AUSTRALIAN COALITION TO END IMMIGRATION DETENTION OF CHILDREN

Alternatives to Detention

JUNE 2015

FACT SHEET

KEY POINTS

- Children currently detained in immigration detention should be released as a matter of priority
- There are alternate mechanisms to detention which provide greater benefits for children, their families, and the broader community
- There should be a maximum time limit of 7 days on the length of time children can be held in immigration detention for processing purposes
- Legislative reform prohibiting the detention of children would reduce the financial burden borne by immigration detention and ensure compliance with Australia's international obligation

Summary

International human rights law, including international human rights treaties that Australia has ratified, clearly state that immigration detention should be used only as a measure of last resort in exceptional cases after all other options have been exhausted in each case. International treaty bodies and international experts have also emphasised that detention is not an appropriate environment for children.

This fact sheet details developments concerning alternatives to detention of asylum seekers, refugees and migrants with a focus on children and their families. Analysis is provided on the Australian context and recommendations are provided within the existing policy and legal framework.

The Australian Context

Australia is the only country in the world to detain children as its first option.[1] 231 children are currently detained in Australian-run detention facilities; 136 in mainland Australia and 95 in Nauru.[2] On average, the length of time that children spend in onshore immigration detention is 345 days as at 26 May 2015. One child has been in detention for almost five years.[3]

Over a fifteen-month period from January 2013 to March 2014 there were reported numerous assaults and self-harm incidents[4], including:

- 233 assaults involving children
- 128 incidents of self-harm by children
- 33 incidents of reported sexual assaults (majority involving children)

Evidence of self-harm, rape and sexual assault involving children from several reports.[5] 34 % of children in detention have serious mental health disorders requiring psychiatric treatment.[6] Parents of children have high rates of mental illness with 30% of adults in detention having moderate to severe mental health conditions.[7] Dozens of children with physical and mental disabilities have been detained for prolonged periods with limited or no access to specialist services.[8] Even after being released from detention, children experience negative and ongoing mental health impacts.[9]

Alternatives to Detention

In response to the increased government and stakeholder interest in alternatives to immigration detention, research has been conducted to determine humane, cost effective and reliable management strategies for cross-border migration.

Alternatives to Detention (ATD) are any mechanism that can avoid the use of immigration detention and enables individuals to reside and be managed in the community. There are child-sensitive alternatives to detention, which include measures that comprehensively protect the rights of children based on consideration of their best interests.

Alternatives are more affordable, with research showing they are up to 80% cheaper than detention[10], reducing litigation, overcrowding and unnecessary long-term and wrongful detention. Alternatives support wellbeing and uphold human rights, and they have also been shown to be successful at managing migration, with effective case resolution in the community, showing up to 95% appearance rates and up to 69% voluntary return on refused cases[11].

The range of identified benefits associated with alternatives to detention include:

- Lower costs
- High rates of compliance and appearance
- Increased voluntary return and independent departure rates
- Less wrongful detention and therefore, litigation

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1 Save the Children (2015) *Never Again: Let's end the detention of children once and for all*. Online at: <www.savethechildren.org.au/about-us/media-and-publications/media-releases/media-releasearchive/years/2015/never-again-lets-end-the-detention-of-children-once-and-for-all>

2 Australian Government (2015). *Senate Estimates Transcript from 26th May 2015 ; Legal and Constitutional Affairs Legaslation Committee*

3 Australian Government, Department of Immigration and Border Control (2015) 'Immigration Detention Statistics for 31 March 2015'. Online at: <www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-mar2015.pdf> (Accessed 1 May 2015)

4 Australian Human Rights Commission (2014). 'The Forgotten Children: National Inquiry into Children in Immigration Detention'. Online at: <> Accessed 1 May 2015.

5 The Moss Review (2014) 'Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru'. Online at: <www.immi.gov.au/about/dept-info/_files/review-conditions-circumstances-nauru.pdf>

6 Australian Human Rights Commission (2014). 'The Forgotten Children: National Inquiry into Children in Immigration Detention'. Online at: <www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf> (Accessed 1 May 2015)

7 Australian Human Rights Commission (2014). 'The Forgotten Children: National Inquiry into Children in Immigration Detention', p. 29. Online at: <www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>

8 Australian Human Rights Commission (2014). 'The Forgotten Children: National Inquiry into Children in Immigration Detention',p. 30. Online at: <www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf> (Accessed 5 June 2015)

9 Australian Human Rights Commission (2014). 'The Forgotten Children: National Inquiry into Children in Immigration Detention'p. 30. Online at: <www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf> (Accessed 5 June 2015)

10 IDC (2011) *There Are Alternatives* Pp 52 Online at: <http://idcoalition.org/there-are-alternatives/>

11 IDC (2014) *Seeking to Implement Alternatives* Online at <https://detentioninquiry.files.wordpress.com/2015/02/international-detention-coalition.pdf>

cases
- Less overcrowding and long-term detention cases
- Respect for, protection and fulfilment of human rights
- Improved integration outcomes for approved cases
- Improved client health and welfare

Research has found that around the world there is a range of mechanisms used by governments to prevent the unnecessary use of detention, using it only as a last resort in exceptional cases. These approaches saw migration management strategies taking place in a community setting in the first instance[12].

The most successful policies determine who should be detained and why, rather than defaulting to detention. These policies are complemented by legislation that exempts particularly vulnerable populations, such as children from being detained on the basis of their migration status.

Existing Mechanisms for Release in Australia

Since October 2010, the Australian Government has moved increasing numbers of asylum seekers and refugees from closed immigration detention into the community, pending resolution of their claims for protection, through temporary "bridging visas" (Bridging Visa E) as well as Community Detention.

