

Twenty Years of Mandatory Detention: The Anatomy of a Failed Policy

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Abstract

The recent parliamentary furore over boat arrivals could be taken as further evidence of irreconcilable difference between the two main parties on how best to manage Australia's borders. The Prime Minister's and the Leader of the Opposition's condemnation of each other's policies on asylum seekers supports this reading. Yet despite the obvious differences in their respective 'solutions,' and despite the apparent lack of bipartisan goodwill, closer inspection suggests that the differences are more ones of form rather than substance. A bipartisan consensus does exist on the fundamentals of Australia's border protection regime. Its key tenets include the differential treatment of asylum seekers arriving by boat, the desirability of off-shore processing, and the necessity of mandatory detention. Of these three pillars of the bipartisan consensus, it is mandatory detention that has the deepest roots, chronologically and ideologically, and that is most obdurately embraced by the leaderships of both Labor and the Coalition.

Paul Keating's Labor government effectively established mandatory detention through a legislative amendment on 5 May, 1992. In the wake of increased boat arrivals beginning in November 1989, the public perception of a migration 'control crisis' increased significantly (Phillips and Spinks 2012). The Coalition exploited and contributed to this perception through its vocal criticism of the government's leniency towards individuals 'abusing Australian generosity.' The Department of Immigration¹ responded to the increased number of boat arrivals

¹ For more clarity the article refers to Australia's Department of Immigration, which has experienced a number of name changes over time (currently it is the Department of Immigration and Citizenship), as the 'Department of Immigration'.

by using what were at that time discretionary powers to detain boat people. As a result, several detainees applied for judicial review of their detention, claiming that it was unlawful because it punished individuals who had committed no crime. The Federal Court was due to hand down its judgement on 7 May, 1992, but was pre-empted by Labor's amendment to the Migration Act, which was supported by the Coalition. The amendment required the judicially non-reviewable detention of 'designated persons' for a maximum of 273 days. The amendment was later upheld by the High Court, and the mandatory detention of designated persons was born. Labor's Minister for immigration, Gerry Hand, made it clear that these designated persons were boat arrivals (*Hansard* 1992, 2370). Mandatory detention was seen to be a significant disincentive to asylum seekers arriving on Australia's shores by boat. The effect, it was implied, would be to arrest the increase in asylum seeker numbers and re-assert government control over Australia's borders. These two rationales – deterrence and border control – would remain central tropes in the repertoire of political defenders of mandatory detention for the next two decades.

In analysing these issues, this paper does two things. In the first part we provide an overview of the past 20 years of mandatory detention, identifying the key political milestones in the development of the policy by Labor and Coalition governments. Although we cannot be exhaustive, several recurring themes are brought into sharp relief. These include the rhetoric of border control and deterrence; Labor and Coalition Governments' 'micro-management approach to refugee protection' with its repeated assertion of executive prerogatives in the face of judicial interference (Crock 2004, 60); the failure of government oversight of detention management; and 'on-the-run' restrictive reforms in response to successive moral panics about boat arrivals (see Hodge and O'Carroll 2006, 23-26). In the second part of the paper, we argue that the policy has been an abject failure both in terms of its publicly articulated rationales and for several additional reasons that are briefly outlined.

Twenty Years of Mandatory Detention: An Overview

While 5 May 1992 is rightly remembered as the day that the Keating Labor Government introduced mandatory detention, the roots of the policy can be located in the unravelling of the

earlier model in which Department of Immigration officials had significant discretion to decide ‘who comes to Australia and the circumstances under which they come,’ to paraphrase former Prime Minister John Howard’s (in)famous remark. Under provisions of the original Migration Act 1958, an immigrant who was not granted an entry permit was a ‘prohibited immigrant.’ A ‘prescribed authority’ could, at their discretion, detain them for seven days, with possible extensions (section 38) (Millbank 2001). This discretionary model came under increased pressure from the late 1970s.

