Borders Erected around Unlimited Right to Detain

Susan Harris Rimmer
Fourteen years after the federal ALP introduced the current legal basis of detention, Immigration Minister Senator Chris Evans has outlined the new approach to detention agreed by the Rudd Labor Government. In essence it has committed itself to seven "values", the first being that mandatory detention remains an "essential component of strong border control".

But the second value sets out the categories of those to whom mandatory detention will apply.

They are: all arrivals for health, identity and security checks, and to them only for a short time; people who present an unacceptable risk to the community; and people who refuse to comply with visa conditions. The third value takes the Coalition "rebel" reforms on children in detention further by placing an outright prohibition on the practice.

Values four to seven attempt to bring detention in line with basic human rights principles, such as the principle that indefinite detention is not acceptable (despite High Court judgments to the contrary); that detention should be a last resort; that detainees should be treated fairly and lawfully; and that conditions of detention should ensure individual dignity. All these values, apart from the first, represent important reforms to the current system.

Mountains of paper have been produced discussing the problems inherent in Australia's current system of immigration detention, in reports by federal parliamentary committees, the UN Human Rights Committee and the Human Rights and Equal Opportunity Commission, by the Commonwealth Ombudsman, in the Palmer and Comrie reports and in psychological and medical literature not to mention civil society campaigns.
The theme of these reports is essentially that Australia's current system of detention has proved itself inherently and irredeemably problematic, and ultimately irreconcilable with basic human rights and respect for human dignity. For example, mandatory detention has a propensity to result in arbitrary detention, which has taken an unacceptable psychological toll on a vulnerable community. The use of private contractors to administer detention centres has led to problems with accountability and transparency. Our detention practices have at times resulted in international embarrassment and condemnation on the world stage. Moreover, research has shown the availability of more effective and cheaper alternative community models, which would still ensure the integrity of the migration system.

Evans's reforms achieve the first stated aim, that of making detention a risk-based system instead of a punitive one, where the onus of proof is on the department to justify detention and the decision is constantly reviewed by the department and the Ombudsman.

The only problem will be in ensuring that the department takes a rigorous view of who really constitutes a "risk" to the Australian community (as opposed to the recent treatment of Dr Mohamed Haneef).

The minister also foreshadowed the move to a community model of detention, such as Melbourne's successful Hotham Mission project.

The more difficult reform to implement will be the idea of expedited removal. As Evans reiterated, "People who have no right to be here and those who are found not to be owed protection under Australia's international obligations will be removed." He also noted that extensive legal processes prolonged detention. This is correct in both logic and law, and this line of thought often exercised the previous minister, Philip Ruddock, in his attempts to limit judicial review of immigration decisions.
The problem is, this system works only if Australia gets the decision right the first time, and in such a manner that the applicant and the Australian community have faith in the fairness of the decision.

For Evans's plan to work, primary decision-making in immigration matters, especially complex asylum cases, must be exponentially improved. At present, more than 21 per cent of departmental determinations are overturned and the Federal Court sets aside more than one-quarter of tribunal decisions.

The one aspect at odds with the new humane and principled approach outlined in the minister's speech is maintaining the exclusion zone and the non-statutory decision-making process for people who arrive by boat and are taken to Christmas Island. This is the cohort of people most likely to be asylum-seekers and to engage Australia's protection obligations.

Excision is a legal fiction, unprincipled and irrational. It was put in place to avoid Australia's international obligations and the scrutiny of our courts. Excision arbitrarily discriminates between boat arrivals and other arrivals. Evans admits harsh detention is not necessary to deter people smugglers.

The only real improvement for asylum-seekers arriving by boat is access to independent legal aid (although there are practical impediments, considering the distances involved); access to a form of review by an "independent professional" (which requires further explanation); and access by the Immigration Ombudsman to provide further oversight of the process. It is not yet known what level of access or review powers the Government will grant the regional office of the UN refugee agency, the UNHCR.

Access and resources for the Human Rights and Equal Opportunity Commission's monitoring role will also be critical to perceptions of the propriety of using Christmas Island.
The UNHCR found the process used in Nauru to be questionable. There will be no independent merits review by an Australian tribunal or access to judicial review in an Australian court. There is no obligation to achieve processing of protection visa applicants within 90 days, and no obligatory tabling in Parliament of the Ombudsman's findings or recommendations.

In response to a question yesterday, the minister seemed to suggest that the new values did not necessarily apply to Christmas Island.

The reforms therefore offer a major improvement for those on the mainland. But they do not address the discriminatory treatment and processing that exist simply by reason of a person’s mode of arrival.

Some hurdles remain to be overcome, then, in Australia’s quest for a fair balance between a migration system that has integrity and one that is humane. Still, this is an important first step.

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