Human Rights Law Centre

Urgent action needed to protect people held in immigration detention

Submission to the Senate Select Committee into COVID-19

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Human Rights Law Centre

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1. Introduction and recommendations

1. The Human Rights Law Centre (**HRLC**) makes this submission to the Committee to raise issues that require urgent attention. The HRLC will be making a more detailed, comprehensive submission by the 28 May 2020 submission deadline on other pressing human rights concerns.

2. The HRLC is calling for the Government to take urgent action to protect the children, women and men that are held in immigration detention in Australia and offshore in Nauru and Papua New Guinea.

3. The HRLC requests the Committee conduct a hearing as soon as possible to receive evidence and consider recommending the Government take the following steps.

Recommendations

1. ***The Government should reduce the population in detention facilities in Australia (including alternative places of detention), to the lowest possible number, by transferring people into safe housing where they can comply with public health advice.***

2. ***The Government should transfer people held in offshore detention in Nauru and Papua New Guinea to Australia before there is a widespread outbreak in places poorly equipped to respond.***

2. People in immigration detention in Australia

4. Everyone deserves to be safe in the face of the unprecedented threat posed by COVID-19. But currently, immigration detention facilities in Australia are creating unacceptable health risks for the people held there, the staff at these facilities, and the broader community.

5. Public health measures adopted across Australia appear to be slowing the spread of COVID-19 in the community. This is a welcome sign. However, Commonwealth, State and Territory advice and the experience of other countries show that the risk of rapid outbreaks of the disease is likely to persist for the foreseeable future, and continuing to implement appropriate measures is central to the management of this risk.

6. The Department of Health recognises that people in detention facilities are among the most at risk of contracting COVID-19.[1] Densely populated congregate settings, where physical distancing measures cannot be effectively implemented, present a heightened risk of person-to-person and droplet transmission. While conditions can vary considerably between and within facilities, people in immigration detention centres typically share physical spaces with large numbers of people and have no choice but to share bedrooms, bathrooms and other facilities.[2]

7. Already there has been one reported case of an officer working in immigration detention facilities testing positive for COVID-19.[3]

A. The medical evidence is clear – detention populations must be urgently reduced

8. Infectious diseases experts and peak medical bodies have warned that without urgent action to reduce the number of people in immigration detention facilities, it is only a matter of time until they become a site of transmission. For instance:

   (a) The Australasian Society for Infectious Diseases and Australasian College for Infection Prevention and Control have called for the Government to address the health risks arising from overcrowding, by considering the release of detainees into suitable housing in the community if they do not pose a significant security or health risk.[4]

   (b) The Royal Australian and New Zealand College of Psychiatrists similarly called for a reduction in the detention population to avoid the risk of clusters developing.[5]

   (c) An open letter from more than 1100 health professionals to the Minister for Home Affairs called for the release of people in detention into community supported housing.[6]

   (d) Professor Allen Cheng, a Professor of Infectious Diseases Epidemiology and Director of the Infection Prevention and Healthcare Epidemiology unit at Alfred Health, has

[1] Department of Health, 'What you need to know about coronavirus (COVID-19)' https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#who-is-most-at-risk (accessed 4 May 2020).

[2] Similar considerations apply to people in prisons and other forms of detention in Australia, though these are primarily issues for State and Territory Governments and are therefore not covered in this submission.

[3] 'Fears for refugees after guard at Brisbane immigration detention centre tests positive for coronavirus', *The Guardian*, 19 March 2020.

[4] Joint Statement by Australasian Society for Infectious Diseases and Australasian College for Infection Prevention and Control, 17 March 2020.

[5] 'Immigration detention centres a significant COVID-19 risk', *Australian and New Zealand College of Psychiatrists*, 17 April 2020.