Initially, there were two principal developments that brought pressure to bear on the old, discretionary model. On the one hand, a developing net of institutions monitoring administrative decision-making reported on the seemingly arbitrary character of many individual decisions at entry, and demanded the introduction of a more prescriptive, statutory framework in lieu of the Department’s discretionary practices (Crock and Berg 2011, 116-121). On the other hand, increasing numbers of persons who had entered Australia lawfully did not leave the country at the expiration of their visa. Post-entry surveillance to detect ‘overstayers’ was limited, and it was relatively easy to apply for and be granted a further visa (Hawkins 1991, 122-125). Both of these developments were occurring in a context of deep economic recession, coupled with the first wave of boat arrivals from Indo-China (from 1976-1981), which provided fertile ground for those agitating to tighten immigration and refugee policies. Consequently, in 1981, section 6 of the Migration Act was modified to narrow the criteria under which permanent residence could be granted after entry. Nevertheless, the 1981 reform still allowed applications for permanent residence on ‘humanitarian or compassionate grounds’. The exact meaning of this expression became the terrain for lengthy battles of interpretation between the Department of Immigration on the one side, and the Federal Court and the High Court on the other. In a number of landmark cases, the courts expanded the reach of ‘humanitarian and compassionate grounds’ further than the Department had expected, raising the spectre of judicial activism in the area of migration policy (Crock 1996).

A more comprehensive reform of the Migration Act occurred 1989, explicitly adopted to reduce court intrusion into the field of entry control, making the grounds for all classes of visa application more explicit, narrow and prescriptive. Ironically, the Department was here losing

some of its discretionary powers, in the context of a reform that would supposedly restore its unchallenged primacy in terms of decision-making (Cronin 1993). The Migration Amendment Act 1989 specified that anyone suspected of being an ‘illegal entrant’ *could* be arrested and detained, but did not mandate it. Detention was thus, in essence, still discretionary, not mandatory.

This would change over the next few years, as the numbers of boat arrivals and ‘overstayers’ increased, thus increasing the public perception of a ‘control crisis’ around immigration and border protection. In the aftermath of the *Tien An Men* square events in Beijing in June 1989, Prime Minister Bob Hawke stated that no Chinese national would have to return to persecution. Several thousand Chinese nationals with expired student visas applied for permanent residence on humanitarian grounds (JSCMR 1992, 186-190). The increased caseload of humanitarian applications created a logistical challenge for the Department, but also a regulatory and political challenge for the government, which increasingly looked to transition from a personalised model of decision making to a legislation-based model. As a result, the possibility of applying for permanent residence on the basis of humanitarian and compassionate grounds was progressively closed down from 1989 and eventually repealed altogether in 1991.

Meanwhile, the first boat people claiming refugee status since 1983 arrived on Australia’s shores in November 1989. Between then and January 1994 18 boats carrying 735 people (mainly from Cambodia) would arrive (Phillips and Spinks 2012, 2-4). The Department used its discretion to detain them, and processing times increased. Given the growing length of detention and the continuation of boat arrivals, the population of detained boat people also increased, reaching 478 by June 1992. The Keating government responded in 1991 by establishing the first immigration detention centre (IDC) specifically earmarked for boat people, at a disused mining camp at Port Hedland, Western Australia.

As already intimated in our introduction, in these circumstances several detainees applied for judicial review of their detention. The Federal Court ruling of their case was pre-empted by the legislative amendment to the Migration Act, which effectively introduced mandatory detention on 5 May 1992. We need not revisit the circumstances and detail of the amended legislation, but

it is worthwhile emphasising two points. First, the amended legislation was aimed, as the then Minister for Immigration, Gerry Hand, made clear, at ‘a specific class of persons’ – boat people. Second, it was initially intended as an interim measure ‘designed to address only the pressing requirements of the current situation’ (*Hansard* 1992, 2370). Yet the political appetites of Labor and Coalition politicians, and that of the Australian public, would soon move this targeted and circumscribed reform in more expansive directions.

