

The Other Long Term Detainees – what can be done?



Australia's detention centres now accommodate many people awaiting removal who have no realistic prospect of being sent to any other country. While the migration laws may make things complex, a simple guide to the human rights standards that are breached can be found by a quick reading of the Universal Declaration of Human Rights (<http://www.un.org/Overview/rights.html>).

The Cornelia Rau case has brought welcome attention to the situation of other people kept in immigration detention for long periods. For many years, widespread concern has been expressed about fundamental conflicts between the key principles of human rights and the operation of the Australian immigration detention system. This paper gives an overview of the current situation, and outlines the elements of a solution which could be swiftly implemented.

We do not believe that this case is an isolated one. The mistreatment of people in immigration detention is a chronic and systemic problem. It is a well documented principle that ignoring the basic rights of one group of people is the first step towards losing one's own rights.

In this paper, we outline:

1. How many long term detainees?
2. What solutions have been proposed and why?
3. Surely the long term detainees can just go home?
4. What does the High Court say?
5. Has the Government rejected our proposals?
6. What are some points raised by the Rau case?
7. What are the solutions, and the issues that the current inquiry won't address?
8. Who should be allies in the Parliament?

1. How many long term detainees?

Using figures from DIMIA, which oversees detention in Australia, and the International Organisation for Migration (IOM), which manages Nauru on DIMIA's behalf, some details of the long term detainees can be calculated.

The table below indicates the nationalities of those in detention at 2 February 2005 (figures dated 27 January for those on Nauru, but unchanged).

The table identifies 198 people who have been detained for over three years, recognised by their nationality as people who arrived by boats before December 2001. There are no publicly available statistics on the period of detention, and the three year milestone has been chosen purely because that is the period for those who arrived by boat, but who are still in detention. We are aware of some detainees who have been kept for much longer periods, and are concerned about any detention for immigration purposes for substantial periods without judicial review.

Summary of persons in immigration detention facilities (centres and RHPs) by nationality (excludes those at "other" facilities^) (includes Nauru)

Nationalities	Adult		Child		Total	3 yrs +
	Male	Female	Male	Female		
Afghanistan	58	2	3	3	66	66
Bangladesh	25	0	0	0	25	2
China, PR	177	48	6	8	239	
Fiji	26	11	3	2	42	
India	33	2	1	0	36	
Indonesia	29	9	4	3	45	
Iran	71	3	1	0	75	75
Iraq	31	2	0	0	33	33
Korea, South	19	15	1	1	36	
Malaysia	20	5	2	2	29	
Pakistan	19	0	0	0	19	1
Philippines	9	3	0	0	12	
Sri Lanka	21	0	0	0	21	21
Tonga	9	5	9	9	32	
Vietnam	43	15	6	4	68	#
Other	123	17	6	4	150	
Nationalities						
Total	713	137	41	36	927	198

^Excludes 69 people held in "other facilities" such as hospitals, alternative detention pilot programs and correctional facilities - at 2 February

#36 of these people have been on Christmas Island since being moved there from Pt Hedland in June 2003

The following table shows that, of these 927 people in detention facilities on 2 February 2005, 222 were kept at Baxter. These figures include Ms Rau, one of the 3 women of other nationalities at Baxter on that day).

Baxter - Capacity 855 (~255)		No of detainees on 02 February was		No of detainees on 26 January was		Total	
(Source: OIS, Site Summaries & DMIA)		222		258			
Nationalities	Adult		Child (Accompanied)		Child (Unaccompanied)		Total
	Male	Female	Male	Female	Male	Female	
Afghanistan	33						33
Bangladesh	6						6
China, PR	18	4					22
Fiji	4	5	2				11
India	7						7
Indonesia							0
Iran	58						58
Iraq	9	1					10
Korea, South	2						2
Malaysia		1					1
Pakistan	5						5
Philippines							0
Sri Lanka	17						17
Tonga							0
Vietnam	5	1					6
Other Nationalities	41	3					44
Total	205	15	2	0	0	0	222

2. What solutions have been proposed and why?

In June 2003, when the numbers of long term detainees was higher, but the period in detention shorter, **A Just Australia** released a paper recommending some practical solutions.