[6] 'Australian doctors call for refugees to be released amid coronavirus fears', *SBS Online*, 2 April 2020.

warned that detention facilities are one of the key risks faced in Australia for a second wave of infections, noting the experience of Singapore — where a second wave of infections came from migrant worker dormitories.[7]

9. COVID-19 in these detention facilities poses a threat not only to the women and men held in these places of detention, but also the broader community. Like cruise ships and group residential settings, detention centres can act as "epidemiological pumps" which drive the spread of disease among the wider community because of the fact that staff are constantly rotating in and out of these centres. British Public Health Professor Richard Coker highlighted how prisons in the former Soviet Union and the United States in the 1990s were settings for explosive outbreaks of multidrug resistant tuberculosis and HIV, which spread beyond prisons and impacted non-prison populations.[8]

10. We act for people who are currently held in these detention centres who are terrified at the prospect of contracting COVID-19 and the fact they cannot protect themselves. For many people, the threat is even greater because they have underlying health conditions that put them at higher risk of serious illness or death in the case of infection. This includes refugees brought to Australia specifically for the purpose of receiving medical treatment, and who have remained in detention since their arrival.

11. It would be appropriate for processes for reducing the population of detention facilities to give priority to individuals with risk factors – including underlying health conditions and age – that place them at increased risk.

B. Other countries have already acted to reduce the risks

12. Other countries have already acted pre-emptively to reduce the numbers of people held in administrative immigration detention in recognition of the risks of COVID-19, either by choice or by court order.

    (a) **Canada** - the Canadian Government released more than half of the immigration detainees in provincial jails and immigration holding centres in the period between 17 March 2020 and 19 April 2020.[9]

    (b) **United Kingdom** - in late March 2020 the Home Office released 300 people from immigration detention to reduce the risk of COVID-19 infection spreading.[10] The

[7] See: https://twitter.com/peripatetical/status/1256202309345832961; 'Plenty of potholes on the road to recovery', *Australian Financial Review*, 17 April 2020.

[8] *Report on Coronavirus and immigration detention*, Professor Richard Coker MB BS, MSc, MD, FRCP, FFPH, 17 March 2020.

[9] 'Canada is releasing immigration detainees at 'unprecedented' rates amid COVID-19 fears', *Global News*, 25 April 2020.

[10] 'Home Office releases 300 from detention centres amid Covid-19 pandemic', *The Guardian*, 22 March 2020.

number released has since risen to 400. This number represents approximately 25% of the detention population at the beginning of 2020.

(c) **Spain** - in late March 2020 the Spanish Ministry of the Interior implemented a policy of individualised assessments aimed at releasing non-citizens detained for the purposes of removal to their home countries. By early April, 90% of detainees had been released.[11]

(d) **Belgium** - in late March authorities released an estimated 300 people because detention conditions did not allow them to enforce safe social distancing measures.[12]

(e) **United States of America** - the Federal Government has been forced by court order to take action. On 21 April 2020, a Federal Judge ordered Immigration and Customs Enforcement (**ICE**) to consider release of anyone in immigration detention with COVID-19 risk factors after finding ICE's response to have been slow, insufficient and to have put lives in jeopardy.[13] Earlier, ten people in Philadelphia were released after a Federal Judge ruled that ICE was incapable of protecting them from COVID-19 infection in detention.[14]

13. This action is consistent with the United Nations' repeated urging for countries to protect those who are in their care. In late March 2020 the UN High Commissioner for Human Rights, Michelle Bachelet, stated that "Now, more than ever, Governments should release every person detained without sufficient legal basis," warning that the consequences of neglecting places of detention are potentially catastrophic.[15] Similarly, a joint UN statement issued by the UN High Commissioner for Refugees, the World Health Organisation, the International Organization for Migration and the Office of the High Commissioner for Human Rights stated:

> *The situation for refugees and migrants held in formal and informal places of detention, in cramped and unsanitary conditions, is particularly worrying. Considering the lethal consequences a COVID-19 outbreak would have, they should be released without delay. Migrant children and their families and those detained without a sufficient legal basis should be immediately released.*[16]

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[11] 'El Gobierno libera al 90% de los internos de los CIE por el coronavirus', *VozPopuli*, 2 April 2020.