A further amendment to the Migration Act, introduced into Parliament in November 1992 but not taking effect until September 1994, expanded mandatory detention of all ‘unlawful non-citizen’ –that is non-citizens without a valid visa. The amendment also introduced charges to be paid by immigration detainees upon release, and removed the detention limit of 273 days. Still, unlawful non-citizens who had previously been lawfully in Australia were eligible for a bridging visa, while ‘unauthorised border arrivals’ were not (Crock and Berg 2011, 482-486). That is, boat people continued to receive differential treatment to that of other unlawful non-citizens. The same year, the scope of appeal for judicial review of migration and refugee decisions at the Federal Court was considerably restricted and a mechanism of administrative appeal of refugee decisions (the Refugee Review Tribunal) was finally established (Crock 1996). As with the introduction of judicially non-reviewable immigration detention, the motivation for establishing a layer of administrative appeals for refugees claimants was largely to restrict the power of the courts, yet another expression of the government’s ‘micro-management approach to refugee protection’ (Crock 2004, 60).

The government’s micro-management, however, did not extend to closely monitoring the management and human rights of detainees. The Human Rights Commission, for example, noted already in the early 1980s that the division of responsibility for detainees at the Villawood IDC between the Department of Immigration and the service provider running the centre, the Australian Protective Services (a Commonwealth agency) was not well-defined. This resulted in management problems and breaches of the detainees’ human rights (HRC 1983, 3). Similar criticism was made of the management of the Port Hedland IDC during a 1994 parliamentary inquiry into the detention of asylum seekers (JSCM 1994). Many submissions criticised the length of detention, deficient medical care, lack of staff training, poor access to legal services

due to the centre's remoteness, and lack of education for both adults and children, and thus demanded that the IDC be decommissioned. Despite these criticisms, support for mandatory detention remained bipartisan as John Howard's Coalition came into government in March 1996.

Mandatory detention under the Howard government

Initially, the Howard Government's stance on mandatory detention was in essential respects the same as that of Labor. The first major change occurred in 1998 when the management of IDCs was privatised. The management of IDCs was transferred to Australasian Correctional Management (ACM), with the objective being to 'deliver quality detention services with ongoing cost reduction' (ANAO 2004, 13). The agreement did not specify what the Department would do if ACM was unable to meet this objective, and nor did it specify that immigration detention was administrative rather than punitive.

The effort to control costs through privatization was subsequently stymied by the unprecedented spike in boat people arrivals claiming asylum at the end of the 1990s. These increased from 200 in 1998 to 2,939 in 2000 (York 2003), making a mockery of the claim that mandatory detention was or is a disincentive to boat arrival asylum seekers. Most were fleeing Iraq and Afghanistan; countries internationally acknowledged as the points of origin for significant levels of forced migration (DIMIA 1999, 85).² Regardless, the Howard government kept all 'unlawful boat arrivals' in detention until resolution of their claims. This resulted in a considerable increase of the population in IDCs, from 693 in 1995-1996 to 7477 in 1999-2000 (Phillips and Spinks 2012: 34). New remote immigration detention centres were opened at Curtin (September 1999) and Woomera (November 1999). Yet there were quickly more detainees than the centres were able to accommodate (Mitchell 2011, 178-185). In response, and as a deterrent, the government introduced three-year Temporary Protection Visas (TPVs) for 'unauthorised arrivals' granted refugee status. TPV holders had to reapply for a refugee visa at the expiration of the three years, they were barred from welfare support usually accessible to refugees, and they had no right to

² Overall the number of asylum claims in Australia increased from 7,630 in 1995 to 9,450 in 1999 (UNHCR 2002, 113).

family reunion (Crock and Berg 2011, 341-435). Far from deterring boat people, however, the adoption of TPVs was followed by increasing numbers of women and children departing from transit country Indonesia, attempting to be reunited with husbands and fathers, as was since acknowledged by Department of Immigration Secretary Andrew Metcalfe.³

