermakers, United Laborers, A.W.U., Electrical Trades Union, Aust Society of Engineers, A.R.U. and Moulders were in attendance at a Conference held in the Miners Hall on Thursday, January 5th, to discuss the Dispute on the Waterfront.

Members of these Unions are requested to consider the following decision:

1—That we give effect to the decisions of the Combined Unions Dispute Committee (Re not working with Free or Licensed Labor.)

IF ANY ATTEMPT IS MADE TO LOAD THE DALFRAM A STOP WORK MEETING OF ALL TRADE UNIONISTS ON THE SOUTH COAST BE IMMEDIATELY HELD.

2—That if it be necessary to hold the Stop Work Meeting powerbe given to the South Coast Combined Unions Dispute Committee to make all arrangements regarding date, time and place.

Shop Delegates of these Unions are asked to co-operate with their respective Union Secretaries, by reporting to their members the main reasons for reaching this decision.

THE MEETING WILL BE HELD ON THE SHOWGROUND, WOLLONGONG

Details will be announced over 2WL and in the Daily Press.

WATCH FOR ANNOUNCEMENT IN "DAILY NEWS" AND FOR BROADCAST IMMEDIATELY ANY DEVELOPMENT TAKES PLACE

(Issued by South Coast Combined Unions Disputes Committee)

"S.C. Times" Print, Wollongong