[12] '300 mensen zonder papieren vrijgelaten coronavirus zet dvz onder druk', *DeMorgen*, 19 March 2020.

[13] 'ICE delayed its pandemic response, putting detainees at 'substantial' risk of harm, judge finds', *The Washington Post*, 21 April 2020.

[14] 'U.S. judge orders release of 10 immigrants in Pennsylvania, calling ICE incapable of protecting them from coronavirus behind bars', *Philadelphia Inquirer*, 31 March 2020.

[15] 'UN rights chief urges quick action by governments to prevent devastating impact of COVID-19 in places of detention', *United Nations News*, 25 March 2020.

[16] 'The rights and health of refugees, migrants and stateless must be protected in COVID-19 response', *OHCHR, IOM, UNHCR and WHO Joint media release*, 31 March 2020.

C. Solutions are readily available

14. The Government has a range of legal and policy tools available to easily and quickly reduce the population of immigration detention facilities to the lowest possible level in line with the advice of medical experts and peak medical bodies.

15. Ensuring that people who are released have appropriate accommodation and support is critical.

16. Some people in detention will have family members who they can return to. For a person in detention who is in a position to return to their home, it is open to the Minister to make a residence determination in respect of the person's home address, or to grant that person a visa and to ensure that necessary support arrangements are in place.

17. For others, the grant of Bridging Visas or the policy known as "community detention" are appropriate and adaptable mechanisms for reducing the detention population. Community detention involves the Minister making a residence determination, which permits a person to live in a community setting with appropriate support, rather than a detention facility. There were already 846 people living in the community under a residence determination prior to March 2020.[17] Transferring people into the community through these means would represent the application of well-established policies and procedures to the COVID-19 context, and could use the capabilities of Australia's settlement services sector during a time in which humanitarian resettlement to Australia is temporarily interrupted.

18. For people in immigration detention with ongoing visa applications, officers of the Department of Home Affairs should expedite the consideration of these applications, and bring forward the release from detention of people who would otherwise be released in the coming months. By fast-tracking the ordinary Departmental processes that lead to release from detention, these measures would have the effect of relieving the relevant Ministers of the administrative burden associated with the use of personal Ministerial powers.

D. Mandatory, indefinite detention is contrary to international law

19. While the focus of this submission is the urgent health crisis, it is important to recognise that Australia's system of mandatory immigration detention is in violation of Australia's international human rights obligations. The continued detention of so many people is unnecessary, contrary to human rights law and out of step with the rest of the world.

[17] Immigration Detention and Community Status Statistics February 2020, *Department of Home Affairs*, Australian Government.

20. Australia's system of mandatory and indefinite detention produces outcomes that amount to arbitrary detention, as has been found by successive findings by United Nations bodies.[18] As of the end of February 2020, 1435 women and men were in immigration detention in Australia, as well as five children. Of this number, 576 people (40%) have been detained for more than a year, and among those, 334 people (23.2% of the total) have been detained for more than two years.[19] This is a much longer period than in comparable countries such as Canada where the average time of detention is typically less than two weeks.[20]

3. People transferred to Nauru and Papua New Guinea

21. The Government's responsibility for people it has detained extends to the approximately 430 refugees and people seeking asylum who remain in Nauru and Papua New Guinea. The Australian Government owes a duty of care to these refugees and people seeking asylum.[21] Numerous United Nations treaty bodies have similarly found the Australian Government continues to exercise effective control over these people and is responsible for their welfare.[22]

22. Neither country has the medical facilities to respond to a widespread outbreak.[23]

[18] See, for example, UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 9 November 2017, [37]-[38]; Human Rights Council, Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018*, Opinion No. 74/2018 (Australia), A/HRC/WGAD/2018/74.

[19] Immigration Detention and Community Status Statistics February 2020, Department of Home Affairs, Australian Government.