As is well-documented, the Howard government's anti-boat people agenda reached a climax when it refused a request from the captain of the Norwegian ship *MV Tampa* to enter Australian waters and disembark 433 asylum seekers who had been rescued from their sinking ship (Marr and Wilkinson 2004). The Government's hardline response proved hugely popular with the Australian public, and turned around its political fortunes just months before the 2001 federal election. An AC Nielson poll published in the *Sydney Morning Herald* on 4 September reported that 77 per cent of respondents supported the government's refusal to allow the asylum seekers into Australia, while 71 per cent agreed with a policy of indefinite detention for asylum seekers (cited in Burke 2008, 208). In this political context, reforms were adopted to further deter boat people from applying for refugee status in Australia, and to increase the entry control prerogative of the executive. Maritime interdiction practices were enhanced and new legislation created a maritime zone in which boat people were barred from applying for a visa in Australia (the excision zone). Applications for refugee status made in the excision zone were still to be processed, but a negative decision could not be appealed at the RRT or courts. Boat people were now temporarily held on Christmas Island in makeshift accommodation, and then sent to Australia's 'offshore processing centres' (OPCs) in Nauru and Papua New Guinea. Hopelessly wedged on the issue, the Labor opposition supported the government's new measures. Under this 'Pacific Solution,' many in the OPC population spent years in remote places with very limited contact with their families or lawyers (Oxfam 2007).

Roughly a year after the adoption of the Pacific Solution, the arrival of boat people in Australia's excision zone came to a halt. This resulted in a significant decline of the OPC population in 2003-2004, and a considerable decline of the proportion of boat people held in mainland

³ See Metcalfe quoted in Philips and Spinks (2012, 9, footnote 44).

detention centres (from 3082 out of 9321 detainees in 2001/2002 to 1 out of 7970 detainees in 2004/2005) as increasing numbers of cases were resolved (Phillips and Spinks 2012, 35). The decline was portrayed by the Howard government as entirely due to its policy. Yet the decline of boat people arrivals was also coterminous with a global decline of asylum claims, confounding any straightforward causal account of the relationship between Howard's policies and the declining number of boat arrivals (Khosler 2011).

Long-term de facto detention in OPCs and on the mainland had a highly detrimental impact on the detainee population, and conditions in mainland IDCs considerably worsened from the late 1990s until the mid-2000s, especially in remote high security facilities such as Woomera, Curtin and Baxter. Monitoring institutions and lawyers were particularly concerned about the detrimental impact on the mental health of detainees of increasingly long detention, with the most critical issue being the detention of children (HREOC 2004). The failure to ensure the detainees' duty of care was, again, related to the vagueness of the obligations to which the detention service provider was bound.

The mistreatment of asylum seekers in detention in Australia and in OPCs constituted a catalyst for the development of a multi-layered refugee advocacy movement in Australia which, along with the efforts of Coalition backbenchers such as Petro Georgiou, brought pressure to bear on the Government's hitherto uncompromising stance on asylum seekers. The wrongful detention of permanent resident Cornelia Rau triggered the Palmer Inquiry, soon expanded to investigate the wrongful deportation of Australian citizen Vivien Solon. The report painted a picture of a shambolic detention policy and demanded significant reforms at the Department of Immigration to transform its 'culture' (Palmer 2005). Amidst the scandals, John Howard was even forced to admit that the immigration detention system had been 'one of the many failings of this government.' Howard pledged to liberalise the immigration detention system, and 'agreed to release families with children and to offer a new deal to long-term detainees and refugees on temporary visas' (Dodson and Kerr 2005, 1).

Although these changes were, at best, only imperfectly implemented, it is true that by the end of the Howard era significant institutional reforms had been adopted within the immigration bureaucracy. These reduced the risk that the mandatory detention regime would be embroiled in the scandals of the past. However, these changes, for the most, were not adopted in statutory law. The mandatory character of detention remained non-reviewable by courts, the detention centres were still privatised entities, and a differential detention and processing regime was still in place for unlawful non-citizens claiming asylum intercepted in Australia's excision zone. Thus the regime had not lost its toxic character of executive 'micro-management' in regards to refugee status determination for 'unauthorised arrivals', and nor had oversight over the management of detention facilities increased substantially.