These temporary "bridging visas" are issued to allow people to legally reside in the community instead of in closed detention centres, while they are applying for a longer term substantive visa, appealing a decision related to their visa (or immigration status), or making arrangements to leave Australia. The government issues bridging visas to different categories of persons, including those whose removal from Australia is not reasonably practicable (categorized as removal pending bridging visas).

Bridging Visa E (BVE)

A BVE is a temporary visa that allows asylum seekers to legally reside in the community while their refugee claims are being processed. BVEs remain in effect while the holder's claim is being resolved. They are issued for a specified period of time, depending upon the holder's individual case circumstances; further BVEs can be granted if necessary, based on the progress and status of the case and the asylum seeker's compliance with the conditions attached to their visa. BVE holders who fail to abide with their visa conditions are at risk of having their visa cancelled and being returned to detention. Asylum seekers who are living in the community on bridging visas have no right to family reunion, and are not able to re-enter Australia if they travel overseas. As at April 30 2015, there were 27,675 people, including 3,004 children, living in the Australian community on BVEs.

Decisions to grant a BVE to asylum seekers are made on a case-by-case basis. There is no formal application process for a BVE; instead, it is within the sole non-compellable discretion of the Minister for Immigration and Border Protection (MIPB) to grant BVEs. Following an individual assessment, including health, identity and security checks, asylum seekers deemed eligible for a BVE are referred to the MIPB for approval. Certain conditions may be attached to Bridging Visas. Holders of BVEs may generally choose where they live. However, any transitional support received may be terminated if they move to another state within Australia. BVE holders are required to advise the Department of Immigration and Border Protection (DIBP) of their address and any change to that address, and to report to the DIBP on a regular basis

Community Detention

Community Detention allows people to live in the community while seeking to resolve their immigration status. People in community detention remain in immigration detention as a matter of law. However, they are generally not under supervision and can move about in the community subject to conditions relating to their residence. For example, they usually have reporting requirements, such as reporting by services, and case managers continue to be the main focal point of contact for those in this program.

Usually vulnerable groups are expedited to this program, by decree of MIBP. However, those in the program do not receive a visa and do not have the same rights as a person on a visa living in the community. Unaccompanied children in community detention will often be housed together as a group with a carer who acts as guardian at all times in attendance.

Alternatives to Detention Around the World

Australia has an opportunity to lead world practice in ending child detention, joining many states that have recently made changes to law, policy and practice to avoid the detention of children.

In 2010, the Coalition Government in the United Kingdom radically transformed the way families with children are detained; as a result of a change in the process fewer families with children now go through detention, and those that do spend a much shorter period of time in detention. In fact, there is now a detention time limit of 72 hours for most such cases[13]. The new family returns process includes: a Family Returns Panel to consider child welfare issues in families who refuse to leave; a family conference to discuss future options and the specific option of assisted return; the opening of Cedars in September 2011; and the expansion and refurbishment of Tinsley House IRC at London Gatwick airport. Both Cedars and Tinsley House hold families for up to 72 hours and require a ministerial declaration for extending a family's stay up to a week in exceptional cases[14].

The United Kingdom example is one of many that have been seen in recent history. In 2007-2008 Belgium introduced a law to end child detention and implements alternatives to

[12] IDC (2011) *There Are Alternatives* Pp 52 Online at: http://idcoalition.org/there-are-alternatives/

[13] 2015 The Detention Forum *Briefing Paper* Online at < http://detentionforum.org.uk/wp-content/uploads/2015/05/Detention-Forum-briefing-for-the-26-March-2015-Lords-Debate-final.pdf>

14 2014 Migration Observatory Briefing Paper Online at <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Briefing.pdf>

detention for children and families; in 2008 Panama introduced a law to prohibit the immigration detention of children; in 2010 Japan released children from immigration detention; in 2010 Finland announced a commitment to end detention of unaccompanied or separated children; in 2011 Indonesia introduced a law permitting the release of children and other vulnerable groups from immigration detention; in 2012 France limited the detention of minors to exceptional circumstances; in 2012 China passed new immigration law restricting the immigration detention of children under 16 years of age; in 2014 The Netherlands announced that families with children who seek asylum will no longer be detained at the border except in exceptional situations.

Australia's International Obligations

Under international human rights law, immigration detention must only ever be used as a last resort.[15] As a result, states must first seek to implement alternatives which allow individuals at risk of immigration detention to live in non-custodial, community-based settings while their immigration status is being resolved.

Australia has ratified the UN Convention on the Rights of the Childwhich establishes in international law that States Parties must ensure that all children - without discrimination in any form - benefit from special protection measures and assistance. The Convention establishes that, in all actions concerning children, the best interests of the child must be a primary consideration.

These special protection measures and assistance include, among other things, that children: have access to services such as education and health care; can develop their personalities, abilities and talents to the fullest potential; grow up in an environment of happiness, love and understanding; and are informed about and participate in, achieving their rights in an accessible and active manner.

In the context of child migration, the UN Committee on the Rights of the Child has found that:

"Children should not be criminalised or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child" Recommendation 79, General Day of Discussion 2012[16].

This means that the denial of liberty to children seeking asylum and families is never appropriate when based solely on irregular entry or status.

Enshrining a maximum time limit for the detention of children of no more than 7 days, for the purpose of conducting security and health checks, is an effective way to promote compliance with Australia's international obligations and ensure that the best interests of children are always given primary consideration.

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15 IDC (2012) *Captured Childhood* Online at < http://idcoalition.org/publications/captured-childhood-2/>

16 2012 UN *General Day of Discussion Report* Online at: http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf