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Submission to the Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

The Victorian Foundation for Survivors of Torture (Foundation House) appreciates the opportunity to provide a submission to the Australian Law Reform Commission's Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges ('Freedoms Inquiry').

The Commission acknowledges that laws that 'abrogate the liberty of the individual and authorise detention' may 'encroach on common law rights, freedoms, privileges and principles'.ⁱ Foundation House submits that the power to detain under the *Migration Act 1958* (Cth) is so broad and lacking in protections that it has allowed successive Commonwealth Governments to implement a detention regime that has improperly and egregiously encroached on the right to liberty and freedom from arbitrary detention of thousands of people. The indefinite and prolonged detention to which people have been subjected in immigration facilities has adversely affected the mental and physical health of many individuals, which has been extensively documented and is very apparent to Foundation House through its work with many clients who had been detained prior to becoming clients, were in detention while receiving our services or continue to be detained.ⁱⁱ

Liberty of the individual and freedom from arbitrary detention

The protection of the liberty of individuals against arbitrary deprivation by executive government has been a key concern of the common law for centuries, in numerous jurisdictions around the world in which the common law has applied and applies. As stated by Mr Justice Fullagar of the Australian High Court in 1955, the right to personal liberty is 'the most elementary and important of all common law rights'.ⁱⁱⁱ His observation was echoed nearly fifty years later by Lord Bingham of the House of Lords who stated that '(i)n urging the fundamental importance of the right to personal freedom...the appellants were able to draw on the long libertarian tradition of English law'.^{iv}

Common law jurisprudence provides that the issue of whether executive government has arbitrarily deprived an individual of their liberty should be assessed not only by its strict legality but also consideration of principles such as due process and proportionality. For example in the *Belmarsh* case cited above, Lord Bingham

affirmed that in determining whether a limitation is arbitrary or excessive, the court must ask itself "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."^v

The common law's concern with the protection of the individual against arbitrary deprivation of liberty has informed and is informed by the regional and international frameworks for the protection of human rights which were developed in the second half of the twentieth century. As stated by Baroness Hale of the House of Lords:

...neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.^{vi}

In the same case Lord Hoffmann similarly observed with respect to the European Convention on Human Rights:

Freedom from arbitrary arrest and detention is a quintessentially British liberty ... It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.^{vii}

The right not to be arbitrarily detained is affirmed in the Universal Declaration of Human Rights (article 9) and the International Covenant on Civil and Political Rights (Article 9). The UN Human Rights Committee has explained the notion of arbitrariness as follows:

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality.^{viii}

Detention under the Migration Act

The *Migration Act 1958* requires a public official to detain someone who the official knows or reasonably suspects is 'an unlawful non-citizen' (section 189). With respect to the duration of detention, the Act provides only that an unlawful non-citizen must be kept in immigration detention until they are removed from Australia, an officer begins the process for removal to a regional processing country, they are deported or granted a visa (section 196).

The High Court in 2014 determined that the ‘duration of detention must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes.’^{ix} However, in the absence of specific, binding guidelines that are rigorously applied, thousands of people have been detained, many for very long periods, without proper assessment of whether their deprivation of liberty was indeed necessary and incidental to purposes such as assessing their protection claims.

As at 31 January 2015, 1382 people then in immigration detention facilities had been detained for more than 366 days; among them, 228 had been detained for more than 730 days.^x The average length of detention of children in detention centres at March 2014 was 231 days.^{xi}

Successive Commonwealth Governments have responded to complaints that the detention regime subjects people to detention that is intrinsically arbitrary by referring to its legal basis. For example, the government advised the UN Human Rights Committee that claims of arbitrary detention were without merit because:

The authors are unlawful non-citizens detained under the Migration Act. Their detention is therefore lawful. The High Court of Australia has found the pertinent provisions of the Migration Act to be constitutionally valid.^{xii}

The High Court has acknowledged that the power of the Commonwealth Government to detain people under the Migration Act may be lawful although it is exercised in a manner that infringes “traditional rights.” As stated by Mr Justice McHugh in *Al-Kateb v Godwin*:

ss 189, 196 and 198 of the Act require Mr Al-Kateb to be kept in immigration detention until he is removed from Australia. The words of ss 196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb ... *The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.*^{xiii} (emphasis added)

In 2008, the Commonwealth Government acknowledged that the system of mandatory immigration detention had resulted in the arbitrary detention of people and had serious, adverse impacts on the physical and mental health of detainees:

Currently persons who are unlawful may be detained even though the departmental assessment is that they pose no risk to the community. That detention may be prolonged. Currently, detention is too often the first option, not the last.^{xiv}

The Government made a commitment to ‘fundamentally overturn’ the model by the adoption of seven immigration ‘values’ with a commitment ‘to detention as a last resort; to detention for the shortest practical period; to the rejection of indefinite or otherwise arbitrary detention.’

The new values were implemented through policy directives rather than legislation and as a consequence it is unsurprising that the values were not realised. People continued to be detained for lengthy periods without proper and routine assessment of whether it was necessary to deprive them of their liberty for purposes such as ascertaining their identity and ensuring public safety.

