

THE END OF MANDATORY DETENTION?

GOVERNMENT HAS ANNOUNCED A FUNDAMENTAL CHANGE TO THE MANDATORY DETENTION POLICY BUT GIVEN A SEEMINGLY LACK OF PUBLICITY, WHAT DOES THIS CHANGE REALLY MEAN?

BY EMMA SWANN, HOLDING REDLICH

In his speech at the Australian National University on 29 July, Immigration and Citizenship Minister Chris Evans announced a new Cabinet-endorsed policy with regard to mandatory detention.

The Minister claimed that as a result of the new policy, “the current model of immigration detention is fundamentally overturned”.¹

Over the past decade, the mandatory detention of asylum seekers who reach Australia without the proper entry documents has evoked strong reactions from the public.

In 2001, Prime Minister John Howard won broad public approval for his refusal to allow the *Tampa*, with its 433 rescued asylum seekers into Australian waters.² Suggestions that the asylum seekers may be terrorists, and a renewed passion for national sovereignty, led many Australians to support the law of mandatory detention.

Conversely, the law has attracted ardent critics. The core of their complaint is that the deprivation of a person’s liberty is the ultimate penalty available to the Australian State, and should not be used against people who are merely seeking asylum.

Countless individuals and NGOs have branded the law as an embarrassment to our nation, while the UN Human Rights Committee found that Australia had, on 14 occasions involving immigration detention cases, breached the International Covenant on Civil and Political Rights.³

Given the controversial role of mandatory detention in recent public debate, it was surprising that this apparent “fundamental overturn” of immigration detention attracted such little media or public attention.

IT’S ONLY A CHANGE OF POLICY

It must be clear from the outset that this “fundamental overturn” has only occurred at the policy level.

There have been no changes to the *Migration Act* 1958 (Cth). However, this Cabinet-endorsed policy broadly supports two main themes.

First, that people are only meant to remain in detention after initial health and identity checks if they are a risk to the community. Second, asylum seekers who have exhausted all opportunities to show that they have a case for protection should be promptly removed from Australian territory.⁴

THE KEY “VALUES”

Minister Evans expanded on the first theme with the seven “key values” regarding future detention policy. These values are as follows:

1. Mandatory detention is an essential component of strong border control.
2. The following three groups are still subject to mandatory detention:
 - all unauthorised arrivals, for the purposes of health, identity and security checks;
 - unlawful non-citizens who pose unacceptable risks to the community; and



- unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
- 3. Children and where possible, their families, will not be detained in immigration detention centres.
- 4. Indefinite or arbitrary detention is not acceptable, and the length and conditions of detention, will be subject to regular review.
- 5. Detention is only to be used as a last resort and for the shortest practical time.
- 6. People in detention will be treated fairly and reasonably within the law.
- 7. Conditions of detention will ensure the inherent dignity of the human person.⁵

IMMIGRATION DEPARTMENT NOW HAS ONUS OF PROOF

The requirement of mandatory detention for those arriving without proper entry documents ranked as the number one value of this new policy. All asylum seekers (bar children), arriving without proper entry documents, will continue to be detained on a mandatory basis while initial health, identity and security checks are carried out. Following these checks, only those posing “unacceptable risks” to the community, or those who have repeatedly breached their visa conditions should continue to be detained.

While the policy is not exactly revolutionary, what is new is that the onus of proof with regard to detention has, at least

at the policy level, shifted to the Immigration Department. There is now a presumption that asylum seekers should stay in the community while their claim for asylum is being processed. The decision maker in the Department of Immigration and Citizenship now has to justify why the person should be detained. The key question is whether the person may be a “risk to the community”.

Risks to the community include asylum seekers with unknown identities, criminal or terrorist links, and those who have repeatedly failed to comply with their visa conditions.

DEPARTMENTAL REVIEW

The implementation of this new presumption against detention is to be monitored by regular departmental reviews. If in detention, a person’s case will be reviewed every three months by a senior department official to check that continuing detention is justified in accordance with the seven key “values”.

The Immigration Ombudsman is now to review cases after a person has been detained for six months. The current practice is for the Ombudsman to review a case after a person has been detained for two years.

PRACTICAL IMPACT OF THESE CHANGES

Asylum Seeker Resource Centre solicitor Maria Psihogios-Billington welcomes the changes, but was quick to point out that they were only changes to policy.