Entitled "**Make the Right Choice – Humane solutions for long term detainees**", it outlined:

- The great majority of people who arrived by boat, and are still in on-shore immigration detention, are not asylum seekers awaiting determination of their claims for protection but rejected applicants awaiting removal.
- Among those awaiting deportation are Palestinians. In almost all cases, the Israeli Government has refused to permit Palestinian asylum seekers to return to

Israel or the Occupied Territories. The Federal Court ordered the release of some of those who have no prospect of immediate return. The Government has introduced legislation to overturn the Federal Court's release orders – meanwhile a dozen releasees are living without any financial support. *[The High Court ruled in October 2004 that this indefinite detention was lawful, which clarified the law, not the problem.]*

- Others are Iranian, including many that if returned face discrimination, but not, in the Australian Government's view, persecution. Iran rarely takes back unwilling returnees. The recently announced memorandum of understanding with Iran aims to provide a "credible threat" of involuntary return to Iranian detainees, hoping that detainees will request voluntary return. These threats and deceptive inducements are not backed up by any safeguards or monitoring of returnees. They are being made against people who have been in arbitrary detention so long that their state of mind, legal representation and connection with their country of origin have all been diminished. *[Despite the then Minister's claim in March 2003 that there was an agreement to allow deportation of these people, they are still here. We are still convinced that the agreement was not what it purported to be, but was rather an agreement to discuss various situations on a case by case basis].*
- So Australia's detention centres now accommodate many people awaiting removal who have no realistic prospect of being sent to any other country. Third country resettlement options do not appear to have been pursued by the Government, which has taken a legalistic, simplistic, and extremely dangerous view – that if they have failed their refugee claims, it is safe to return them to their country of origin.
- The situation of non-removable deportees is an urgent humanitarian crisis that needs to be discussed and resolved satisfactorily. In the normal course of events, Australia is not required to permit unauthorised arrivals that are not refugees to stay, but for the long term detainees, the system has failed. The absence of fair, credible and rapid determination systems, the policy of detention for the entire period of assessment, and the politicisation, even demonisation, of refugees, all contribute to this system failure.
- Credible, rapid and transparent processing systems would lead to more rapid return of failed applicants – who in many cases would suffer no more than shame at the failure of having been rejected. The current delays compound the problems immeasurably.
- The lengthy detention and the trauma that this has caused create an obligation, including for rehabilitation. Humanitarian visas, complementary to refugee visas, need to be issued to those who the system has failed – even temporary humanitarian visas in these circumstances, until a more permanent return or other migration option can be explored.
- Those who have committed a crime under Australian law and been sentenced to imprisonment by an Australian court may require detention. But others in detention awaiting deportation, the great majority, have committed no crime and their continued detention is unreasonable and inhumane.

At that time (June 2003), we recommended that the Government

- a. Establish an Asylum Seeker Claims Processing Review Committee – a committee of experts to review the cases, starting first with the people who have been detained longest, that is, those who have been detained for over four years. If there are no threats to the security of the community, the detainees must be permitted some freedom. They cannot be detained indefinitely until circumstances change to permit their deportation.

- b. Empower the committee to recommend special humanitarian temporary or permanent visas, as appropriate in particular circumstances, to rejected asylum seekers who remain in detention and whose return to their country of origin is not possible for the immediate future. Although temporary protection visas are inappropriate for refugees they could be used quite appropriately to permit the release of persons awaiting deportation who are unlikely to be able to be deported within a short time.
- c. Allow the committee to offer third country resettlement, with support from Departmental officials and non-government organisations to set up third-country options on a case-by-case basis.
- d. Do not force asylum seekers who have been in long-term detention to return home and refrain from actively promoting the return of asylum seekers unless and until there are fundamental, durable and effective changes of circumstances in countries of origin.
- e. Immediately bring those on Nauru to Australia and include them in the processes of the Asylum Seeker Claims Processing Review Committee.