Mandatory detention under the Rudd/Gillard government

Over the past five years, the statutory framework for mandatory detention and refugee status determination procedures has changed significantly. Some of these changes have been driven by the Labor government, others by the High Court. As in the past, however, the political fallout of an increase of boat people arrivals to Australia's territorial waters from 2010 played a major role in dampening progressive reforms and re-focusing the field on deterrence.

Progressive change was adopted early in Kevin Rudd's Prime Ministership. Temporary Protection Visas and the Pacific Solution came to an end in February 2008. Nonetheless, the 'excision zone' was maintained. All 'irregular maritime arrivals' (as 'unauthorised arrivals' were relabelled) intercepted in the excision zone would now be detained at detention facilities on Christmas Island. Boat people claiming asylum still had no access to an administrative review of negative decisions by the RRT. But as with people claiming asylum on the mainland, they were granted access to publicly funded legal advice (Philipps and Spinks 2012, 12).

In July 2008, Immigration Minister Chris Evans announced 'New Directions in Detention', an initiative said to embody seven core values (Evans 2008). Parliament's Joint Standing

Committee on Migration described Evans's seven values as a 'paradigm shift' (JSCM 2008: viii). The first two values stressed that mandatory detention is 'an essential component of strong border control' and supported 'the integrity of Australia's immigration program' (Evans 2008). These were partially in tension with the fifth value, which contended that detention 'is only to be used as a last resort, and for the shortest practicable time.' That is, there was now a presumption in favour of release from detention once necessary health, identity and security checks had been made. Furthermore, children should not be detained, and legal advice to detainees should be more readily available. A year later, the Migration Act was amended to abolish the charge that detainees were required to pay for their detention, and to nullify existing detention debt. Yet an amendment aiming to entrench the new detention values in statutory legislation – which in effect would have increased discretionary powers to ensure that detention remained a last resort – lapsed in a context of increased boat arrivals.⁴ Between 2008-09 and 2010-11, 11,042 boat people arrived in Australia (DIAC 2011, 183).

Once again, the increased number of boat arrivals drew a predictable response from both the government and the opposition. Not wanting to be politically wedged as they had been previously, Labor responded with a hardening of its position, with the rhetorical target now being people smugglers. The opposition, meanwhile, used the increased boat arrivals as proof that the government's policies were failing.⁵ Whatever the political ramifications, the increases triggered a renewed expansion of Australia's immigration detention network. The sharp increase of the population in detention centres soon replicated earlier difficulties, especially the lack of preparedness of IDC staff for the catastrophic impact of long-term detention on detainees. In its inquiry released in March 2012, Parliament's Joint Select Committee on Australia's Immigration Detention Network noted that while the provision of general health services had significantly improved, they had not improved for mental health services. This was not only attributed to a breach of duty of care by Serco, the new private management of the detention network, but also to the powerlessness felt by detainees who were left in the dark in regards to the outcome of their cases (JSCAIDN 2012, 45-102).

⁴ See for instance the reservations on this limited change by A Just Australia (2009).

⁵ See for instance the Coalition's dissenting report to the findings of the Joint Select Committee on Australia's Immigration Detention Network (JSCAIDN 2012, 219-297).

