

Australian Human Rights Commission

2009

Immigration detention and offshore processing on Christmas Island

Summary and Recommendations

(a full copy of the report can be accessed at:

http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s2)

1 Introduction

This report contains a summary of observations by the Australian Human Rights Commission (the Commission) following its July 2009 visit to Australia's immigration detention facilities on Christmas Island. It follows the Commission's 2006, 2007 and 2008 annual reports on inspections of immigration detention facilities.^[1]

The Commission provided an advance copy of this report to the Department of Immigration and Citizenship (DIAC). Their response is available on the Commission's website at www.humanrights.gov.au/human_rights/immigration/idc2009_xmas_island_response.html.

2 Summaryⁱ

In early 2008, the Commission commended the Australian Government for ending the so-called 'Pacific solution' by closing the offshore immigration detention centres on Nauru and Manus Island. Since then, the government has initiated further positive reforms, in particular the July 2008 announcement of 'New Directions' for Australia's immigration detention system.^[2]

However, despite these positive changes, the Commission has ongoing concerns – one of the most critical being the mandatory detention and offshore processing of asylum seekers on Christmas Island.

While there are clearly significant efforts being put into the detention and offshore processing system on Christmas Island, those efforts cannot overcome the fundamental problems with the system itself. The Commission's major concerns can be summarised as follows:

Excision and offshore processing

- Asylum seekers who arrive in excised offshore places such as Christmas Island are barred from the refugee status determination system that applies on the mainland under Australian law. Instead, they go through a 'non-statutory' process governed by guidelines that are not legally binding. They have no access to the Refugee Review Tribunal and very limited access to the Australian courts. They must rely on a non-compellable and non-reviewable Ministerial discretion to be allowed to apply for a protection visa.

Mandatory detention, without judicial oversight

- Asylum seekers (including children) who arrive by boat without a valid visa in an excised offshore place are mandatorily detained on Christmas Island despite the fact that the Migration Act does not require this. Further, the *Migration Act 1958* (Cth) (Migration Act) purports to bar them from challenging the lawfulness of their detention in the Australian courts.^[3]

Detention of unaccompanied minors and families with children

- Some children (including unaccompanied children) are detained in a closed immigration detention facility on Christmas Island – the ‘construction camp’. The Commission considers this a concerning regression from the 2005 changes to the Migration Act which affirmed the principle that children should only be detained as a last resort.
- There is a conflict of interest created by having the Minister for Immigration and Citizenship or DIAC officers act as the legal guardian for unaccompanied minors detained on Christmas Island. There is also a lack of clarity about responsibilities and procedures relating to child welfare and protection for children in immigration detention on the island.

Detention in a small, remote community

- Asylum seekers on Christmas Island are detained in a small community in a remote location where their access to appropriate services including health and mental health care, legal advice, cultural and religious support, and community-based advocacy and support networks is more limited than it would be on the mainland.
- The remote location and limited facilities and infrastructure on Christmas Island make it a difficult place in which to ensure implementation of some key aspects of the government’s New Directions – in particular the intention to use immigration detention centres only as a last resort, and the presumption that unauthorised arrivals will be released into the community once their health, identity and security checks are completed. The shortage of community-based accommodation appears to be preventing the release of some detainees from closed detention facilities into community detention.
- The remote location of Christmas Island makes the immigration detention operations there less visible and transparent to the Australian public, and less accessible for external scrutiny bodies.

Conditions and treatment of detainees

- The immigration detention facilities on Christmas Island are not appropriate for detaining asylum seekers, particularly those with a background of torture or trauma. The Christmas Island Immigration Detention Centre (IDC) is a high security detention centre that looks like a prison. The construction camp facility is not appropriate for unaccompanied minors or families with children.
- While some detainees on Christmas Island expressed positive views about their treatment, others expressed frustration about the restrictions placed on them during the initial ‘separation detention’ phase, the length of time they had been detained, their lack of access to external excursions, and difficulties accessing interpreters and translated documents.

Under the Refugee Convention, asylum seekers should not be penalised because of their method of arrival. Regardless of how or where they arrive in Australia, all people are entitled to protection of their fundamental human rights, including the right to seek asylum.

