Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment

RESTRICTION OF MOVEMENT OF ASYLUM CLAIMANTS

VICTORIA CASEY QC

CLIFTONCHAMBERS

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DETENTION OF ASYLUM CLAIMANTS

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1. I was appointed to conduct an independent review of Immigration New Zealand's processes and procedures relating to restriction on the liberty of claimants for refugee and protection status. I was asked in particular to focus on the appropriateness of the use of Corrections and Police facilities in New Zealand for Immigration detention. I was requested to provide guidance at a systems level on potential alternatives, and, if I considered that the legislative scheme is inconsistent with New Zealand's human rights obligations, highlight matters for consideration in any future review of the Immigration Act 2009.

2. Under current law, asylum seekers who claim at the border but are declined a visa can be detained for up to 96 hours in a Police cell, and then indefinitely in a Corrections facility pending resolution of their claim to be recognised as a refugee under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. People who claim later, when they are a unlawfully in the country (eg their visa has expired) and facing deportation, can also be detained on the same basis. Detention is usually at Mt Eden prison. Refugee claimants are held with and under the same conditions as remand prisoners: no special arrangements are in place and Police and prison officers will generally be unaware they are refugee claimants.

3. The scope of my review is set out in my terms of reference: annex A. A summary of my recommendations and matters for consideration is at annex B. My inquiry process and a list of the organisations I spoke with is set out in annex C. I am grateful for the generosity of time and willingness to engage with this review process that I encountered from every person and group I spoke to.

4. My conclusion is that while very short term detention of some arrivals who claim refugee status at the border may be justified (though the current practice of how this is done must change), the practice of long term detention of refugee claimants in Corrections facilities is wrong, at every level. It raises serious issues of non-compliance with New Zealand's international and domestic human rights obligations. It is also inhumane and contrary to our society's core values to treat such vulnerable people in this manner, and while a form of long term detention might in extraordinary circumstances be necessary for public safety or national security, the current rate and form of detention is not justifiable on any basis.

5. There are three major areas of concern: the first relates to the structure of the regime under the Act, the second relates to INZ's operational practice, and the third relates to the use of Police and Corrections facilities. All three require change. Before addressing those, I briefly describe the broader context.

CONTEXT

Who are we talking about?

6. This review concerns people who claim to be recognised as refugees either at the border, or who are already in New Zealand (for example, on a student visa) and then make a claim. They are

L1, Solnet House, 70 The Terrace
PO Box 5621, Wellington 6140
New Zealand
P 64-4-212 4679
M 64-21-0299 5428
E victoria.casey@cliftonchambers.co.nz
www.cliftonchambers.co.nz

often referred to as 'Convention' refugees as they are exercising the rights granted to them under international law to claim asylum.[1] Those rights are incorporated into New Zealand's domestic law under Part 5 of the Immigration Act 2009.

7. This group is different from New Zealand's 'quota' refugees. People who come to New Zealand under the refugee quota programme are already recognised as refugees before they arrive, and are automatically granted permanent residence. On arrival they transfer to Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre) for a five or six week reception programme, before being settled in the community.

8. It is important to recognise that Convention refugees are not 'cheating the system', or 'queue jumping'. New Zealand's quota refugee programme sees New Zealand take a certain number of recognised refugees through the international resettlement system.[2] Convention refugees arrive in New Zealand on another path (and usually from different countries of origin[3]), but they are not thereby 'second class' or in any way less of a refugee, and they have the same rights under the Convention. A Convention refugee also does not 'use up' a quota space: New Zealand accepts Convention refugees in addition to its agreed quota under the resettlement programme.

9. Nor do Convention refugees represent an overwhelming number such that New Zealand as a good international citizen could not reasonably be expected to cope with the volume of claimants.[4] New Zealand is physically isolated and relatively difficult to get to.[5] While the years pre-covid saw an increasing number of claimants, these were in the order of 300 – 500 per year.[6] Most of these made their claim 'in country' and the portion who claim at the border on arrival is very small: in the period 2015 – 2020 there were only 146 such claimants in total.[7]

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1 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. People may also be entitled to 'protected person' status, recognising New Zealand's obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1966 International Covenant on Civil and Political Rights.

2 The Government announced in September 2018 that the annual refugee quota would increase to 1,500 from July 2020, but due to covid restrictions this number has not been reached: between 750 – 1,000 people will be settled in New Zealand in 2021/2022: https://www.immigration.govt.nz/about-us/what-we-do/our-strategies-and-projects/supporting-refugees-and-asylum-seekers/refugee-and-protection-unit/new-zealand-refugee-quota-programme. New Zealand also accepts up to 300 people a year under the family reunification programme: https://www.immigration.govt.nz/about-us/what-we-do/our-strategies-and-projects/supporting-refugees-and-asylum-seekers/refugee-and-protection-unit/new-zealand-refugee-quota-programme.

3 https://www.immigration.govt.nz/documents/statistics/statistics-refugee-and-protection.pdf

4 From pre-covid data, New Zealand is recognised as having one of the lowest number of accepted refugees per capita internationally: 0.3 refugees per 1,000 people, putting us 95th in the world (below Australia at 59th): https://theconversation.com/new-zealand-has-one-of-the-lowest-numbers-of-refugees-per-capita-in-the-world-there-is-room-for-many-more-162663.

5 Nor have we seen a mass arrival, noting the Immigration Act 2009 contains special provisions to deal with mass arrivals, which are not part of this review.

6 https://www.immigration.govt.nz/documents/statistics/statistics-refugee-and-protection.pdf

7 Of these 146: 49 were detained in a Corrections facility (all except one were male, 80% aged between 18 and 40, and by country of origin by far the largest grouping was from Afghanistan); 8 were held at the Māngere Refugee Resettlement Centre (with an age and gender profile suggesting family groups); 14 were 'released' under Residence and Reporting Requirements Agreements (mostly male and over half aged between 20 and 40, though with other ages suggesting family groups also); 71 were granted visas on arrival (roughly equal male and female, with well over a quarter being aged under 20, again indicating family groups). No claimants from Afghanistan, Syria, Somalia, Pakistan, Iran or Iraq were granted visas on arrival over this period. Some refugee lawyers raised concerns that from their perspective they saw racial profiling in the decisions to detain: this data bears that out to a certain extent and this is something that INZ should consider further.

10. The vast majority of Convention refugee claimants do not end up in detention: of the approximately 2,500 people who made claims between 2015 – 2020, only around 100 were detained.

11. Most Convention refugee claimants are granted visas to regularise their immigration status while their claims are being processed, which allows them to access health, education and welfare services and to work. For the small number who are declined visas at the border or who are facing imminent deportation at the time of their claim, however, the position is very different. Detention in a Corrections facility is in practice essentially the default position, and can extend for a long time: over the 2015 – 2020 period 60% were detained in prison for more than 3 months, and 12% for over a year.[8] One person was held for over three years.[9]

12. On average about a third of 'Convention' claims are approved by the Refugee Status Unit. Of those that are declined at the RSU level, another third are recognised as refugees by the Immigration and Protection Tribunal. This means that over half of all Convention refugee claimants will end up being accepted as refugees in New Zealand. In other words, when we are talking about a person who is a refugee claimant, there is a more than even chance that they will be recognised as such.

13. It is also important to bear in mind that under the Convention, New Zealand does not 'grant' refugee status. Rather, if a claim is successful, we *recognise* that the person *is* a refugee. This means that we recognise the person has a well-founded fear of being persecuted in their own country, for reasons of race, religion, nationality, membership of a particular social group or political opinion. For many refugees that well-founded fear is likely to be linked to personal experience of trauma.

14. A refugee fleeing persecution (or with a well-founded fear that persecution awaits them back home) is among the most vulnerable groups of people that we deal with in this country. New Zealand owes obligations as to how we treat these people both under law and as a matter of common humanity.

The nature of the problem

15. The starting position is that New Zealand as a sovereign state has the right to control its borders. Non-citizens generally have no rights to enter or remain in New Zealand, other than what we choose to allow them. Decisions at the border are legitimately and appropriately highly precautionary: we don't want to (and generally don't have to) let people in unless border officials are satisfied that they pose no harm.

16. In entering into the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol New Zealand has however voluntarily agreed to limit its powers to exclude or remove people who would otherwise be turned around on arrival or deported. New Zealand has undertaken to recognise refugees and allow them rights and entitlements in this country, including the right not be expelled save in highly exceptional circumstances.

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[8] The data provided to me by INZ underwent a number of revisions and may not be entirely accurate: the final figures also differ from the figures provided by INZ to the UNHCR. While this is not significant for the purposes of my review (as this information is contextual only) it highlights a broader concern. Much of the information I requested had to be collated from source materials, and I am very grateful for the work done to meet my requests, but this should not have been necessary. INZ should be routinely collecting and compiling data so that at all times it has a full overview of the status of refugee claimants who have not been granted a visa, including the demographics of those detained, where they are detained, for what reason and for how long, what steps have been taken or are underway to facilitate their release into less restrictive controls, where their refugee claim is up to in the process, and so on.

[9] And then recognised as a refugee.

17. That creates complexities and risks that must be acknowledged: people who would not be allowed visas must be allowed to stay. Some of these people will have arrived with no, or no valid, documentation and may not be able to establish their identity, either initially or in some cases at all. New Zealand may be rightly concerned about national security and public safety. There are a range of other broader concerns that are also valid: New Zealand does not want to become a 'soft' entry point for criminal or terrorist organisations, nor does it want to incentivise people smuggling. For people who claim asylum only after they are facing deportation, there is a concern not to incentivise 'gaming' the system.

18. These are genuine issues, but for most of these problems the solution is *not* routine long term detention of refugee claimants.

19. Many aspects of New Zealand's systems for dealing with refugee claimants more generally are regarded positively by the international community: asylum seekers here have access to legal representation, interpreters and legal aid, and we have a fair and thorough processes for assessing claims including access to a specialist appeal body. Most refugee claimants are granted visas to regularise their immigration status while their claims are being processed. New Zealand is also recognised for having an immigration detention regime that relative to our peers appears to be well tailored, and operates by warrant of commitment subject to regular review by the courts.

20. Serious concerns have however been raised about aspects of New Zealand's detention practices for asylum seekers who have not been granted visas pending resolution of their claim. The United Nations Human Rights Committee and the Working Group on Arbitrary Detention have expressed concern about the use of Corrections and Police facilities, and that asylum-seekers are not separated from the rest of the detained population.[10]

21. These concerns are not new: policy papers leading to the 2009 Immigration Act refer to the "overwhelming concern expressed in the submissions that protection claimants should not be detained in facilities that are associated with criminality, or where they may be further traumatised". These papers also record concerns raised with MFAT by other governments, concerns raised by the United Nations High Commissioner for Refugees and Amnesty International, and the harm to New Zealand's international reputation arising from the use of Police and Corrections facilities.