3. Surely the long term detainees can just go home?

The Government argues that these people are in detention only as long as they choose to be – that they can return “home” at any time. The Government keeps them in maximum security, cut-off from scrutiny, threatens them with deportation, opposes their legal applications, and gives them no option but to stay or go. Friends and advocates for these detainees keep urging them to fight on – exploring legal avenues, appealing to Ministerial discretion, in some cases, advising them to protest through hunger-strike.

“Stay or go” might be an easy sounding set of options, but it ignores crucial points.

- Among those who have been determined not to be refugees, there are nevertheless many with real and well-founded fear of persecution on return home. So the choice to “go” is not easily open to them.
- Among the long-term detainees are some who do not have the choice to “go” since there is no other country which recognises their citizenship to which they can be repatriated.
- The experience of the long term detention has damaged the judgement of the detainees – mental illness, depression, pride, fear, unreliable or mistrusted information about their home circumstances, and chronic commitment to their claims – their story – whether true or false to begin with.
- The remaining long term detainees have seen thousands of others eventually given permanent or temporary refugee status – and there is a spark of hope, fanned by their supporters, that they might too if they stick it out. So the “go” option is not that likely for these who remain.

More importantly, the “stay” option involves an abandonment of responsibility from Government to fundamental human rights standards. Rights to liberty, fair and rapid assessment, judicial review, presumption of innocence, special consideration for children – all went out the window into the desert some time ago.

Holding people in detention simply as a deterrent to others and to maintain the “integrity” of the refugee program – and to continue to keep these same individuals for years on end, constitutes arbitrary detention. The independent expert bodies, set up to monitor the human rights treaties that Australia signed up to, have concluded this.

4. What does the High Court say?

Even the High Court, in finding that immigration detention was lawful as long as the government said that it was planning to remove people one day, expressed concern that this power was in breach of human rights standards. As noted in a Commonwealth Parliamentary Library Research Brief, *The High Court and indefinite detention* (Parliamentary Library, 16 November 2004):

This is confirmed by the decision in Al-Khateb and Al Khafaji. The majority rejected the idea that immigration detention laws were limited to what was 'reasonably capable of being seen as necessary'. As long as the laws were for a purpose related to the 'aliens' or immigration powers in the Constitution, it did not matter whether they were 'unjust or contrary to basic human rights' (Justice McHugh), contravened the ICCPR (Justice Hayne) or infringed the common law's 'fundamental and ancient' protection of personal liberty (Justice Callinan).

Justice McHugh said the outcome for Mr Al-Khateb and Mr Al Khafaji was 'tragic' and suggested the remedy lay in adopting a bill of rights for Australia. Without this there was little the High Court could do about indefinite detention: "As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights".

This recent case on indefinite detention, was one of a number of others pursued over the years by lawyers with great publicity, which have failed for their clients, but have had the effect of confirming several of the migration laws. It is now clear that the Government can largely do whatever it wants with people it declares to be "unlawful non-citizens". And because its actions have been found to be lawful, the Government considers them to be justified. Deportation with chemical or physical restraints – in plain language, injecting drugs and using gaffer tape and handcuffs – is lawful. Intimidation, lying, neglect, abuse of children, denial of care – are all lawful.

Worst of all, there is no higher authority or ticking clock. The Minister doesn't wake up each morning worrying that she has to account for 200 prisoners still in detention for another day.

5. Has the Government rejected our proposals?

We've put the same proposal to the Minister and the Department a number of times over the last year – let NGOs help sort out the last couple of hundred long term detainees – starting with the ones detained for over three years.

The lack of concern or urgency for these individual prisoners is brutal.

Through meetings and correspondence with the Minister since a public stoush over the Nauru hunger strike, New Year 2004, we have been proposing that there should be alternatives considered to the "stay or go" approach.

Minister Vanstone agreed to meet with Howard Glenn and Ian Anderson of **A Just Australia**, and the meeting was held on 12 February 2004. The meeting discussed her decision to review the Afghan detainees on Nauru (which led to some

reconsidered refugee status for many) and also had some outcomes for Iraqi people on Temporary Protection Visas; other issues were referred to a future meeting with Departmental officials.