The excision and offshore processing regime establishes a two-tiered system for determining refugee status. Asylum seekers who arrive in excised offshore places such as Christmas Island have fewer legal safeguards than those who arrive on the mainland. In the Commission's view this undermines the core principles of the Refugee Convention, jeopardises asylum seekers' human rights and increases the risk that a refugee may be sent back to a place where their life or freedom would be threatened.

Further, the policy of detaining all unauthorised boat arrivals in a place as small and remote as Christmas Island restricts asylum seekers' access to essential services and support networks, and limits the ability of the Australian Government to ensure that those people are treated in accordance with key aspects of its own New Directions policy.

The Commission therefore reiterates its past recommendations that the provisions of the Migration Act relating to excised offshore places should be repealed; people should not be held in immigration detention on Christmas Island; and all unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

3 Recommendations

Recommendation 1: The Australian Government should repeal the provisions of the Migration Act relating to excised offshore places.

Recommendation 2: The Australian Government should abandon the policy of processing some asylum claims through a non-statutory refugee status assessment process. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

Recommendation 3: The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention.

Recommendation 4: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, it should abolish the policy of mandatorily detaining all unauthorised boat arrivals on the island. The Migration Act does not require detention in excised offshore places.

Recommendation 5: Section 494AA of the Migration Act, which bars certain legal proceedings in relation to offshore entry persons, should be repealed. The Migration Act should be amended to accord with international law by requiring that a decision to detain a person, or a decision to continue a person's detention, is subject to prompt review by a court.^[4]

Recommendation 6: Legislation should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based

on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

Recommendation 7: The Australian Government should accede to the *Optional Protocol to the Convention against Torture* and establish an independent National Preventive Mechanism to conduct regular inspections of all places of detention. This should include all immigration detention facilities, including those located in excised offshore places.

Recommendation 8: If the Australian Government intends to continue the practice of holding children in immigration detention on Christmas Island, children should be accommodated with their family members in community-based accommodation. They should not be detained in the construction camp immigration detention facility, the secure compound of the Phosphate Hill immigration detention facility, or the Christmas Island IDC.

Recommendation 9: The Australian Government should implement the outstanding recommendations made by the Commission in the report of its national inquiry into children in immigration detention, *A last resort*.^[51] These include that Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the new laws should incorporate the following minimum features:

- There should be a presumption against the detention of children for immigration purposes.
- A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- All courts and independent tribunals should be guided by the following principles:
 - detention of children must be a measure of last resort and for the shortest appropriate period of time
 - the best interests of the child must be a primary consideration
 - the preservation of family unity
 - special protection and assistance for unaccompanied children.

Recommendation 10: If the Australian Government intends to continue the practice of holding children in immigration detention on Christmas Island it should, as a matter of priority:

- clarify the applicable laws and jurisdiction of relevant state and federal bodies
- clarify through formal Memoranda of Understanding the respective roles and responsibilities of state and federal authorities with regard to the welfare and protection of children in all forms of immigration detention on Christmas Island
- clearly communicate these roles and responsibilities to all relevant state and federal authorities, and to unaccompanied minors and their carers or representatives
- ensure that there are clear policies and procedures in place regarding child welfare and protection concerns that may arise in respect of children in immigration detention on Christmas Island, and communicate these policies and procedures to all relevant staff.

Recommendation 11: The Australian Government should, as a matter of priority, implement the recommendations made by the Commission in *A last resort* that:

- Australia's laws should be amended so that the Minister for Immigration and Citizenship is no longer the legal guardian of unaccompanied children.
- An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

Recommendation 12: If the Australian Government intends to continue to use the Christmas Island IDC, it should implement the recent recommendation of the Joint Standing Committee on Migration that all caged walkways, perspex barriers, and electrified fencing be removed and replaced with more appropriate security infrastructure.^[6]

Recommendation 13: DIAC should ensure that all immigration detainees on Christmas Island, upon entering detention, are provided with up-to-date induction materials with information on:

- how to request an interpreter, including the phone number for the Translating and Interpreting Service (TIS)
- how to lodge a complaint with DIAC or the detention service provider, and how soon that complaint will be responded to. It should include contact phone numbers so that detainees do not have to rely solely on submitting a written complaint or request form
- how to lodge a complaint with the Commonwealth Ombudsman or the Australian Human Rights Commission. Current contact details, including phone and fax numbers, should be included
- current contact details for the local police, including a phone number
- what medical, dental and mental health services are available to detainees, and how a detainee can access those services
- how to request an external excursion
- what facilities are available for religious purposes
- contact details for Legal Aid, the United Nations High Commissioner for Refugees (UNHCR), Australian Red Cross, major refugee and asylum seeker information and advice groups, and Immigration Advice and Application Assistance Scheme (IAAAS) providers.