Continuing practical and political difficulties led the government to devise its own plans involving 'protection elsewhere.' In 2010 the Gillard government raised the possibility of establishing an offshore processing centre on East Timor as part of a regional framework. Before the specifics of the scheme could be defined it fell into disrepute, with East Timorese authorities showing little enthusiasm for it (AAP 2011a). In May 2011, Immigration Minister Chris Bowen suggested a 'Malaysian Solution', in the context of which 'offshore entry' asylum-seekers would be processed in Malaysia in exchange for an additional caseload of already assessed refugees ready to be resettled in Australia (Kelly 2011). Here, too, Malaysian authorities were at best ambivalent, although the UNHCR did give cautious support, which it had not done for the Pacific Solution (Donovan 2011). As it transpired, the plan was struck down by the High Court in a September 2011 decision. It judged that asylum seekers sent to Malaysia would be at risk of persecution given that the country had never ratified the Refugee Convention, and given that there was prima facie evidence of mistreatment of forced migrants in Malaysia (AAP 2011b).

A few months earlier, the High Court had taken another decision that would even more significantly jeopardise the attempted spatial and legal insulation of boat people seeking asylum. In August 2011, the Court decided that 'offshore entry persons' claiming asylum were entitled to the same refugee status determination procedures as asylum seekers on the mainland. This meant that in the case of an appeal of a negative primary decision, asylum claims would have to be reviewed by the Refugee Review Tribunal (Farouque 2011).

In the context of these court decisions, swelling numbers of boat arrivals, and overflowing detention centres, Immigration Minister Chris Bowen announced in November 2011 that he would be facilitating the release of asylum seekers into the community on bridging visas (Needham 2011). Although this was a decision driven principally by pragmatism, it appears to be a significant change in the pattern of restrictive decision-making routinely adopted over the past twenty years. Paradoxically, the recent Parliamentary stand-off about the form that off-shore processing should take may well contribute to a further pragmatic softening in the mandatory

detention regime. This could only be a positive thing given the failures of mandatory detention as a policy for the past two decades.

Mandatory Detention: A Failed Policy

In spite of its longevity, mandatory detention has been one of the more remarkable policy failures in Australia's political history. It has not succeeded in meeting its publicly-stated objectives, and nor has it conformed to Australia's human rights obligations under international law. It has unnecessarily cost tax payers billions of dollars that could have been more productively spent elsewhere, and it has coarsened and degraded Australia's public discourse and debate. But its most tragic failing has been its terrible impact on the lives of several generations of asylum seekers, who have been treated as depersonalised aliens deserving of detention, rather than as potential citizens who could make a positive contribution to the society in which they were seeking refuge.

As has been documented above, the most frequently repeated rationale for mandatory detention over the past 20 years has been deterrence and border control. In the earlier years of this period, it was the deterrence of boat people themselves that was foregrounded in the discursive repertoire of immigration bureaucrats and government and opposition proponents of mandatory detention. More recently, this has been coupled with an emphasis on the deterrence of 'people smugglers.' Taken together, the deterrence of boat people and people smugglers, embodied in Tony Abbott's slogan of 'stop the boats,' is part of a broader political rationale of *taking back* control of Australia's borders, where control has allegedly been lost or is at least under threat. As far back as 1990, a Joint Standing Committee on Migration Regulations report could note that '[t]he presence of illegal entrants has come, whether correctly or not, to symbolise the inability of governments to control their borders ...' (JSCMR 1990: 14). John Howard's politically masterful flourish that 'we will decide who comes to Australia and the circumstances under which they come,' crystallized perfectly this sense that asylum seeking boat arrivals represented nothing less than a grave threat to the integrity, and indeed sovereignty, of Australia's borders. This manifested what Anthony Burke (2008: 208) has aptly referred to as a 'securitization' of Australia's border politics. The permeability of Australia's borders demanded rectitude and decisive action by the government of the day, in order to send a 'clear message' to those who

would ‘jump the immigration queue’ and transgress Australia’s borders by boat. Part of Howard’s 2001 message of deterrence was of course the innovation of TPVs and off-shore processing, or what has been referred to as the Pacific Solution. But this form of deterrence was grounded in, grew out of, and was organically connected to the supposedly deterring effects of the prior establishment of mandatory detention. In many ways the Pacific Solution was tacit acknowledgement that mandatory detention had failed as a deterrent to asylum seeking boat arrivals, and that the stakes therefore had to be raised.