The meeting with Departmental Officials was held on 10 June 2004. We proposed to work with an Iranian NGO to explore whether there was any prospect of monitoring and assisting safe return of Iranian detainees, if the Department would agree to support this trial. Undertakings were given to respond on this issue.

On 21 June 2004, we wrote to Minister Vanstone, specifically seeking agreement to develop alternatives for the long term detainees, arising from the Departmental meeting.

On 21 September 2004, we received a reply from a Departmental officer apologising that the letter hadn't been dealt with, and that the government couldn't answer now that it was pre-election period

On 25 October, Howard Glenn wrote back to Minister Vanstone, congratulating her on her reappointment, and raising the same issues for discussion.

On Friday 12 November, "Alex" from Minister Vanstone's office rang to say that Minister would like Howard Glenn to meet with Principal Advisor John Nation and Senior Advisor Paul Giles to discuss letter, on first day of Parliament sitting, 16 November. As that date was not convenient, it was agreed that I would ring back and make a time for the next sittings.

Since that time, no return of phone calls despite many messages to Paul Giles and to John Nation. When this raised in December sittings with other Government MPs – "oh they never return our calls either!"

10 January 2005, letter from a junior Departmental official "noting" representations in our letter to Minister.

6. What are some points raised by the Rau case?

- We don't have Federal prisons – and for very good reason. If we were to, then one would want a whole range of checks and balances established – such as Official Visitors – professional medical services, etc – not to mention judicial review of sentencing, presumption of innocence and detention as last resort.
- Having Baxter, a maximum security facility in the SA desert, without any of these checks and balances – has given public servants a lot of responsibility, without any accountability. With an accidental Federal prison in the mix, missing persons registers don't work.
- There are no Inspectors, Visitors, and really low level commercial management and health management contractors, under the supervision of pretty low level public servants.
- The media commentary started as "how can an Aussie have been treated like an illegal immigrant?" Well as we said at the time of launching the A Just Australia campaign – if government gets away with abuse of human rights like this for these people, it'll be doing the same to us one day. That's probably just philosophical and rhetorical – except that it's starting to happen.
- But more disturbing is why we're treating illegal immigrants like this anyway – just because our Constitution allows "aliens" to be treated any which way – standards of decency and human rights laws don't.

- There's at least 198 people who've been in detention now for over three years – the remaining boat people of 2001. 54 of them are on Nauru – docile thanks to massive doses of anti-depressants and other treatments – and most of the rest in Baxter.
- Of the 222 in Baxter on 2 February (see above) – 44 of them were described as “other nationalities” – Ms Rau was included in that figure that day – who are the rest?

7. What are the solutions, and the issues that the current inquiry won't address?

We've put the same proposal to the Minister and the Department a number of times over the last year – let NGOs help sort out the last couple of hundred long term detainees – the ones over three years to start with.

The remaining Afghans on Nauru and in Australia; the Iraqis and the other state-less and assorted nationals, could face a simple process, based on the principle that “if we didn't owe them protection when they arrived, we owe them something now that we've detained them for over three years”.

A simple review process, perhaps conducted with a cross-party appointed panel, could establish whether, after all this time, it is safe to return them, or not. If yes, then involve NGOs and advocates in a return plan, if not, release them into community care, with an individual rehabilitation and monitoring plan. The Minister has very wide discretionary powers, plus a Parliament that will give her anything else she needs if necessary. And a community that already thinks that these issues have been resolved so won't oppose this becoming a reality.

It is now clear that the Government can largely do whatever it wants with people it declares to be “unlawful non-citizens”. And because its actions have been found to be lawful, the Government considers them to be justified. Deportation with chemical or physical restraints – in plain language, injecting drugs and using gaffer tape and handcuffs – is lawful. Intimidation, lying, neglect, abuse of children, denial of care – are all lawful. Worst of all, there is no higher authority or ticking clock, no bill of rights, or international sanction.

We've never believed the former Minister's claim that he had negotiated a treaty with Iran to allow for the removal of all the Iranian detainees – and with almost two years since that claim and still 73 Iranians in detention, that view hasn't changed.