22. The extensive evidence-based report by Amnesty International published in May 2021 *Please take me to a safe place: The imprisonment of asylum seekers in Aotearoa New Zealand* has highlighted the grim experiences of detained claimants, and identified serious issues with the treatment of asylum seekers detained in Corrections facilities during the processing of their claims.[11] The Royal Australian and NZ College of Psychiatrists also records the deleterious and accumulating adverse effects of detention on the mental health of asylum seekers, observing that asylum seekers are among the most vulnerable and marginalised people in our community, many having experiences torture, trauma and other catastrophic events prior to displacement and flight, and many of whom will be experiencing cultural bereavement and culture shock.

23. The UN Committee against Torture and the Human Rights Council have both recommended that New Zealand adopt measures to ensure that detention is applied only as a measure of last resort,

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10 Report of the Office of the United Nations High Commissioner for Human Rights, Compilation of UN Information, A/HRC/WG.6/32/NZL/2, 13 November 2018 at p 10. Report of the Working Group on Arbitrary Detention - Addendum - Mission to New Zealand, A/HRC/30/36/Add.2, 6 July 2015, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/148/80/PDF/G1514880.pdf?OpenElement

11 https://www.amnesty.org/en/documents/asa32/4113/2021/en/

when determined to be strictly necessary, in a manner proportionate to each individual case and for as short a period as possible.[12] The New Zealand government accepted those recommendations in June 2019.[13]

24. These recommendations align with the UNHCR's 2012 *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention*.[14]

25. Progress has not been made, however. The issue has meanwhile gone into temporary abeyance as covid restrictions at the border cut out new arrivals, and INZ found its way to placing 'in country' claimants in the community rather than Corrections facilities. As border restrictions ease it is imperative that the system is reformed to ensure that past practices do not simply return by default.

New Zealand's international obligations

26. I do not in this report attempt to set out a full description of the law relating to the detention of asylum seekers: that would be a major work beyond the scope of this review, and much has already been written on the subject.[15] I am grateful to the many people who forwarded me a wide range of relevant materials, and for the thoughtful additional work provided by the office of the UNHCR in Canberra.[16]

27. The UNHCR Guidelines detail the obligations of state parties to the Convention in relation to the detention of asylum seekers. The Convention does not prohibit detention in all cases, and it is generally acknowledged that there can be circumstances where detention may be justified, especially for a very short period for a new arrival to allow checks to be made.

28. In summary, the Guidelines confirm the following obligations of state parties:

    28.1 The right to seek asylum must be respected;

    28.2 The basic human rights to liberty and security of person, and to freedom of movement, apply to asylum-seekers as they do to everyone else;

    28.3 Detention is to be an exceptional measure of last resort, with liberty being the default position;

    28.4 Conditions of detention must be humane and dignified, and the special needs of particular asylum-seekers must be taken into account;

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12 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: New Zealand*, 1 April 2019, A/HRC/41/4, p.22

13 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: New Zealand*, A/HRC/41/4/Add.1, 17 June 2019

14 9 April 2012 UNHCR *Detention Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention*

15 Including the 2108 *Revised Deliberation No. 5* of the Working Group on Arbitrary Detention, the UNHCR *Detention Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention*, the 2017 paper by Dr Costello (with Yulia Ioffe and Teresa Büchsel) *Article 31 of the 1951 Convention Relating to the Status of Refugees*, and the New Zealand Court of Appeal decision in *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577.

16 Particularly regarding the interpretation and application of Article 31(2) of the Convention which relates to the restriction of freedom of movement of refugees who have entered or are present unlawfully, pending their status being regularized, and the relationship between establishing identity and justifiable detention.

28.5 Detention can only be resorted to when it is determined on an assessment of the individual's circumstances to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose, and this assessment must be undertaken both initially and over time;

28.6 Less coercive or intrusive alternatives to detention must be considered, observing the principles of minimum intervention, and the necessity and proportionality of detention must be assessed on that basis;

28.7 Detention must not be arbitrary, including:

28.7.1 detention laws must conform to the principle of legal certainty – the law and its legal consequences must be foreseeable and predictable;

28.7.2 detention must not be inappropriate, disproportionate, unjust or lack predictability;

28.8 Indeterminate detention is arbitrary and maximum limits on detention should be established in law;

28.9 Minimum procedural safeguards must be provided, including:

28.9.1 to be informed at the time of arrest of the reasons for the detention, their rights in connection with that, including review procedures, in a language and in terms which they understand;

28.9.2 free legal assistance is to be provided and made available as soon as possible after detention to help the detainee understand their rights;

28.9.3 to be brought promptly before a judicial authority to have the detention decision reviews, within 24 – 48 hours of the initial decision to detain, and thereafter on a regular basis;

28.9.4 the judicial authority must have the power to order release or to vary any conditions of release;

28.9.5 the burden of proof lies with the state to establish the lawfulness of the detention, including establishing that it is justified according to the principles of necessity, reasonableness and proportionality, and that other less intrusive means of achieving the same objectives have been considered in the individual case;

28.9.6 detention must not constitute an obstacle to an asylum-seeker's pursuit of their claim;

28.9.7 access to the UNHCR and other independent agencies should be available.

29. These core principles align with New Zealand's domestic human rights law, both under the New Zealand Bill of Rights Act 1990 and common law.[17]

[17] See for example *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) and *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743.

30. The UNHCR Guidelines provide specific direction on what are and are not legitimate purposes for which an asylum seeker can be detained. Legitimate purposes for detention of asylum seekers may include:

30.1 preventing absconding, where for example there is a past history of non-compliance with conditions of release;

30.2 for initial identity and/or security verification – but detention here must last only as long as reasonable efforts are being made to establish identity or to carry out security checks, and recognising that lack of identity documentation is not per se a reason to detain;

30.3 to protect public health;

30.4 to protect national security, where detention is necessary, proportionate to the threat, non-discriminatory and subject to judicial oversight.

31. Legitimate purposes justifying detention explicitly do *not* include:

31.1 Detention as a penalty for illegal entry or illegal stay;

31.2 Detention as a deterrent to seeking asylum or incentive to withdraw a claim;

31.3 Detention of asylum seekers on the grounds that they are subject to expulsion (in New Zealand's parlance, deportation or turnaround).

32. The Guidelines also set out firm directives against the use of Police cells, and that the use of prisons should be avoided. They say that if asylum seekers are held in prison facilities they should be separated from the general prison population. Appropriate medical treatment including psychological counselling must be provided where needed, and medical and mental health examinations should be offered to detainees promptly on arrival. While in detention, detainees should receive periodic assessments of their physical and mental well-being, acknowledging that many detainees suffer psychological and physical effects as a result of their detention. All staff working with detainees should receive training in relation to asylum, sexual and gender-based violence, and the identification of the symptoms of trauma and/or stress.

33. The Guidelines discuss alternatives to detention, noting that electronic monitoring is considered to be harsh, not least because of the criminal stigma attached to its use, and should as far as possible be avoided (but nonetheless is preferable to detention).

34. More recent materials published by the UNHCR[18] emphasise that detention must only be used on an exceptional and individual basis, as a measure of last resort when no alternative exists. They express the view that detention should not be carried out in criminal or penal institutions, even when criminal and administratively detained populations are separated. The duration of detention for legitimate purposes such as initial identity, health and security checks must be minimised, and that it is impermissible to prolong detention due to inefficient processing modalities or resource constraints.

[18] Most recent being the draft *Guidelines on international protection: Article 31*, published for consultation at the end of 2021.

35. The UN Human Rights Committee has issued similar guidance in relation to article 9 of the International Covenant on Civil and Political Rights (the right to liberty and security of the person), in General Comment 35:

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security...
>
> Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.

36. As I outline below, for this small group of asylum seekers, New Zealand's current regime totally fails to meet many of these requirements. The fact that the numbers are small does not of course excuse this: on the contrary, with such small numbers we ought to be able to do much better.

STRUCTURAL CONCERNS

The Immigration Act establishes a flawed framework

37. The Immigration Act 2009 allows for refugee claimants (both those who claim at the border and those who claim later when facing deportation) to be detained *simply because they cannot be immediately deported*. In other words, the Act allows for the long term detention of an asylum seeker just because they would have been removed if they hadn't lodged a refugee claim that prevented that.[19]

38. These 'removal' detention provisions in the Act are not designed for refugee claimants. They are designed for immigration detention: the short term detention of people who don't have a valid visa or are in the process of being deported, who are briefly detained simply to control their whereabouts while arrangements are made to put them on a flight back home. Under these 'removal' provisions, the threshold for detention for 'turnarounds' (new arrivals who are not given a visa at the border) is so low that it is effectively non-existent.[20] For people unlawfully in the country and facing deportation processes there is a positive presumption that they will be detained in custody.[21]

39. These thresholds are entirely inappropriate for the long term detention of a person claiming protection as a refugee, and bear no relationship whatsoever to the requirements of the Convention and the UNHCR Guidelines set out above.

40. The UNHCR Guidelines in fact expressly condemn this practice of treating refugee claimants as 'removals', confirming that "as a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on grounds of expulsion [ie that they are subject to turnaround or deportation] as they are not available for removal until a final decision on their claim has been

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19 As noted above, the fact that an asylum seeker may not be removed from the country while their claim is progressed is a key feature of New Zealand's obligations under the Convention, and is reflected in s 164 of the Immigration Act.

20 Immigration Act s 316. A person meets the threshold for detention simply if they cannot be removed from New Zealand, which is inherent in the fact that they have made a claim to be recognised as a refugee.

21 Immigration Act s 317 provides that a Judge may not even order release on conditions, absent exceptional circumstances.

made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected."[22]

41. The files I reviewed disclose that refugee claimants are being held long term in Corrections facilities for reasons that are frankly trivial and in no way reflect any assessment of risk to national security or threat to public safety, or even any genuine risk of absconding. One person (whose personal profile would not on the most prejudiced assessment raise any such concerns) was held for *16 months* in jail because – when first approached by INZ as an overstayer - they had initially claimed a false identity. Another was detained because they had no family or friends in New Zealand (having arrived and sought protection at the border) and hence "may be difficult to locate" for the purposes of removal in the event that their claim to be recognised as a refugee was in the end declined.

42. The Immigration Act does have a separate regime for detaining people assessed or suspected to be a threat to public safety or risk to national security. Such persons can be held for a *maximum of 14 days* and then *must be released* unless the Minister has certified that the person is a threat or a risk to security.[23] Parliament may have envisaged that these were the provisions that would apply to the long term detention of asylum seekers in exceptional circumstances,[24] but the Act does not make that clear, and this is not how it is applied. I understand that none of the refugee claimants held in long term detention in Corrections facilities since the Act came into force have been detained under these provisions.