[20] Quarterly Detention Statistics, Canada Border Services Agency, Government of Canada.

[21] For example, *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 established that the Australian Government owed a duty of care to a refugee to procure a safe and legal termination of her unwanted pregnancy after she was raped in Nauru. The Federal Court of Australia has also repeatedly found, and the Australian Government has accepted, that there is a *prima facie* case that a duty to provide appropriate medical care exists: see for example *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050; *DRB18 v Minister for Home Affairs* [2018] FCA 1163, *EHW18 v Minister for Home Affairs* [2018] FCA 1350.

[22] See for example: Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia,* UN Doc E/C.12/AUS/CO/5 (11 July 2017) at [18]; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) at [35]; Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia,* UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) at [30].

[23] 'Papua New Guinea's Health System Unprepared for COVID-19', *Human Rights Watch,* 8 April 2020; Johns Hopkins University and Nuclear Threat Initiative, *Global Health Security Index 2019.*

23. Nauru, which is yet to have a confirmed case at the time of writing, has no tertiary level hospital and is ranked as one of the least prepared countries in the world.[24]

24. Papua New Guinea has had several confirmed cases in geographically diverse parts of the country, raising concerns that the virus is already spreading in the community without detection, including in Port Moresby where many of those forcibly transferred by the Australian Government remain.[25] Papua New Guinea reportedly has only 14 ventilators,[26] and its Prime Minister has acknowledged that the country has only 500 doctors for a population of more than 8 million people.[27]

25. The prospect of an uncontrolled outbreak will be a continuing risk in both countries for the foreseeable future.

26. As has been shown at a *prima facie* level in repeated court proceedings in 2018 and 2019, the Australian Government owes a legal duty of care to provide appropriate medical treatment to people it continues to hold in Nauru and Papua New Guinea. In the context of the severe threat posed by COVID-19 and the lack of medical facilities to deal with an outbreak, this duty of care requires the pre-emptive transfer of people to Australia. Pre-emptive transfers of people under the Australian Government's care are preferable to waiting until a widespread outbreak, and would also alleviate the pressure on local health systems.

27. The refugees and people seeking asylum in Nauru and Papua New Guinea include people who remain there despite being approved for medical transfer to Australia by the relevant Minister (under the former Medevac legislation), based on recognition that local health services were inadequate for their medical needs even prior to the pandemic.

28. The pandemic also presents new and additional challenges to securing lasting protection for these refugees in third countries. This creates new uncertainty over how much longer they will remain in limbo, and adds impetus to the present need for the Government to bring them to Australia.

[24] Johns Hopkins University and Nuclear Threat Initiative, *Global Health Security Index 2019*.

[25] 'Fears for PNG as COVID-19 appears in different parts of the country', *Sydney Morning Herald*, 23 April 2020; 'Coronavirus could see Papua New Guinea, Indonesia become failed states', *ABC News*, 29 April 2020.

[26] 'An economic hurricane is hurtling towards the South Pacific', *Sydney Morning Herald*, 30 March 2020.

[27] 'Panic over lack of covid info in rural PNG risks lives', *Radio New Zealand*, 3 April 2020.

4. Conclusion

29. Medical experts, peak bodies and more than one thousand doctors have been clear that immigration detention presents a high risk of sites of COVID-19 transmission. This jeopardises the health of people in these places of detention, the staff and the broader public health.

30. The only appropriate response is to take urgent action to protect the children, women and men who are under our Government's care both in Australia and offshore in Papua New Guinea and Nauru. This should be done by:

    (a) reducing the number of people in immigration detention in Australia by releasing people into the safe housing where they can comply with public health advice; and

    (b) transferring people held in Nauru and Papua New Guinea to Australia before there is a widespread outbreak.

31. The Department of Home Affairs and the relevant Ministers have at their disposal powers to easily give effect to our recommendations in a manner that is safe, dignified and reduces the risk to individuals and the wider community.