We proposed exploring whether NGOs in Australia, working with NGOs in Iran, can make monitored arrangements for those who choose to return – offering a safer landing than the current “piss-off or we'll deport you anyway” nonsense. With the deterioration of relations with Iran, it may be too late for this.

The 21 Sri Lankans who are sticking it out in detention with appeals and hunger strikes might have a better sense of their possible future back in Sri Lanka if some NGOs worked between the two countries to explain how the lie of the land has changed since the recent cease fire.

8. Who should be allies in the Parliament?

During the 2004 Election, candidates for seats in the House of Representatives and the Senate, from all political parties, were asked by *A Just Australia* – directly and through follow-up by individual supporters – whether they would sign the “Refugee Guarantee”.

The text of the Refugee Guarantee read:

I provide this guarantee, that whatever else I am involved in, I will support the effort to:

- ensure that the mistreatment of refugees and asylum seekers for political purposes never happens again;
- work for a just refugee program based on the human rights standards that Australia has developed and endorsed;
- remove the remaining children and their families from immigration detention;
- provide a secure future to proven refugees;
- immediately review the cases of all asylum seekers detained for longer than 90 days, aiming to provide non-custodial supervision or options, unless a court is convinced that there is a threat to the community from that individual.

The following Senators signed the guarantee:

Senator Andrew Bartlett, Queensland, Democrats
Senator John Cherry, Queensland, Democrats *
Senator Trish Crossin, Northern Territory, ALP
Senator Brian Greig, Western Australia, Democrats*
Senator Gary Humphries, Australian Capital Territory, Liberal
Senator Joe Ludwig, Queensland, ALP
Senator Aden Ridgeway, New South Wales, Democrats*
(term finishes 30 June 2005)

The following candidates who signed the Refugee Guarantee were elected to the Senate for terms commencing on 1 July 2005:

Anne McEwen, South Australia, ALP
Rachel Siewert, Western Australia, Greens
Chris Milne, Tasmania, Greens
Helen Polley, Tasmania, ALP

The following candidates who signed this guarantee were elected:

Bird, Ms Sharon, Member for Cunningham, ALP
Burke, Ms Anna, Member for Chisholm, ALP
George, Ms Jennie, Member for Throsby, ALP
Hall, Ms Jill, Member for Shortland, ALP
Hoare, Ms Kelly, Member for Charlton, ALP
King, Ms Catherine, Member for Ballarat, ALP
Lawrence, The Hon Dr Carmen, Member for Fremantle; ALP
Macklin, Ms Jenny, Member for Jagajaga, ALP
McMullan, Mr Bob, Member for Fraser, ALP
Plibersek, Ms Tanya, Member for Sydney, ALP
Sercombe, Mr Bob, Member for Maribyrnong, ALP
Smith, Mr Stephen, Member for Perth, ALP
Tanner, Mr Lindsay, Member for Melbourne, ALP

296 candidates for the House of Representatives and 46 candidates for the Senate signed the Refugee Guarantee. 3,874 supporters scattered across every electorate in the country also put their names to it.

It should be noted that there were many members of the House of Representatives and some Senators, who have worked consistently with **A Just Australia** on the issues, but who did not sign the guarantee, and some continuing Senators not up for re-election who were not asked. It should also be noted that efforts to follow-up questionnaires were patchy across the country, and weak towards minor parties. It may be that many other candidates would have signed if pressed. Those who received an award from **A Just Australia**, for their appreciation of the refugee and asylum seeker issues, and who are currently in the Parliament are:

Bruce Baird, Judi Moylan, Petro Georgiou, John Forrest, Kay Hull, Patrick Secker, Marise Payne, Andrew Bartlett, Penny Wong, Carmen Lawrence, Duncan Kerr, Tanya Plibersek, Julia Gillard, Nicola Roxon, Jennie George and Stephen Smith.

We believe that the reports of Backbench MP unease with the handling of the Rau case is an opportunity to consolidate bipartisan understanding of the human rights of all detainees.

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