43. The Act also provides for *indefinite* detention, limited only by how long it takes the person's refugee claim to be processed.[25] The six month time limit on immigration detention (which requires a higher level of scrutiny before detention is allowed to continue) does not even start to run while a refugee claim is being determined.[26] This is contrary to the directions regarding indeterminate detention in the UNHCR Guidelines.

Under this framework, the warrant of commitment process is ineffective

44. The warrant of commitment process, which requires a District Court Judge to review the person's detention every 28 days, is completely ineffective as a safeguard to ensure that detention only occurs in circumstances that the UNHCR Guidelines would recognise as legitimate. This is no criticism of the Court: the Court is required to apply the Act according to its terms. The Crown has no burden of proof to establish 'just cause' for detention under the 'removals' detention provisions, and there is accordingly no basis upon which a detained person can effectively challenge the issue of a further warrant.

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22 At [33], page 20. Noting that the references provided in the Guidelines supporting this principle post-date the New Zealand Court of Appeal's decision in *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577. Footnote 56 to the Guidelines reads: "See *Lokpo and Touré v. Hungary,* above note 29; R.U. v. Greece, (2011), ECtHR, App. No. 2237/08, para. 94, available at: http://www.unhcr.org/refworld/docid/4f2aafc42.html. See, also, *S.D. v. Greece,* (2009), ECtHR, App. No. 53541/07, para. 62, available at: http://www.unhcr.org/refworld/docid/4a37735f2.html. The ECtHR has held that detention for the purposes of expulsion can only occur after an asylum claim has been finally determined. See, also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary,* 30 March 2012, App. No. 13058/11, available at: http://www.unhcr.org/refworld/docid/4f75d5212.html; UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Said v. Hungary,* 30 March 2012, App. No. 13457/11, available at: http://www.unhcr.org/refworld/docid/4f75d5e72.html."

23 Immigration Act ss 163, 318 and 322.

24 Section 316(1)(c) provides some support for that inference.

25 Including appeals and any subsequent claims. The longest time a person spend in detention in the period covered by this review was over three years, at the end of which the person was recognised as a refugee.

26 Immigration Act s 323.

45. As one lawyer (with considerable experience in the warrant of commitment process) commented, the Refugee Convention simply "doesn't register" in these provisions of the Act.[27] Put simply, the Act does not require *or allow* a Convention compliant assessment by the Courts of whether detention is truly necessary as a last resort. Examples exist where a concerned Judge has proactively pushed for release on conditions over the opposition of INZ, but that appears to be rare, and in the file that I reviewed was met by a view that INZ should appeal to ensure that the integrity of the Act was upheld.

46. My impression is that in essence for this small group of asylum seekers the default position is that they remain in custody until their refugee status is finally resolved. Some detainees (numbers range from one in 10 to around a third) are at some point released on conditions[28] to Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre) or to the independent Asylum Seekers Support Trust hostel, but this is in effect purely at the discretion of the individual INZ compliance officer, not the result of the court process.

47. Lawyers I spoke to in the refugee bar told me their experience is that it is essentially hopeless to challenge the issue of a warrant, and that while some lawyers will invest considerable (and largely unpaid) time to challenge detention at one or more warrant hearings, there was little point rearguing the same issues at every 28 day renewal, when nothing had changed and INZ was not shifting its position.[29] That experience reflects this basic structural problem with the Act.

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27 Under ordinary principles the Convention could not in any event override the clear requirements and thresholds in the Act: *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] – [145].

28 Or under a Residence and Reporting Requirements Agreement (an RRRA).

29 Lack of representation for asylum seekers at the warrant of commitment hearings is a very fraught issue, raised by a number of different groups. As I understand it, a warrant of commitment process is classified as a civil proceeding for the purpose of legal aid, requiring a different legal aid approval than many refugee lawyers hold (and being in practical terms closer to a criminal process, a different skill set from that held by many lawyers holding civil legal aid approval). Legal aid is also restricted to 3 hours, which is generally regarded as inadequate for a fully contested warrant of commitment hearing given the practical onus on the claimant to persuade the Court that detention is not warranted. I heard criticisms that a claimant's refugee status lawyer would not attend the regular 28 day review hearings, and would leave their client's representation to duty lawyers who were not expert in Convention law and felt unable to represent these detainees properly (and who were also generally not approved for civil legal aid and hence also unfunded and not necessarily qualified for this work). I gather these are well-worn criticisms, and I also heard in response from refugee lawyers who told me that these hearings in the Manukau District Court were largely futile and a waste of time which they could not afford (on top of the legal aid complexities, levels of funding and relevant skill sets). Some lawyers told me that for each client they would invest significant time and resources (largely unpaid) into one warrant hearing, to attempt to persuade INZ or the Judge that their client could safely be released on conditions, but once that failed, there was little point in rearguing the position when nothing significant had changed. Other files I reviewed showed extensive and repeated but unsuccessful attempts to obtain release on conditions. My view is that the lawyers' overall perception that the regular warrant hearings do not address the core issues of whether detention is truly necessary is basically correct. However, that has serious consequences for the claimant: not only is there no genuine review and no real basis to challenge their detention, from their perspective they are also left unrepresented and isolated, compounding the harm caused by the detention process. This problem of representation and legal aid for these hearings is a complex mess that needs to be sorted out. A starting point would be for the agencies involved to recognise that there is a structural problem and seek to find a practical solution to it, placing at the centre the interests of the asylum claimant and the critical importance of effective judicial oversight of continuing detention to ensure that New Zealand's compliance with its international obligations and domestic human rights law. It may be relevant here also to bear in mind that if the approach I am recommending is adopted, the numbers of warrant hearings should drop considerably (to hopefully near zero), but may also increase in complexity given the higher thresholds and the seriousness of the public interests at stake. The funding levels and skill sets for these hearings will accordingly need to be reconsidered in any event.

The INZ Operations Manual is ineffective as a safeguard

48. The INZ Operations Manual and other internal guidance[30] is also completely ineffective as a safeguard.

49. First, not only is the Manual out of date (as recognised in my terms of reference, the Manual still refers to the 1999 UNHCR Guidelines, not the 2012 revised Guidelines[31]), the guidance generally is fundamentally flawed in conflating Convention compliant reasons for why detention might be warranted (strictly as a last resort where detention is necessary for public safety or national security concerns, or where genuine risks of absconding arise), with immigration concerns (such as whether a person has previously been deported, or has provided false information to an INZ official on arrival).[32] The internal guidance thus provides for and allows detention for reasons and thresholds that are not consistent with the Convention and the UNHCR Guidelines.

50. Second, this internal guidance is to all intents and purposes operationally ineffective. As one INZ official said to me, such guidance is useful for officers that are starting out and learning how things are done, but for those with experience they prefer to pay attention to the Act itself. As a statement of INZ's legal obligations that can hardly be criticised, and in practical terms it is confirmed in the selection of files I reviewed. This links to my third and more substantive concern, discussed below.

The framework allows for arbitrary detention

51. My third concern is that INZ's operational guidance is *not aligned to the Act*, and accordingly *should* be operationally ineffective. The difference between the Act (which provides a low or no

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30 In addition to the relevant sections of the Operations Manual I was provided with a range of SOPs and the more recent 2020 INZ Compliance – Detention Team Manual *Managing Detention: Turnaround Cases Refugee and Protection Claimants*.

31 I was advised that INZ was preparing an updated version of the operational guidance to reflect the 2012 UNHCR revised Guidelines, but this was not completed in time for me to consider it in this review (a draft was emailed to me the evening before my draft report was due: I have briefly reviewed the draft but it does not address the main concerns identified in this report).

32 In summary, for in-country claimants facing deportation at the time they lodge their claim, the guidance material provides nothing more than a direction to consider whether continued detention is "appropriate" (and no direction to consider whether it is necessary). The guidance generally confirms the expectation in the Act that this category of claimants will remain in custody until their claim is determined. For border claimants, the guidance is more nuanced but overall does not reflect the requirements of the Convention. The materials generally contain good language at a high level, confirming the principles that restrictions on the freedom of refugee claimants should be restricted to the least degree and shortest duration possible, and that detention should only occur when all other alternatives have been considered and excluded. However, the more detailed directions in the SOP emphasise the broad discretion of INZ officers in this assessment, and refer for example to detention for a range of purposes including "effectively managing persons liable for deportation" and "protecting the integrity of the country's immigration system". Practical guidance is slanted towards detention, and release on conditions or an RRRA is not considered suitable unless the INZ compliance officer is *positively satisfied* that the person poses a low risk of criminal offending, absconding or otherwise posing a risk to national security and public order, and there is no direction to consider whether any such risks can be adequately managed by conditions rather than detention. The most recent Detention Team Manual illustrates the conflation of immigration objectives and more Convention compliant considerations. The considerations include whether the person is within the categories for which a visa must be denied, including if they have previously been removed or deported from New Zealand or any other country; or whether they have destroyed or otherwise disposed of travel or identity documents with the intention of misleading INZ officials (noting that this is seen to include people who have been smuggled). There is no firm requirement for an affirmative assessment that the claimant does in fact pose a risk to the community or national security, or that they are an internal flight risk, or whether less restrictive options will not be sufficient to meet those risks. As noted by the UNHCR there are also a number of gaps in the Operations Manual and SOPs. For instance, UNHCR's *Detention Guidelines* make clear that the special needs and particular personal circumstances of asylum-seekers should be considered. This includes children and women, but also victims of torture or trauma, victims of trafficking, asylum-seekers with disabilities, elderly asylum-seekers and LGBTI persons. The INZ materials are extremely vague as what is required from INZ officials when considering detention for vulnerable people such as these, and the files I reviewed showed examples of where a particular vulnerability of this kind was clearly drawn to INZ's attention but apparently ignored.

threshold for detention) and the Operational guidance (which sets out a more constrained range of reasons for when detention is appropriate) is a recipe for arbitrary detention. The Court is obliged to issue a warrant on the low thresholds in the Act, so if a warrant is applied for it is almost guaranteed it will be granted. The effect of this framework is that the actual and operative decision which results in a person's ongoing detention is the *INZ officer's decision to apply for the warrant in the first place*.

52. That decision is highly discretionary and happens 'behind closed doors": there is no right to be heard, no reasons given, no clear or predictable criteria, and no basis for the decision to be challenged.

53. Arbitrariness is further exacerbated by the provisions in the Act that allow for release under a Residence and Reporting Requirements Agreement (an RRRA) as an alternative to detention, at the *absolute discretion* of an INZ officer. "Absolute discretion" is a defined term, and means that a person cannot apply for the officer to exercise that discretion, no reasons need be given for a decision, and the rights of access to information under the Privacy Act 2020 and the Official Information Act 1982 do not apply.[33]

54. The combined effect of these structural features is that long term detention of refugee claimants is effectively occurring at the discretion of individual INZ compliance officers, exercised on opaque grounds that are not open to review by the Court. The regime established by the Act is thus fundamentally flawed at a structural level.