To establish that mandatory detention had and has the effect of deterring boat people from seeking asylum in Australia, it would be necessary, in the first instance, to demonstrate a systematic relationship between the policy of mandatory detention and a decline in the numbers of boat arrivals seeking asylum in Australia. To establish that such a policy is both a *necessary and sufficient* condition for deterring boat people asylum seekers, we would also need to identify a causal mechanism that could be isolated to explain why potential asylum seekers are deterred from entering and applying for asylum in Australia. Unfortunately for proponents of mandatory detention, neither of these conditions can be met.

As has been alluded to in the previous section, the relationship between mandatory detention and boat arrival asylum seekers is by no means systematic or uniform. While it is true that there was a decline of such asylum seekers in the mid-1990s, several years after the introduction of mandatory detention, by the late 1990s their numbers spiked to unprecedented levels. Between 1999 and 2001, for example, there were approximately 9500 asylum seekers who had arrived by boat (JSCM 2008: 3). These numbers would again decline drastically from 2003, but again sharply increase between 2009 and 2011, as mentioned earlier. Prima facie, then, it would appear that mandatory detention has little or no value as a deterrent. This view is supported by the UNHCR (2011), who argue that ‘detention is generally an extremely blunt instrument to counter irregular migration. There is no empirical evidence that the threat of being detained deters irregular migration or discourages people from seeking asylum.’ In a submission to the New Zealand Parliamentary Select on Immigration, which was considering proposed legislation to introduce mandatory detention into that country, the International Detention Coalition (2012) makes similar arguments. They cite research that shows that despite increasingly tough detention

policies around the world over the past 20 years, the numbers of irregular arrivals have actually increased rather than decreased. The same research suggests that asylum seekers are principally concerned with reaching a place of safety, have little understanding of the migration policies of receiving countries, and are often reliant on people smugglers for the choice of ultimate destination (IDC 2012: 7). Where they do have choice, they are more likely to choose destinations where they will be united with family and friends, rather than being influenced by policies such as mandatory detention. To sum up, there is no evidence that mandatory detention works as a deterrent.

In addition to failing as a deterrent, Australia's policy of mandatory detention fails the test of a raft of international legal statutes to which Australia is a signatory. These include, but are not limited to, the 1951 Geneva Convention Relating to the Status of Refugees; the Convention on the Rights of the Child (1990); the International Covenant on Civil and Political Rights (1966); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). Obviously we cannot here give an exhaustive legal analysis of mandatory detention's violations of international law. But a few emblematic examples are enough to adequately make the point.

The 1951 UN Refugee Convention, for example, defines a refugee as any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, unwilling to avail himself of protection of that country ... [and] is unwilling to return to it' [Section 1A (2)]. The important point here is that people are refugees not because they are declared to be refugees by a government, but because they meet the criteria set out in the Convention's definition. Such persons should not be detained or otherwise penalised because they entered a country without proper documentation, irrespective of the manner in which they entered [1951 Convention, 31 (1)]. Clearly, Australia's policy of mandatory detention is in violation of this convention, to which Australia became a signatory under the Menzies government 1954.

Similarly, mandatory detention has, until very recently, been in flagrant violation of the Convention on the Rights of the Child (1990). Articles 3(1), 22(1) and 37(c) of this Convention make it clear that children should not be detained or separated from their families or caregivers even for purposes of migration regulation. Rather, their best interests must be protected in accordance with the Convention. Detaining children behind razor wire, with or without their families, could only be interpreted as protecting their interests under the most Orwellian and cynical of readings.

Finally, the International Covenant on Civil and Political Rights (1966) makes it absolutely clear that persons detained by a state must be accorded due process before the law and have access to independent judicial review. That is, they must be able to challenge the lawfulness of their detention before an independent court [see articles 2(3), 9(1) and 9(4)]. As we have seen in our overview of mandatory detention, the very facts of its introduction from the outset compromised the capacities of the courts to use their discretion in making judgements about boat-arrival asylum seekers. Once mandatory detention was combined with offshore processing, the ability of asylum seekers to access lawyers, let alone independent judicial review, was all but extinguished.