These induction materials should be translated into the main languages spoken by the detainee population. Each detainee should be provided with a copy in a language they can understand. If this is not possible, or a detainee cannot read, an interpreter should be provided in person to go through the materials with the detainee in their preferred language.

Recommendation 14: DIAC should ensure that all immigration detainees are provided with clear information on their arrival in immigration detention informing them of:

- their right to seek asylum
- their right to access independent legal advice and assistance
- the scope of the IAAAS assistance that will be provided to them
- the non-statutory refugee status assessment process, including the steps in the process and the approximate estimated timeframes for each of those steps. This should include information about what will be expected of the detainee during each step in the

process, and who will make the decision at each step. It should also clearly indicate any timeframes that detainees are expected to comply with.

While this information may initially be provided verbally, detainees should also be provided with a written copy in a language they can understand. If this is not possible, or a detainee cannot read, an interpreter should be provided in person to go through the written information with the detainee in their preferred language.

Recommendation 15: If DIAC intends to continue to use the separation detention system, it should ensure that all detainees are able to:

- make an initial phone call to contact their family members
- access communication facilities if they wish to contact a lawyer or migration agent.

DIAC should consider allowing detainees to have more regular communication with family members while they are in separation detention.

Recommendation 16: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees are provided with adequate access to phones, and that detainees can make and receive phone calls in privacy.

Recommendation 17: Wherever possible, DIAC should ensure that official letters and documents are provided to a detainee in a language the detainee can understand. Where this is not possible, the detainee should be offered the assistance of an interpreter to translate the contents of the letter or document. This should include documents relating to decisions, and reasons for decisions, at the primary and independent review stages of the non-statutory refugee status assessment process for offshore entry persons; and the primary and Refugee Review Tribunal stages of the refugee status determination system for detainees who are not offshore entry persons.

Recommendation 18: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that detainees on the island are provided with access to appropriate health and mental health care services. These should be no less than the services available to detainees on the mainland.

Recommendation 19: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees, including those at the construction camp, are provided with a range of recreational facilities and activities. All detention facilities should have open grassy space for sports and recreation.

Recommendation 20: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that:

- detainees have access to appropriate educational activities, including ESL classes
- each detention facility has an adequate supply of reading materials in the principal languages spoken by detainees.

Recommendation 21: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should:

This summary and the following recommendations has been taken verbatim from the Australian Human Rights Commission Report and has been provided on this website with the permission of the Commission.

- adopt minimum standards for the conduct of regular external excursions from immigration detention facilities, including for detainees in separation detention
- include these standards in the contract with the detention service provider
- monitor compliance with these standards on an ongoing basis and take appropriate remedial action when they are not being complied with
- ensure that the detention service provider is allocated sufficient resources to provide escorts for regular external excursions.

Recommendation 22: If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees are provided with access to regular religious services conducted by qualified religious representatives.

^[1] The Commission's immigration detention inspection reports are available on the Commission's website at http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html#9_4.

^[2] See C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 27 July 2009).

^[3] Section 494AA(1)(c) of the Migration Act states that: 'The following proceedings against the Commonwealth may not be instituted or continued in any court: (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen'. Note, however, that section 494AA(3) states that nothing in section 494AA is intended to affect the jurisdiction of the High Court under section 75 of the Constitution. For further discussion of the High Court's original jurisdiction under section 75 of the Constitution, see note 48 below.

^[4] To comply with article 9(4) of the ICCPR, the court must have the power to order the person's release if their detention is not lawful. The lawfulness of their detention is not limited to domestic legality – it includes whether the detention is compatible with the requirements of article 9(1) of the ICCPR. See, for example, United Nations Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.5. At <http://www.unhcr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument> (viewed 31 August 2009).

^[5] Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004) (A last resort). At http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf (viewed 25 September 2009).

^[6] Joint Standing Committee on Migration, *Immigration detention in Australia: Facilities, services and transparency* (2009), p 57. At <http://www.aph.gov.au/house/committee/MIG/detention/report3/fullreport.pdf> (viewed 25 September 2009).