Detention of 'in country' claimants has additional aspects of arbitrariness

55. For claimants who are unlawfully in the country when they lodge their claim, there is a further element of arbitrariness: whether or not the person is detained pending resolution of their refugee claim depends entirely on whether they have been served with a deportation liability notice or deportation order. If the claim is made (even orally) before actual service and arrest, the detention provisions in the Act do not seem to apply. If it is made after, there is a presumption that they will be detained, and the Act does not even allow release on conditions absent exceptional circumstances.[34] The difference between long term detention and freedom in the community is thus only whether the person 'knows the ropes' and makes a claim in time, and it is poor reflection on the Act that it penalises those who do not have the knowledge or resources to understand how to play the system (and vice versa).

56. The underlying theme suggested by the essentially punitive provisions of the Act that apply to this group, that long term detention is justified as some sort of disincentive to prevent people making asylum claims to avoid deportation, also does not withstand scrutiny.

57. First, it is important to recognise that a refugee claim by a person facing deportation cannot be assumed to be without foundation. As noted, most refugee claims are made by people who are already in the country rather than first thing on arrival at the border. Asylum seekers may well have genuine and deeply ingrained reasons for not trusting state authorities, and staying on unlawfully rather than bringing themselves to the attention of the authorities by lodging an asylum claim can be an understandable position for them to have taken, even if one not consistent with the requirements of the Immigration Act. As one insightful INZ compliance officer put it, a person who claims at this stage *might* be just trying to slow the removal process, or it may be they had not found the courage to come forward until INZ and deportation was right

33 Immigration Act ss 11 and 315.

34 Immigration Act s 371(5)(d).

in front of them. Before assumptions are made that all or even most claims made in this context are without merit, INZ should collect and review the data to find out what is actually occurring.

58. Second, legitimate concerns about claimants making unfounded claims to delay deportation can and should be addressed through the claims determination processes of the Refugee Status Unit. If there is a serious issue here, fast-track processes could be adopted for claims made in this context that appear hopeless. The Act also contains a range of provisions for summarily dealing with claims where the claimant is not acting in good faith or with second or subsequent claims that are manifestly unfounded or clearly abusive to.[35] If those options are not being used effectively, the solution lies with addressing the impediments that prevent that, not in imprisoning refugee claimants to cover the gap.

59. Finally, there is also no evidential foundation for such 'disincentives' being effective to discourage unfounded claims, let alone discouraging *only* unfounded claims: and that latter point requires some emphasis.[36] Detention to punish or deter an asylum claim or incentivise its withdrawal is also firmly condemned by the UNHCR Guidelines.

Legislative amendment is required

60. Legislative amendments are required to set up a system that ensures compliance with New Zealand's international obligations and consistency with the New Zealand Bill of Rights Act 1990 (especially the right not to be subject to arbitrary detention). Asylum seekers should not be subject to the 'removals' detention provisions at all, but rather a separate regime which requires that any restrictions on their freedom pending resolution of their claim must be affirmatively justified by the state as necessary and proportionate.

61. Justification may be relatively easily shown for a short period for new arrivals where there are identity concerns and it is necessary to check biometric data. To avoid even that detention becoming arbitrary, however, the purpose for it needs to be clearly stated and the detention must extend no longer than is necessary to meet that purpose. The corollary of that is that INZ must progress those checks without delay.

62. After that first short phase, severe restrictions on freedom such as detention or electronic monitoring should be affirmatively justified as necessary in the individual case for public safety or national security, or where there is a genuine and real risk of absconding prior to the determination of the claim for asylum. As the UNHCR Guidelines confirm, the burden should be on INZ to establish to the Court that the restrictions it seeks are justified in each individual case according to the principles of necessity, reasonableness and proportionality, and also that other less intrusive means of achieving the same objectives are inadequate to mitigate the identified risk.

63. Legislative amendment is crucial: as the present context graphically demonstrates, attempting to mitigate the flaws in the legislative regime through the INZ operational guidance is ineffective (although pending legislative reform, stricter Convention compliant guidance should be put in place an internal steps taken to ensure that it is applied).

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35 These are set out in Part 5 of the Immigration Act.

36 I asked MBIE whether this aspect of the regime under the 2009 Act had been supported at the time of enactment of the legislation by any analysis or data identifying this as an appropriate solution to an established problem. While access to relevant papers (now at least 13 years old) proved to be not straightforward, the papers located did not indicate this to have been the case. The 2012 UNHCR *Detention Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention* also record to the contrary, that there is no evidence that detention has any deterrent effect on irregular migration.

OPERATIONAL CONCERNS

INZ is not actually making a decision

64. The structural flaws in the legislative regime outlined above, that it in effect places the detention of an asylum seeker at the discretion of the individual INZ compliance officer who decides who to apply for a warrant of commitment, is compounded by the fact that compliance officers *are not treating this as their decision*.

65. INZ compliance officers seem to regard their role as primarily implementing a decision that has *already* been made – that the person is not to be given a visa or is to be deported – and then putting evidence before the Court to meet the low threshold for detention under the 'removals' provisions in the Act. The legal team are also involved at this point, but again their role is limited to whether the grounds in the Act to justify a warrant of commitment are met.

66. Under the current regime, the key decision for INZ: is detention of this person actually justified (in terms of the Convention and the UNHCR Guidelines, or even INZ's own operational guidance) is simply missing.

67. The operational implications of this are extraordinary. For a new arrival, once a decision is made to decline a visa there is no record of any further decision about what should happen next on any of the files that I saw, and no reference to decision making criteria. INZ officials confirmed that they would not usually meet or speak with the claimant before processing the warrant application or any renewals, and judgements such as whether the person might be threat to public safety, a flight risk or even just uncooperative with authorities were being made on the basis of inference and assumption.[37] The position is similar for in-country claimants subject to deportation.

68. It is important to be clear that the decision whether or not to grant a person a visa – either at the border or as an alternative to deportation for an overstayer - is fundamentally different from the decision whether it is appropriate to place an asylum seeker in long term detention in a Corrections facility.

69. The decision whether to grant a visa is highly discretionary, in line with New Zealand's rights as a sovereign state to control its borders. INZ border officials rightly take a precautionary approach as to who they allow to 'walk through the doors' and out into the community. People arriving with no documents or false documents, who cannot establish their identity, who may have no money, whose country of origin is unstable and violent, who may have been subject to state persecution giving them a record of imprisonment, who may have a complex travel history through areas of known concern, who may be adamant that they will not return to their home country, who may have a deep distrust of authority and hence not be fully co-operative when first questioned on arrival: these people tend to not meet the comfort level required for the issue of a visa at the border. Similarly people who are unlawfully in New Zealand after their visa has expired and facing deportation don't usually meet the criteria for a further visa.

70. However, the broad discretionary factors that are appropriate to determine whether a visa should be issued *do not* justify long term detention in a Corrections facility. As the UNHCR

[37] One aspect of this assessment particularly stood out, and was the subject of valid criticism by refugee lawyers: claimants at the border are routinely asked whether they will voluntarily leave the country if their claim for recognition as a refugee was declined. A negative response is generally taken as an indication of flight risk and likely non-cooperation with authorities, and feeds into the decision to detain. In my view, that question is unfair: an asylum-seeker who has a well-founded fear of persecution in their home country is unlikely to agree that they will voluntarily return there. The question is also a catch-22 for claimants: if they don't agree, INZ will hold that against them for the purposes of detention, but if they do agree, the Refugee Status Unit may hold that against them in terms of the genuineness of their claim.

Guidelines makes clear, detention is only justified in exceptional circumstances where the risk to public safety or national security, or genuine risk of absconding, are sufficiently serious to warrant such extreme measures, and even then only if those risks cannot be adequately mitigated by other means.

71. This is a fundamental flaw in INZ's current operational processes, that the two issues - immigration status and justified detention - have been conflated.

A separate (Convention compliant) decision on detention is required

72. Once a decision is made not to issue a visa at the border (or a person subject to deportation makes a claim in country), there needs to be an entirely separate and Convention compliant decision made at an appropriate level of seniority and subject to rigorous internal review about what happens to the asylum claimant pending the resolution of their claim.

73. The default position should be liberty with the minimum levels of reporting and residence restrictions needed to allow INZ to manage the person's irregular immigration status, with any additional restrictions on a person's freedom justified on a solid evidential basis, and set at the minimum level possible.

74. It is this assessment by INZ that should then be the subject of the warrant of commitment process in the District Court. In other words, the INZ assessment and the statutory criteria for the Court to issue a warrant of commitment must align, both between themselves and with the requirements of the Convention. This 'triangle' of alignment is the only way to ensure that the process meets New Zealand's international obligations and does not become arbitrary.

75. On that approach, long term detention should be very rare indeed.

76. Consideration should also be given to whether this decision should remain within the ambit of INZ's compliance branch. As one official told me, responsibility for the detention of refugee claimants has essentially defaulted to INZ compliance because they administer the 'removals' detention regime. INZ compliance officers are inevitably focused on immigration compliance and integrity issues, and from what I observed have little or no focus (or, as I understand it, training) on matters relating to the Convention (noting again that this is not required from them under the Act as it stands). My recommendation above is that the regime for detention or other restrictions for asylum seekers be separated from the 'removal's regime, and it may be appropriate for this to be reflected in a separate operational framework where decision makers have a firm grounding in the Convention, to avoid slipping back to the conflation of the two that is such a dominant feature of the present system.

Identity concerns must not be overstated, and must be addressed promptly

77. The UNHCR Guidelines confirm that lack of identity documentation is not per se a reason to detain. Especially once initial biometric checks have been completed (which can usually be done in a matter of days), lack of established identity does not by itself equate with the sort of threat to safety or risk to national security that might warrant significant restrictions on an asylum seeker. This is confirmed in the INZ operational guidance which makes it clear that establishing identity should not be a precondition to an RRRA or release on conditions.[38]

78. The INZ officials I spoke with confirmed that definitively establishing an individual's identity was more to do with establishing their immigration history and providing a foundation for their future

[38] For example the 2020 INZ Compliance – Detention Team Manual *Managing Detention: Turnaround Cases Refugee and Protection Claimants*, at page 11.

immigration status, rather than raising any particular concerns about public safety or national security. However, contrary to their own internal guidance, in practice INZ compliance officers appear to be reluctant to consider that a person could be released on conditions if they were not sure who they were, just in case that unknown information was important. This disjunct is again reflected in the Act.[39]

79. According to information provided by the UNHCR, many countries house asylum-seekers in open accommodation centres while undertaking identity checks, including Sweden, Finland and Germany, while Canada directs its officials to release individuals who are co-operating with efforts to establish their identity.