We could go on and give many more examples of mandatory detention's contradictions with international law. But this would be to labour the point: mandatory detention is a failed policy that violates Australia's international legal obligations. It does so while having cost the country and its tax payers billions of dollars.

There is no single source that we are aware of where the overall monetary costs of mandatory detention since 1992 have been aggregated. However, several reports that analyse the costs of mandatory detention since 2000 (Bern et al., 2007; Edwards 2011; Ward 2011), when combined with more recent Australia National Audit Office (ANAO) data, indicate that the direct costs alone run to several billions of dollars, and that these costs have escalated rapidly in recent years. For example, Bernard Keane estimates that federal budget and ANAO documents reveal that Australian tax payers have spent \$2.4 billion on asylum seekers arriving by boat since 2000. This cost does not even include the hundreds of millions of dollars spent on border security. According to the ANAO, the cost of upgrading the Christmas Island facility has alone been \$517

million (Keane 2011). Former Secretary of the Department of Immigration, John Menadue (2011: 1), points out that budget forecasts for the 2011-2012 financial year suggest that \$709 million will be spent on asylum seeker detention and related costs, up from \$147million in the previous year.

These costs are all the more striking when compared to the costs of alternatives to mandatory detention, such as integrating asylum seekers into community housing while their claims are evaluated. A UNHCR report (Edwards 2011) suggests that the cost of detaining a single asylum seeker in an IDC is on average \$339 per day, compared to an upper end estimate of \$39 per day for community housing. This is a \$300 per day difference for a population where, on average, four out of every five will eventually be granted asylum in Australia. Needless to say, these direct costs do not even factor in the long-term indirect costs such as medical care for former asylum seekers who have been mentally traumatised by their experience of mandatory detention. A recent report conservatively calculated this cost as being an additional \$25,000 per trauma sufferer (Ward: 2011: 11-12).

The issue of asylum seeker trauma brings us to the final failing of mandatory detention – its unquestionably destructive impact on asylum seekers themselves, 80 per cent of whom will go on to be permanent residence in Australia. The evidence for the damaging effects of mandatory detention, especially long-term mandatory detention, is overwhelming and has been extensively documented in numerous reports down through the years (e.g., HREOC 2004; Coffey et al., 2010; Edwards 2011; Ward 2011; IDC 2012). A 2004 Human Rights and Equal Opportunity Commission (HREOC) inquiry into Children in Immigration Detention confirmed ‘the detrimental impact that long-term detention of children has on their mental health.’ Another medical study that examined the health records of 720 of the 7,375 people in Australian detention centres in the 2005-06 financial year, identified a ‘clear association between time in detention and rates of mental illness’ (Green and Eagar 2010: 70). Similarly, another Australian study concluded that there is ‘now a large body of research indicating that immigration detention causes asylum seekers psychological harm ...[including] high rates of depression and Post Traumatic Stress Disorder (PTSD) and that the extent of their mental ill health is correlated with the length of time spent in detention’ (Coffey et al., 2010: 2076). Four out of every five of these

persons with elevated rates of mental illness will of course go on to live in the Australian community and make demands on the Australian health system. Thus mandatory detention will not only have been a failing and a curse for these people personally, but it will have been a more fundamental collective failure with society wide impacts.

Mandatory detention has this year reached its twenty year milestone. Originally established as an interim measure for contingent legal and political reasons, a solution in search of a problem, it has long since become entrenched as the central pillar of a border protection regime that has bipartisan support. Yet it is a policy that has failed on every conceivable ground, save perhaps the callous calculus of short-term electoral advantage. Indeed, this is the main explanation for the policy's longevity. But in terms of deterrence, Australia's international legal obligations, monetary costs and the impact on asylum seekers, mandatory detention is the epitome of a failed policy. Its abolition would be a giant step forward in Australia's social and political life.

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