While the new presumption against detention was commendable, Ms Psihogios-Billington told the YLJ that “s189 of the *Migration Act* 1958 (Cth) still says that an unlawful non-citizen must be detained”.

Thus the presumption of detention of all people reaching Australia without the required entry documents remains in the Act.

Ms Psihogios-Billington said that the changes would have little beneficial effect for two of her clients who had recently arrived from Afghanistan on false documents. They had passed initial health checks but were likely to remain in detention until they could locate papers in Afghanistan which established their identity.

The Department was not proactively attempting to establish their identity and had effectively left it to them to locate and deliver the necessary paperwork. Their contacts in Afghanistan were too scared to go into conflict zones where the required documents were located, and the men were left to coordinate this difficult logistical task from detention, with email and telephone being the extent of their resources.

When asked how much longer they had to stay in detention, Ms Psihogios-Billington had to advise her clients that “until you get something which says that you are who you say you are . . . it could be a really long time”.

Ms Psihogios-Billington said that the new policy changes would be unlikely to significantly reduce their time in detention.

While the promise of three-monthly reviews by senior departmental officials could certainly assist to keep these new “values” fresh in the minds of department decision makers, the effectiveness of internal review in any organisation is generally questionable.

Ms Psihogios-Billington was certainly not convinced that internal reviews would have a significant effect on the way that cases were dealt with by the Department.

“How can we trust the Department to internally assess whether someone can come out of detention? We can’t rely on the Department to make an objective and appropriate assessment.”

While independent review will be provided on a more regular basis in the form of the Immigration Ombudsman, it is important to note that the Ombudsman can only make recommendations.⁶

THE LIBERAL PARTY'S RESPONSE

The main objection outlined by Shadow Minister for Immigration and Citizenship Senator Chris Ellison was that the policy could result in "hundreds of unlawful non-citizens disappearing into the community".⁷

He pointed out that there are currently 357 people in immigration detention in Australia, and that only six of these were unauthorised arrivals. This means that the vast majority of people in immigration detention had overstayed or breached their visa conditions. He suggested that these people could disappear into the community under Labor's new policy.

However, under the policy, only people who have passed health, identity and security checks, and are not determined to be a risk to the community or a flight concern, will be released from immigration detention. Therefore, the implication that hundreds of visa-breaching asylum seekers will be suddenly released into the community is a little misleading.

Ms Psihogios-Billington claimed that most undocumented arrivals could be safely managed in the community through regular reporting requirements.

This already occurs in Australia for asylum seekers who arrive with proper entry documents, and it currently happens in Sweden with undocumented arrivals.

"People know what's at stake, it takes just one breach and they're in detention, so there's a lot riding on them complying", Ms Psihogios-Billington said.

CONCLUSION

With the exception of the Liberal party, most individuals and organisations who have commented on the policy have commended the government on this new approach.

As Dr Mary Crock, Professor of Public Law, Sydney University said: "It's a phenomenal, fundamental change in attitude to immigration detention and the government is to be applauded for the move that it's made".⁸

However many commentators have also highlighted the limitations apparent with any change that remains at the policy level.

Ms Psihogios-Billington noted that a real barrier to change is that many of the Department decision makers who served the previous government remain in the Department today.

Thus changing attitudes in the government have not necessarily filtered down to those making the every-day decisions.

As Ms Psihogios-Billington claimed, "what you're really relying on is political goodwill and I believe that (at) the higher levels, it's there, I believe the Minister wants to do the right thing. On the ground, however, what the Minister doesn't know, he can't respond to or remedy, and that's where the problems still exist". ■

1. Evans, Chris "New directions in detention – restoring integrity to australia's immigration system" at <http://www.minister.immi.gov.au/media/speeches> Australian National University, Canberra, 29 July 2008.
2. Phillips, Janet & Millbank, Adrienne Research Note No 22 2003-04 "Protecting Australia's Borders" at <http://www.apf.gov.au/library/pubs/rn/2003-04/04rn22.htm> 24 November 2003.
3. Note 1 above.
4. Note 1 above.
5. Note 1 above.
6. Asylum Seeker Resource Centre "What the changes to mandatory detention really mean" at http://www.asrc.org.au/act_now/changes-to-mandatory-detention.html.
7. Ellison, Christopher "Labor announces a new relaxed approach to border security" at <http://www.liberal.org.au/news>, 29 July 2008.
8. Crock, Mary, "Government moves to soften immigration", Lateline, ABC 29 July 2008.

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