80. This flags a related concern with current practice. Even where INZ has sought detention on the basis of identity concerns, INZ officials do not regard it as within their role to work with the claimant to proactively address identity issues, so as to facilitate prompt release from detention into less restrictive conditions. As I understand it, where identity cannot be readily established, INZ compliance officers usually wait until the Refugee Status Unit have resolved this issue as part of the refugee claims process (the RSU have expertise in this area and will generally be looking at identity issues as part of processing the claim). This can be a slow process, taking many months (if it is reached at all - refugee status can be recognised without identity ever being definitively established).

81. Ironically, the very fact of detention in a police cell and Corrections facility actively obstructs a refugee claimant in this context. In Mt Eden prison (and in Police cells) there is no access to the internet and limited (if any) ability to get in touch with family and other contacts in the person's home country, which may be critical for the person to obtain evidence to establish their identity, creating a catch-22 in terms of getting out of detention. As one person commented, it is 'just nuts' for INZ to place an obligation on a claimant to prove their identity before they can be released from detention, then at the same time take away their ability to do so.

82. These features strongly signal arbitrariness and unreasonableness in how the regime is operating.

83. In those cases where identity is legitimately an issue that forms part of the reason for detention or other restrictive conditions, INZ should be taking active steps to get that resolved as soon as possible, rather than waiting for the usual RSU processes to reach that point. Arrangements should be put in place for RSU to fast track their inquiries on identity for a person who is in custody, to assist INZ in that process. Similarly, INZ should ensure that a person in custody has everything they need – including access to the internet and free access to a telephone in the appropriate time zones – to allow them to speedily progress obtaining any available evidence and supporting documents.

Alternatives to detention must be available and be proactively considered

84. Under the current system officials also do not regard it as within their role to actively seek alternatives to detention, either at the point of first detention or afterwards.[40] The person I

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39 This is another example where INZ guidance (and the UNHCR Guidelines) and the Act are in conflict: release on conditions is actually prohibited under the Act save in exceptional circumstances if the identity of the person is unknown (s317(5)(a)), so *if* INZ opts to raise this as an issue, a warrant is close to guaranteed.

40 This was seen as the responsibility of the person and their lawyer. The files that I reviewed illustrated the random effect of this: for those who had a proactive lawyer, release on conditions or an RRRA might be arranged (but not always – some files showed attempt after unsuccessful attempt by lawyers to obtain release of their clients). However, claimants without proactive assistance of this nature appear to just continue in detention. This reflects that basic structural flaw that instead of INZ showing cause for continued detention, claimants are required to satisfy INZ that they should be released, which is extremely difficult for those in prison without support.

referred to above as being in detention for 16 months was not interviewed by INZ for over 500 days after being taken into custody, at which point it was 'discovered' that there was a spouse and child in the community, and they were then released on conditions to that address.

85. The Māngere Refugee Resettlement Centre appears to be considered as an option only where there is an obvious problem with using a Corrections facility (such as for a family group including children), but there seemed to be general agreement that its use for detention purposes is in any event problematic.[41] Placement on conditions at the Asylum Seekers Support Trust hostel *might* be considered, but I could not ascertain in what circumstances: my sense is that this didn't really register as an option in most cases.

86. The assessment to release on conditions or an RRRA also appears to be strongly influenced by the INZ compliance officer's own views as to the likely validity of the claim for refugee status, despite compliance officers having no particular expertise or training or specific knowledge about the claimant's claim to inform that assessment. More importantly, that assessment bears no relationship to whether the person poses a risk to the community that might warrant restrictive conditions, let alone detention in prison.

87. A related issue is that INZ compliance officers are constrained in practical terms by the alternatives to detention that are currently available within their system. So, for example, one official based in a centre out of Auckland described that they would have liked to have an asylum claimant released on conditions to the Māngere Centre, but INZ does not fund the transfer of asylum seekers to Auckland, so instead the person remained detained in prison until their claim was resolved.

88. INZ officials I spoke to generally agreed that having the option of electronic monitoring would be useful, but there seems to be no moves towards bringing immigration detention into that regime.

89. However, the fact that *INZ* does not have, or does not fund, other alternatives to detention does not mean that detention is justified as a last resort, simply because there are no other suitable options available in practice. The obligation under international and domestic human rights lies on the state, and the government needs to ensure that suitable and less restrictive alternatives are genuinely available and properly funded.

90. Those alternatives should be focussed on supporting refugee claimants in the community in accordance with the principle of minimum intervention. Established options already exist and it is not clear why INZ is not using them more: for example the independent Asylum Seekers

[41] Largely to do with implications of mixing asylum claimants with accepted quota refugees. Asylum claimants held at the MRRC do not have access to the same programmes or even catering as the accepted quota refugees, creating a real division. Some report this conveys the sense that a claimant is 'bad' and second-class. It is also seen as unfair to both groups – quota refugees are themselves highly vulnerable and should not have to deal with the tension and grief of asylum claimants waiting for their claim to be determined and then possibly declined, and asylum seekers should not have to be faced with people who are already accepted and being actively supported into the community if they then fail to achieve that themselves. Also, MRRC is set up for short term stays (the quota programme is five or six weeks) not the months and possibly years for a claimant. On the other hand, there are a range of supports available at the MRRC that are available for claimants, and the staff are experienced in dealing with refugees: and everyone agrees that placement there is far preferable to Mt Eden. Interestingly, it is reasonably apparent from policy papers leading to the 2009 Act that the intention at that stage was for all detained asylum claimants to be housed at MRRC, and provision was made in the Act for the Minister to designate facilities as places of detention for that purpose. The policy papers endorse this in light of the "overwhelming concerns" expressed during consultation on the Act about the use of Corrections facilities. In the years that followed, however, MRRC has not proved to be a good option for detention, and no other facilities have been designated, so detention has defaulted again to Corrections facilities.

Support Trust advised that over the years they would have been able to find capacity to place every claimant who has been detained in prison.

91. It is worth noting that the cost of detaining asylum seekers in a Corrections facility is borne by Corrections out of its appropriation: so in addition to detention being an 'easy option' for INZ in terms of passing responsibility for the claimant to another agency, and a 'safe option' in terms of potential risk (to the community and hence to INZ's decision making), there is also a structural disincentive for INZ to engage in exploring and establishing less restrictive alternatives to detention. At some point however the overall economics of this system should be looked at, as even the basic data indicates that there should be a more efficient way to address this issue:

    91.1 Corrections' latest published data records that the average cost of housing each prisoner is $90,977 per annum or *$249.25 per day*;[42]

    91.2 Refugee claimants released on conditions or an RRRA are provided with an allowance at INZ's discretion (reflecting the fact that they do not have a visa and are hence unable to work or access social welfare).[43] That allowance was increased in April 2020 from $120 to *$225 per week* (or $85 per week if housed at the Māngere Centre, as their accommodation – but not food – is provided for).[44]

Restrictions on liberty must be genuinely reviewed on a regular basis

92. The importance of a regular review of the continuing necessity for detention is a key feature emphasised by the UNHCR Guidelines and INZ's own operational guidance, but again this is not in practice operating to provide any sort of safeguard for claimants in prison.

93. Some of the files I reviewed showed evidence of the required fortnightly internal INZ 'review of detention', but these uniformly referred only to the status of the person's refugee claim, not whether detention remained necessary or even appropriate. One file, for example, included a strong plea for release on conditions by a lawyer acting for a claimant who had suffered torture in his country of origin and was finding conditions at Mt Eden traumatic. There was no acknowledgment or consideration of that request in the 'detention reviews' that followed, and the person's detention simply continued until their claim to be recognised as a refugee was determined in their favour and a visa was granted.

94. As with the initial decision to detain outlined above, this review needs to be undertaken on the same Convention compliant basis as the Court should then adopt (under amended legislation) in deciding whether a further warrant is justified. That is, with the onus on INZ to affirmatively establish that there are well-founded concerns that an individual poses a serious threat to public safety or risk to national security (or genuine risk of absconding), *and* to demonstrate that less restrictive conditions would be insufficient to address that risk. The Court at this stage should also be reviewing whether INZ has taken prompt steps to facilitate whatever action may be necessary to allow less restrictive options to be used, and continue to monitor that progress.

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[42] https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/previous_years_prison_statistics/march_2011#general

[43] These allowances are entirely discretionary, and the Asylum Seekers Support Trust told me that it is not always made available, throwing the person's support entirely on the Trust. Payment ceases as soon as the person's asylum claim is either approved or declined by the Refugee Status Unit, and is not available during any appeal (even though a third of all RSU declines are reversed at the IPT level).

[44] The Ombudsman has raised concerns about the level of this allowance, noting that residents have said that the allowance was insufficient to cover hygiene and menstrual products as well as food and other costs, which was acknowledged by MRRC staff: Ombudsman's April 2021 OPCAT Report *Report on an announced inspection of Māngere Refugee Resettlement Centre under the Crimes of Torture Act 1989*.

There is an overall 'responsibility gap'

95. These features also illustrate what appears to be a fundamental 'responsibility gap' in the regime. New Zealand has affirmative obligations under international law in its treatment of refugee claimants, but no part of the government agencies involved are taking overall responsibility for ensuring those obligations are met for refugee claimants who are declined visas (and thus end up in detention or released on conditions).

96. If refugee claimants are to be detained or subject to other restrictions on their freedom of movement in the public interest, the government needs to maintain clear oversight of the circumstances in which this occurs and the conditions under which they are held, in order to be satisfied that New Zealand is meeting its obligations under international law.[45]

97. INZ needs to adjust its operations so that it explicitly takes *and maintains* clear responsibility for *ensuring* that detention only occurs in accordance with the Convention (ie as an exceptional measure of last resort), *ensuring* that detention is replaced with less restrictive conditions as soon as possible (including proactively working with claimants to that end), and, where short or long term detention is properly justified, *ensuring* that refugee claimants are held under appropriate conditions and have access to the support, information, care and facilities that they (and the UNHCR Guidelines) require.[46]

98. This last point leads to the next area of concern, the use of Police cells and Corrections facilities.

DETENTION IN POLICE CELLS AND CORRECTIONS FACILITIES

99. My terms of reference ask me to focus on the appropriateness of the use of Corrections and Police facilities for immigration detention, in the context of detention of asylum seekers. At the same time, they expressly exclude from scope "investigation into the treatment of claimants in, and any conditions of, Police and Corrections facilities". I have navigated this boundary by talking about usual conditions at a general level, with a focus on what INZ does and does not do to ensure that the UNHCR Guidelines for detention of asylum seekers are being met (over and above the assumed compliance by Police and Corrections with their own statutory and human rights obligations). I did not speak with either Police or Corrections in my review, although a draft of my report was provided to them and both provided feedback and commentary, which has been useful. None of my observations should be taken as findings or criticisms in relation to Police of Corrections operational practices and procedures.

100. The starting point to bear in mind is that, as outlined above, New Zealand's obligations under the Convention and domestic and international human rights belong with the state. INZ's valid explanations of what they can and cannot control within Police or Corrections' facilities are beside the point: if Police and/or Corrections are unable within their own operational frameworks to deliver an environment that meets the requirements of the state's obligations under the Convention, then it does not mean that those obligations are excused. It means that those facilities are not suitable.