This is very apparent with respect to two groups of people – people detained while they await their claims for protection to be determined and people who have been found to be refugees but are refused visas because they are subject to adverse security assessments by the Australian Security Intelligence Organisation (ASIO). The circumstances of the latter group warrants further discussion.

People subject to adverse security assessments by ASIO

Foundation House has had as clients more than 20 individuals who have been in prolonged (in some instances more than five years), indefinite detention because they were or remain subject to adverse security assessments by ASIO. It is a matter of executive policy not legislation that they are not granted visas and therefore must be detained. As Foundation House advised a Parliamentary committee inquiry in January 2014, ‘the deleterious effects on our clients of their prolonged and unending detention are profound’.^{xv}

Foundation House and others have advocated to successive governments that the system of security assessment should be reformed – for example, to permit judicial scrutiny – and that alternatives to detention should be available in appropriate cases. The Inspector-General of Intelligence and Security has suggested that risk mitigation strategies and conditions similar to those applied to community detention could be explored for ‘situations where a visa applicant has received an adverse security assessment and is facing an indefinite period in a detention centre’.^{xvi} Participants at a UNHCR convened Expert Roundtable on National Security Assessments canvassed options for such alternatives almost three years ago, including ‘case specific or “tailor-made” reporting arrangements to match the risk.’^{xvii}

The UN Human Rights Committee has considered a complaint by 37 of the people affected. The Committee found that their detention is arbitrary contrary to Article 9 of the ICCPR and considered ‘that the combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant’^{xviii} i.e. cruel, inhuman or degrading treatment or punishment.

About the Victorian Foundation for Survivors of Torture

Foundation House has since its establishment in 1987 assisted thousands of survivors of torture and other traumatic experiences, of refugee backgrounds, who have settled in the Australian state of Victoria. We provide counselling and other services to individuals and families; train and support service providers in the health, education and welfare sectors; and conduct and commission research to improve policies, programs and services affecting the health and wellbeing of people of refugee backgrounds.

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Endnotes

ⁱ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Issues Paper 46*, December 2014, 123.

ⁱⁱ See for example: Keller, A et al, “The mental health of detained asylum seekers” (2003) 362 *The Lancet*, 1721-1723; Steel, Z, Silove, D, Brooks, R, Momartin, S, Alzuhairi, B and Susljik, I, “Impact of immigration detention and temporary protection on the mental health of refugees” (2006) 188 *British Journal of Psychiatry*, 58-64; Coffey, G, Kaplan, I, Sampson, R and Tucci, M, “The meaning and mental health consequences of immigration detention for people seeking asylum” (2010) *Social Science and Medicine*, 2070-2079; UNSW Social Policy Research Centre, *The experiences of Irregular Maritime Arrivals detained in immigration detention facilities: Final Report*, July 2013; FASSTT, *Submission from the Forum of Australian Services for Survivors of Torture and Trauma to the Australian Human Rights Commission National Inquiry Into Children in Immigration Detention*, 13 June 2014, <<https://www.humanrights.gov.au/sites/default/files/Submission%20No%20210%20-%20Forum%20of%20Australian%20Services%20for%20Survivors%20of%20Torture%20and%20Trauma.docx>>; Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment Bill 2013*, Submission 8, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_Bill_2013/Submissions>.

- ⁱⁱⁱ Fullagar J in *Trobridge v Hardy* (1955) 94 CLR 147, 152.
- ^{iv} *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [36].
- ^v *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.
- ^{vi} *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [222].
- ^{vii} *Ibid*, [88].
- ^{viii} Human Rights Committee, *Draft General Comments No.35 on Article 9: Liberty and Security of Person*, UN Doc CCPR/C/GC/R.35/Rev.3, [12].
- ^{ix} *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34, [29].
- ^x Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 January 2015, 10.
- ^{xi} Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, November 2014, 56.
- ^{xii} Human Rights Committee, *Communication No. 2094/2011: Views adopted by the Committee at its 108th session (8-26 July 2013)*, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013), [6.2].
- ^{xiii} *Al-Kateb v Goodwin* [2004] HCA 37, [33].
- ^{xiv} Senator Chris Evans, Minister for Immigration, “New Directions in Immigration Detention – Restoring Integrity to Australia’s Immigration System” speech given at Australian National University, 29 July 2008.
- ^{xv} Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment Bill 2013*, Submission 8, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_Bill_2013/Submissions>.
- ^{xvi} Inspector-General of Intelligence and Security, “Annex 4: Inquiry into ASIO’s security assessments for community detention determinations”, *Annual Report 2011-12*, 76.
- ^{xvii} UNHCR, “Expert Roundtable on National Security Assessments for Refugees, Asylum-Seekers and Stateless Persons in Australia: Chair’s Summary”, 3 May 2012, [37].
- ^{xviii} Human Rights Committee, *Communication No. 2094/2011: Views adopted by the Committee at its 108th session (8–26 July 2013)*, CCPR/C/108/D/2094/2011, [9.8].