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45 Noting my concerns outlined above about the lack of accurate data and the importance of establishing a system that records and makes transparent what is happening in terms of detention and lesser restrictions for asylum seekers.

46 The UNHCR Guidelines specify that appropriate medical treatment, including psychological counselling, must be provided where needed, and medical and mental health examinations should be offered to detainees promptly on arrival. While in detention, detainees should receive periodic assessments of their physical and mental well-being, acknowledging that many detainees suffer psychological and physical effects as a result of their detention. All staff working with detainees should receive training in relation to asylum, sexual and gender-based violence, and the identification of the symptoms of trauma and/or stress.

Up to 96 hours (4 days) in a Police cell

101. Under the present regime a refugee claimant can be held up to 96 hours (4 days) in a Police cell.

102. There are a number of concerns with current practice.

The length of time and the reasons for detention

103. Four days is a very long period to be in custody before being brought before a court, and a very long period of time to be housed in this type of temporary holding facility. The UNHCR Guidelines refer to a maximum of 24 – 48 hours.

104. Policy papers leading to the 2009 Act confirm that this extended period of detention for 'removals' was introduced primarily to accommodate the longer timeframes it took to place people on a return flight given the increased security and other requirements following 9/11. The extended period was seen to be more efficient and cost effective as people could be held until they were actually removed from the country, rather than going through a warrant process and transfer to a Corrections facility for what would only be an extra day or two.

105. That rationale of course does not apply to a refugee claimant, and concerns were raised in advice to the Attorney-General at the time on the consistency of these proposals with the New Zealand Bill of Rights Act.[47] That advice recorded that detention for a period of 96 hours outside the deportation context should not be expected, and that if initial detention is considered necessary to establish identity or undertake other security checks it would become arbitrary if there was undue delay in completing those steps. [48]

106. I understand however that under current practice, the 96 hour period is considered necessary primarily to allow an application for a warrant of commitment to be prepared. The process of biometric checks may not necessarily even be commenced in this first 96 hour period, let alone completed at speed. Further, as already noted, INZ officials do not regard it as within their role to assist a claimant to establish their identity (through, for example, facilitating internet contact with family and contacts in their home country), even though it is acknowledged that a claimant newly arrived and lodged in a police cell would have no opportunity to do this themselves.

107. More fundamentally, however, it does not appear that this initial period of detention is necessarily linked to identity or security concerns at all: rather, it is simply the default position for claimants who have not been granted a visa at the border, unless (as occasionally has happened for family groups) border officials have already put in place release under an RRRA.[49]

Access to support is denied

108. The New Zealand Red Cross told me that they are denied access to these people, apparently on the grounds of privacy.[50]

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47 See https://www.justice.govt.nz/assets/Documents/Publications/bora-immigration-bill.pdf.pdf

48 I understand that biometric data checks – if sought immediately - can usually be obtained in a shorter timeframe, and if there are delays then continuing custody in Police cells is not the answer, given the nature of the facilities.

49 Figures from INZ show that during the 2015 – 2020 period only 14 claimants were released on an RRRA on arrival. I understand that these were all family groups.

50 This is unacceptable: privacy issues can be readily addressed through an opt-in or opt-out system. If necessary INZ should work with Police and the Privacy Commissioner to develop a system that respects privacy but also ensures that this highly vulnerable group of people have a genuine and freely exercised choice to accept or decline contact by the New Zealand Red Cross while in Police custody.

109. The Asylum Seekers Support Trust has similarly been refused permission to even provide pamphlets outlining their support services and their contact details. The Immigration Protection Tribunal's attempts to establish a roster of suitably qualified refugee lawyers who have volunteered to be available on call appears to have been stymied because of issues raised by legal aid.

110. INZ however also disclaim responsibility for a claimant's treatment and welfare once they have been transferred to Police custody. I understand that while at the point of arrest Police will be aware that the person is to be held as an immigration detainee, it is unlikely that Police officers managing their custody will be told that the person is a refugee claimant. Nobody is tasked by INZ with providing support over and above what could reasonably be expected from Police in their day to day operations (bearing in mind that people claiming protection at the border may have arrived with very little in the way of belongings). No arrangements are in place for the medical and mental health examinations and support that the UNHCR Guidelines say should be offered to detainees promptly on arrival.

111. It is unlikely that any INZ official will visit or speak to the person during this period.

Information is not provided

112. INZ are supposed to give a letter to Police with a request for the person to be told that this is an immigration detention and they are not charged with an offence, but INZ appears to provide no information to the person about why they are detained or the legal process that is underway.

113. It is not clear whether the reasons for the person's detention are properly explained, let alone in way that would be comprehended by them given the context of their arrival, and the likely language difficulties and lack of familiarity with our legal system.

Overall

114. These features all combine to present a grim picture of how New Zealand is treating people who claim asylum at the border and are declined a visa. One of the most chilling comments made to me during my interviews was from a refugee who had arrived in New Zealand some years ago before the current process developed, and is currently working with our newer refugees. He said that what would have made an enormous difference to these young men is simply being told when they were in Police custody that *there was a legal process underway*. They'd had no idea what was going on and were terrified.

115. The New Zealand Red Cross made a similar observation: that for asylum seekers taken into custody at the border, simply knowing that another agency – independent of the state – knows that they exist and are in custody, can make a huge difference to the level of trauma that is experienced.

Change is required

116. Short term detention for border claimants may be necessary in some situations, for example while biometric information is processed to assess whether there are grounds to suspect that the person may be a threat or risk to security or public safety. This should not be the default position however, and ideally this should not be in a Police cell (noting that the UNHCR Guidelines are firmly opposed to this practice for asylum seekers). I understand that from time to time there have been proposals for a bespoke short term detention facility close to Auckland airport, which would be used for immigration detainees facing deportation as well. The feasibility of such an option should be revisited.

117. In the meantime, the key here is that such detention must be only where absolutely necessary and always *as short as possible*, recognising the unsuitability of a Police cell for a refugee claimant who has just arrived in New Zealand.

118. If Police detention is to remain an option, INZ needs to take immediate steps to satisfy itself and ensure that the following requirements are met: allowing access to detainees by the New Zealand Red Cross; permitting the ASST to provide pamphlets about its services; actively facilitating prompt access to appropriately qualified refugee lawyers; provision (where needed) of basic personal hygiene needs, climate appropriate clothing and culturally appropriate food; provision of initial medical and mental health checks. INZ must also take responsibility for ensuring that claimants are fully informed in a way that is understood by them not only of the reasons for their detention and their rights, but also the legal processes that are underway.

119. It may be that some of these are not feasible in the context of Police custody, given the Police's own operational requirements. As I note above however, in that event, Police custody is not appropriate, and a bespoke short term detention facility is essential.

Detention in a Corrections facility

120. From Police custody, the majority of refugee claimants who have not been granted a visa at the border transfer to Mt Eden prison under a warrant of commitment, that in most cases will be renewed every 28 days until their refugee claim is finally resolved, unless an INZ official agrees to their release on conditions or an RRRA. Detained in-country claimants are held on a similar basis, but, as noted, they cannot be released on conditions unless they establish "exceptional circumstances".

The reality of detention

121. The asylum seeker at this point becomes subject to the Corrections Act 2004 and Corrections Regulations 2005.

122. It appears that INZ until very recently did not consider that they retained any responsibility for the treatment or welfare of asylum seekers in detention,[51] including in the past simply referring serious complaints back to be dealt with under the Corrections complaints processes. As outlined above, INZ also do not consider that it has any role in working with the refugee claimant to resolve the issues that INZ has relied on in seeking a warrant of commitment (for example, facilitating resolution of any identity issues or working with them to find suitable placement in the community). Corrections advised me that they received very little information about the person from INZ to assist in their management.

123. Refugee claimants in custody are subject to the same conditions as remand prisoners in terms of visits, access to phones, time out of their cell, drug testing, security measures including strip searching, restrictions on personal clothing and property and physical grooming, double bunking and so on.[52] I understand from those who work with claimants that most prison staff will be unaware that they are an asylum seeker.[53] There is no special unit to house them, though Corrections told me that people held under immigration warrants will where possible be

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51 The recent appointment of MBIE's refugee claimant welfare officer is a welcome step, but her role in this context is very limited.

52 With one exception: while remand prisoners are not permitted to change their hairstyle detainees under the Immigration Act may adopt the hairstyle of their choice, subject to any direction on the grounds of health, safety or cleanliness. An immigration detainee is however not permitted to grow a beard or moustache without the prior approval of the prison manager (regs 70 and 188).

53 This is further complicated by the strict requirements of confidentiality regarding the identity of any refugee claimant reflected in s 151.

generally held together, and may be operationally separated to a greater or less extent from other prisoners where numbers and operational requirements allow. The low numbers involved however complicates that.

124. INZ places emphasis on the fact that most refugee claimants are held in Mt Eden prison, which is primarily a remand facility (that is, for people charged with an offence who have not been granted bail). The suggestion is that this is a positive feature: that the majority of immigration detainees are not held with the general prison population of convicted offenders. However, a remand prison can be a harsher environment than an ordinary prison, especially a low security prison. Remand prisoners have no security classification and prisoners are moving in and out of the prison to go to court, so the prison is managed at a higher level of security. Prisoners are also moved around within the prison more frequently as the remand population changes, changing cells and cell mates, and generally speaking fewer programmes and facilities are available.

125. A claimant detained at Mt Eden will be strip searched on arrival, and on every occasion that they return to prison after (for example) going to court or to a hearing at the IPT. The units at Mt Eden house between 45 to 80 prisoners, so claimants will inevitably be housed in the same unit as other remand prisoners. Lock down hours at Mt Eden will vary depending on operational requirements, but generally a prisoner can expect to be locked in their cell from 5pm to 8am each day.

126. It is also important to understand that under New Zealand's criminal justice system most people facing charges are entitled to be released on bail, and for those facing all but the most serious charges (or with significant record of criminal offending) there is a presumption against being detained on remand: detention has to be positively justified by the state as having 'just cause' before it will be ordered by the Court. It would be wrong to assume that remand prisoners are less likely to be associated with gangs, or to be violent, aggressive, or intimidating to a refugee claimant than a convicted prisoner. The May 2021 report by Amnesty International *Please take me to a safe place: The imprisonment of asylum seekers in Aotearoa New Zealand*[54] also provides detailed evidence to the contrary.

127. For a refugee claimant who claimed asylum at the border the experience of prison can be made far worse by the fact that they will often have little or no english,[55] little understanding of what is happening in terms of both the day to day conduct of the prison, and of the overall process that they have fallen into. Such people may have arrived with little or no money, and few clothes or other possessions. I understand that as for all remand prisoners, basic items are provided for them on arrival in the prison (although some claimant lawyers spoke of shortcomings here in practice), and there is an allowance of $1.70 per week from which to purchase personal items and phone cards. While Correction's standard medical and mental health services are available, there is no specialist mental health services for them despite the need for this being clearly identified by the UNHCR.[56]

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54 https://www.amnesty.org/en/documents/asa32/4113/2021/en/

55 Corrections confirmed that they access the Ezispeak translation service for important interactions such as induction and health checks, and also that given the diversity in staffing in Auckland there may be prison staff able to assist as well.

56 Noting the Royal Australian and NZ College of Psychiatrists also emphasise that harms to wellbeing for this vulnerable and often already traumatized group accumulate during detention and the longer a person is held in detention, the higher their risk of developing or worsening mental ill health. They record that while people continue to be held in difficult, often (re-) traumatizing conditions and with an uncertain future, mental disorders are likely to persist or worsen. They record that in Australian immigration detention facilities, self-harm and suicidal behaviour have become endemic.

128. There is also no access to the internet so contact with family overseas is severely limited. Lawyers working with claimants in custody refer to issues with claimants being unable to access or afford payphone contact with their home country, though Corrections told me that such contact should be able to be arranged by prison staff if they are aware of the need. Anecdotally even where the prison processes can be navigated there are also difficulties getting phone numbers approved, given the practical issues of different time zones.

129. Those who work with these detainees talk about them being isolated, lonely and frightened.

130. It is also important not to lose sight of the fundamental impact of being a prisoner, even aside from the risk of intimidation, violence and abuse from other inmates and the other issues identified in the Amnesty International report. Prisons represent total loss of freedom and autonomy: every movement and every moment of the day is controlled by the state authority. Society uses this as its most serious form of punishment for its most serious offenders. Refugee claimants have neither committed nor been charged with any criminal offending, and have done nothing to warrant a penalty at all, let alone one of this severity.

131. Finally, it is important to keep in mind that this is all occurring to a person who is more likely than not a genuine refugee, who may have already experienced significant trauma (including possibly torture) at the hands of authorities. It is hard to imagine a worse match in terms of vulnerability to put a refugee claimant through this process and place them in this environment. This is also a terrible way to welcome a potential future citizen, and anecdotally sets up a level of trauma and bitterness for some that makes it even more difficult for the person to then settle into New Zealand life and positively engage with society.

Detention interferes with an asylum seeker's claim

132. It is also generally acknowledged that being in custody disadvantages a claimant in their ability to progress their claim for recognition as a refugee. Under the Immigration Act it is up to the claimant to establish their claim, and to ensure that all information and evidence that they wish to be considered is provided to the refugee and protection officer. Lack of access to the internet and the severe practical restrictions on telephone contact with the person's contacts in their home country creates huge difficulties with obtaining relevant documentation or supporting evidence. What could have been done in days may take weeks or even months, even with the assistance of a lawyer, and possibly may not happen at all.

133. Contact with the lawyers themselves is more difficult and disrupted due to limitations on visiting hours and lack of suitable facilities. As one lawyer described, for a complex claim they might expect to spend full days sitting with their client reviewing the papers, working to fill gaps in documentation, and planning and preparing for the upcoming interview with the RSU, but they simply cannot work in the same way with a client in prison.[57] They also describe a 'double whammy' of the additional burden in working with a detained claimant, given the practical difficulties of working with a client in custody, combined with the faster track procedures that RSU and the Immigration and Protection Tribunal rightly seek to run for detained claimants to reduce their time in prison. The hurdles faced by a refugee claimant in prison are thus significantly higher than for those in community.

134. Claimants are also then usually to go through the crucial RSU interviews *in prison*, possibly with a Corrections officer present in the room while they are asked to provide detailed descriptions

[57] This same sort of practical difficulty is well recognised in the criminal justice system, and the courts will engage in approving specific bespoke arrangements for trial preparation to ensure access to a fair hearing as an alternative to bail: see for example *Watson v R* [2021] NZCA 542. No such tailored options are made available to refugee claimants under current arrangements.

of the deeply personal and often traumatic events that they rely on to establish that they have a well-founded fear of persecution in their home country.[58] It is obvious that this poses an additional layer of stress and pressure on what is an already overwhelmingly high stakes process for the claimant.

Contrary to the UNHCR Guidelines

135. The current regime of detaining asylum seekers in Corrections facilities contravenes a raft of the requirements and objectives of the UNHCR Guidelines, outlined above. This is also reflected in the concerns expressed and recommendations made by the United Nations bodies, which the New Zealand government has accepted.

136. No justification has been suggested for this practice to continue, other than concerns about the inefficiency (and hence cost) of establishing a parallel civil detention regime instead.

What are the alternatives?

Don't detain

137. The most obvious, and most important, alternative to detention in a Corrections facility is for the refugee claimant not to be detained at all. As outlined above, if New Zealand applies a Convention compliant approach to detention of asylum seekers, it seems highly likely that none of them would end up in long term detention. There is no suggestion from my review that any of the 100 or so asylum seekers detained since 2015 would have posed the sort of threat to public safety or risk to national security that could warrant such restrictive measures. I gather New Zealand has also never had a major problem with asylum seekers absconding.

138. Instead of defaulting to detention, as the current system does in practice, the default should be liberty with the minimum levels of reporting and residence restrictions needed to allow INZ to manage the person's irregular immigration status, with any additional restrictions on a person's freedom only imposed when they are justified on a solid evidential basis, and reflecting the principle of minimum intervention.

139. In practical terms, that suggests release on reporting conditions (and possibly other tailored conditions) or under an RRRA to the Asylum Seekers Support Trust, or equivalent hostel or facility (noting that these will need to be properly funded).

140. Claimants outside Auckland need to have similar options available, although in appropriate cases (eg where there are no links to the local community) this could be met by transferring the person to Auckland. Where there are existing links to the local community such that transfer is not appropriate, bespoke arrangements will be required.

'Partial' detention or release to Māngere?

141. Use of Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre) for 'partial' or less restrictive detention than Mt Eden Prison does not appear to be a good option on anyone's assessment. If an individual poses a level of risk that requires detention, then the inability to enforce conditions and the presence of potentially highly vulnerable quota refugees at MRRC makes their placement there unsuitable. If the person does not pose that level of risk, then they should not be being detained at all.

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[58] When I asked why claimants were not being taken out of prison for this interview, one lawyer explained that despite these drawbacks having the interview conducted in prison was generally preferable, to avoid the invasive security measures their client was put through when travelling out of and returning to the prison (noting also that one or more Corrections officers may well be in attendance in any location, in accordance with prison security requirements).

142. MRRC might still be used as the equivalent to a hostel for a claimant released on conditions (as it occasionally has been), although there are a number of complexities with that.[59] Those issues need to be worked through and a decision made whether it is appropriate to use this facility for asylum seekers at all, and if so, how the current concerns (from all sides) can be resolved.

Electronic monitoring

143. Access to electronic monitoring should be available as an option in cases of heightened risk, if it is assessed as the only option providing sufficient security to avoid detention (noting that the UNHCR Guidelines direct that electronic monitoring should be avoided as far as possible as it is a harsh restriction, bringing with it the stigma of criminality).

The rare occasions when detention is necessary

144. In the rare cases where long term detention is warranted, the current system of detention in a Corrections facility is not appropriate. However, the very low and infrequent numbers involved would also not warrant establishment of a long term civil detention facility, and such facilities in any event come with their own challenges in terms of Convention compliance.

145. I suggest that INZ engage with Ara Poutama Aotearoa (Corrections), who have wide experience in a range of varying detention arrangements to deal with particular groups (low security prisoners, mothers with babies, Public Safety (Public Protection) Orders and Extended Supervision Orders). It seems likely that the civil detention arrangements for public safety or extended supervision orders could provide a useful template for one-off bespoke arrangements for refugee claimants posing a serious threat to public safety or risk to national security, as the objectives and purposes of the detention are similar.

146. Any such arrangements must of course meet the requirements for conditions of detention outlined in the UNHCR Guidelines and other relevant international and domestic obligations applicable to places of detention. They must also be appropriate to meet the particular needs of the refugee claimant, as the UNHCR Guidelines emphasise, and staff will require the appropriate training in relation to asylum, sexual and gender-based violence, and the identification of the symptoms of trauma and/or stress. The conditions of detention should as far as possible not obstruct the person's ability to work with their lawyer and advance their claim for refugee status.

V E Casey QC

Dated: 23 March 2022

[59] As outlined above: these concerns are largely to do with implications of mixing asylum claimants with accepted quota refugees. Asylum claimants held at the MRRC do not have access to the same programmes or even catering as the accepted quota refugees, creating a real division. Some report this conveys the sense that a claimant is 'bad' and second-class. It is also seen as unfair to both groups – quota refugees should not have to deal with the tension and grief of asylum claimants waiting for their claim to be determined and then possibly declined, and asylum seekers should not have to be faced with people who are already accepted and being actively supported into the community if they then fail to achieve that themselves. Also, MRRC is set up for short term stays (the quota programme is five or six weeks) not the months and possibly years for a claimant. On the other hand, there are a range of supports available at the MRRC that are available for claimants, and the staff are experienced in dealing with refugees: and everyone agrees that placement there is far preferable to Mt Eden.

Annex A: terms of reference

TERMS OF REFERENCE: REVIEW OF PROCESSES AND PROCEDURES RELATING TO RESTRICTION OF MOVEMENT OF ASYLUM CLAIMANTS.

Purpose

1. This document sets out the parameters for a review of Immigration New Zealand's ("INZ") processes and procedures relating to restrictions on the liberty of claimants for refugee and protections status ('claimants'). In particular, the review should focus on the appropriateness of the use of Corrections and Police facilities in New Zealand for immigration detention.

Background

2. Part 9 of the Immigration Act 2009 ('the Act') provides a tiered monitoring and detention regime for INZ to manage the deportation or turnaround of people in New Zealand. When deportees or turnarounds are also claimants, any monitoring or detention is managed using guidance set out at A16.2 of the INZ Operational Manual. It is noted that the A16.2 guidance is drafted with reference to the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999), which have subsequently been replaced.

3. A decision to detain a person who is liable for turnaround may be made where they are assessed as being at risk of absconding, offending or non-compliance if placed in the community, or where they are considered a risk to public safety or security, or their identity has not been established.

4. Additionally, an application for a Warrant of Commitment ("WOC") may be sought if a person who is liable for deportation and turnaround cannot be deported or turned around within the initial 96 hours of being arrested and detained. If a person makes a claim for refugee or protection status after they have been detained, section 317(5)(d) of the Act limits the discretion of the District Court Judge considering the WOC application in that a Judge may not release the person unless there are exceptional circumstances.

5. Detention is subject to the decision of District Court Judges, who must grant a WOC in order for continued detention to occur. WOCs allow for detention for periods of 28 days: continued detention requires authorisation by District Court Judges through the grant of further Warrants of Commitment.

6. In the period 2015 to 2020, 86 asylum claimants have been detained in Corrections facilities for periods ranging from 1 day to 1177 days.

Scope

7. The reviewer is asked to:

- Review whether the current guidance set out in A16.2 of the INZ Operational Manual and Compliance Standard Operating Procedures ("SOPs"), as they relate to the detention of asylum seekers in Corrections and Police facilities, are congruent with New Zealand's international human rights obligations including the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention 2012, and recommend any changes as necessary.

- Review a representative sample of cases from the period 2015 to 2020 (inclusive), where there has been some form of restriction of a claimant's freedom of movement under Part 9 of the Act, such as detention in Corrections or Police facilities, detention at Te Āhuru Mōwai o Aotearoa (Māngere Refugee Resettlement Centre), Release on Conditions or release subject to a Residence and Reporting Requirements Agreement. This review should determine whether INZ operated in accordance with relevant sections of the Immigration Act 2009 and guidance in INZ's Operational Manual (at A16.2) and SOPs, and consistent with the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention 2012.

- Offer guidance at a systems level on potential alternatives to the current facilities used for the detention of asylum claimants, including alternative Corrections facilities and/or community alternatives to detention and any other possible forms of restriction on a claimant's freedom of movement that could be utilised. If necessary, identify any legislative impediments to the use of these restrictions.

- Interview relevant INZ compliance officers and relevant civil society stakeholders including the NZ Law Society, the Auckland District Law Society, Amnesty International, the Asylum Seekers Support Trust, the Refugee Council of NZ, and lawyers named by INZ, as well as UNHCR and the Immigration Protection Tribunal. The reviewer may interview any other relevant organisation or person as they see fit.

- Consider the effectiveness of WOC processes and proceedings, and make recommendations on how these can be improved consistent with New Zealand's human rights obligations and access to justice. If the legislative scheme is inconsistent with New Zealand's human rights obligations, highlight matters for consideration in any future review of the Immigration Act 2009.

Out of scope

8. The following matters are not within the scope of this review:

- Matters not referred to in Paragraph 7.

- INZ's processes for the assessment of refugee and protection claims.

- Investigation into the treatment of claimants in, and any conditions of, Police and Corrections facilities which are used as places of immigration detention.

- Access to, and matters related to, eligibility for legal aid for the purpose of making a claim for refugee and protection status.

- any matters not administered by the Ministry of Business, Innovation and Employment or regulated under the Immigration Act 2009.

ROLES AND RESPONSIBILITIES

Review

9. The Review will be carried out by Victoria Casey QC.

10. Fraser Richards, Special Counsel (Immigration) and Hiranthi Abeygoonesekera, Director of MBIE Legal Services will be responsible for providing support to the Reviewer. INZ will supply secretarial support to the reviewer.

11. Susan Cooke, Principal Business Advisor, Verification and Compliance Branch, and Gareth Grigg, Business Support Manager, Verification and Compliance Branch will assist with the provision of documents.

Reporting

12. A draft report will be prepared containing the results of the review, summarising key findings and clear recommendations for any change of Operational policy or processes and which will be submitted to MBIE for comment. Matters which MBIE may wish to consider as part of any legislative review of the Act will also be highlighted.

13. A final report will be made available to the Deputy Chief Executive (Immigration) at MBIE.

Publication

14. The review and any report may be made public. The reviewer has been selected for their judgement and knowledge of legal processes but it is not intended that her report is legal advice such that legal professional privilege will apply.

Annex B: summary of recommendation and matters for consideration

1.	**Legislative change – Part 9 of the Immigration Act 2009**
	The Immigration Act 2009 should be amended to separate the regime for detention and lesser restrictions on freedom of movement for refugee claimants from the regime for immigration detention for turnarounds and people in the process of being deported. Provisions allowing for detention and lesser restrictions on freedom of movement of refugee claimants should: • Set thresholds and parameters that comply with the Convention, the UNHCR Guidelines and the New Zealand Bill of Rights Act 1990; • Reduce the time period before which the person must be brought before the Court for their detention to be reviewed from 96 hours to (preferred) 24 hours, but in any event a maximum of 48 hours; • Recognise that the default position is liberty and that freedom should be restricted to the least degree and shortest duration possible (acknowledging that some level of reporting and residence requirements may be warranted to manage the person's irregular immigration status); • Recognise that detention of a refugee claimant is only justified as an exceptional measure of last resort, when it is determined on an assessment of the individual's circumstances to be necessary, reasonable and proportionate to a legitimate purpose, and observing the principles of minimum interference; • Recognise that legitimate purposes for detention may include: o For a short period only while prompt measures are taken to allow initial identity or security verification (noting that lack of identity documentation is not by itself a legitimate reason for ongoing detention); o Preventing absconding where there is a well-founded and serious risk, for example past history of non-compliance with conditions of release, and this risk cannot be effectively managed by less restrictive means; o To protect public health; o Well-founded and serious concerns for national security or public safety, where this risk cannot be effectively managed by less restrictive means (possibly adopting equivalent provisions to those currently in the Act for where such serious concerns are suspected on reasonable grounds, which direct that they are to be affirmatively established within 14 days failing which the person is to be released); • Reflect that detention of in country claimants who have been free in the community is unlikely to be justified on any of these grounds; • Reflect that legitimate purposes for detention of a refugee claimant do not include the following (acknowledging that some of these factors may form part of the assessment of threat to national security or public safety): o The person is a turnaround or liable for deportation but cannot be removed pending determination of their claim; o Maximising compliance with the Act or protecting the integrity of the immigration system; o The person has claimed refugee status after being served with a deportation liability notice or order, or after they were arrested for the purpose of deportation; o General concerns that the person may be difficult to locate or abscond later, if their claim is eventually declined (noting the UNHCR Guidelines are clear that detention for this purpose can only occur after the claim is finally determined); o The person's claim is informally assessed as without merit or unlikely to succeed; o The person has not been granted a visa;

	○ The person is or is suspected to be a person to whom section 15 applies (eg they have been previously deported from New Zealand or another country); ○ The person has been unlawfully in New Zealand and/or has previously provided false information or presented false documents to authorities; ○ The person has arrived without valid travel or identity documentation, or has destroyed travel documents on arrival, or has been smuggled; ○ The person has not established their identity; ○ To allow identity or security verification processes that are not being promptly pursued; ○ To deter the making of a claim or incentivise withdrawal of a claim; ○ Lack of available facilities in the community for release on conditions; • Place the burden of proof on the Crown to establish that detention is justified, hence for a warrant of commitment to be issued INZ must affirmatively establish that: ○ there are well-founded concerns that a person poses a serious threat to public safety, risk to national security or risk of absconding; and ○ less restrictive conditions would be insufficient to address that risk; • Provide for regular review of detention by the Court, with the burden of proof on the Crown to affirmatively establish at each review that detention continues to be justified, that all reasonable steps have been taken to resolve any issues that are impeding release on conditions, and that other less restrictive options have been fully explored and remain insufficient to address the identified risk; • Ensure that detention or lesser restrictions on freedom do not constitute an undue obstacle to the pursuit of the claim; • Place a maximum term on detention.
2.	**Legislative change - electronic monitoring as an alternative to detention**
	Electronic monitoring should be available as an option for use only in those cases where the Court considers it necessary to address well-founded and serious risks of absconding, or to public safety or national security.
3.	**Legislative change – RRRA not to be an 'absolute discretion'**
	Amend s 315(2) so that the decision to agree to an RRRA for a refugee claimant is not a matter within the absolute discretion of the INZ officer. A refugee claimant should be able to request an RRRA or a variation to an RRRA and should be entitled to a statement of reasons if that request is declined. That decision should be subject to oversight by the courts and the Ombudsman.
4.	**Operational process – pending legislative reform**
	Pending legislative reform to Part 9, INZ should put in place equivalent operational guidance and monitor its application to ensure that the same outcomes are being achieved. As the Court warrant proceedings will be ineffective as an oversight mechanism (given that the District Court is required to apply the Act as it stands) any decision to seek a warrant to detain a refugee claimant should be reviewed and approved at a sufficiently high level within MBIE to ensure that this step is appropriately limited to exceptional cases that meet the high threshold required.
5.	**Operational process – identify appropriate decision maker and ensure consistency of decision making with 2012 UNHCR Guidelines**
	Once a decision is made not to issue a visa at the border (or a person subject to deportation claims refugee status) a separate and Convention compliant decision should be made at an appropriate level of seniority as to what happens to the claimant pending the resolution of their claim. Operational guidance and SOPs should clearly reflect the UNHCR Guidelines, including the importance of considering the special needs and particular personal circumstances of the

	claimant, and starting from a default position of liberty with the minimum levels of reporting and residence restrictions needed to allow INZ to manage the person's irregular immigration status, with any additional restrictions on a person's freedom justified on a solid evidential basis and set at the minimum level possible. The claimant must be interviewed as part of this process especially if detention is under consideration, and records of reasons, including full consideration of all options, clearly made. As outlined above, pending legislative reform, a decision to seek a warrant to detain a refugee claimant should be reviewed and approved at a higher level of seniority. Consider whether this decision sits with INZ compliance or elsewhere, given the requirement for focus on and specialist understanding of the Convention and UNHCR Guidelines.
6.	**Operational process – work with RSU to promptly address identity concerns**
	Recognising that establishing identity is not by itself a precondition for release on conditions or an RRRA, where identity is a concern warranting any level of restriction on a claimant INZ should take active steps to get that resolved as soon as possible. Arrangements should be put in place for RSU to fast track their inquiries on identity for a person who is in custody. INZ should also ensure that a person in custody has everything they need – including access to the internet and free access to a telephone in the appropriate time zones – to allow them to speedily progress obtaining any available evidence and supporting documents.
7.	**Operational process – ensure Convention compliant internal review every 14 days**
	Regular reviews of detention and other restrictions should be focussed reviewing whether restrictions continue to be necessary, on proactively progressing the person into less restrictive arrangements as soon as possible, and addressing any impediments in the way.
8.	**Operational process – ensure alternatives to detention are available**
	For new arrivals, ensure adequate facilities in the community such as the ASST hostel or similar are available and appropriately funded. INZ should proactively consider these options in the first instance, instead of short term detention. Consider how to provide similar arrangements for arrivals outside Auckland, possibly by transfer to Auckland or bespoke arrangements in the local community. Work through the concerns raised about placing refugee claimants at Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre) on conditions or under an RRRA, and determine how they can be addressed and whether it is appropriate to continue with such placements. Assuming placements at MRRC continue, complete the planned review of the adequacy of the allowance for refugee claimants residing at the MRRC. For in country claimants, recognise that the most likely best option is an RRRA or release on conditions to their existing place of residence. Consider assessing the overall costs of alterative options to detention on a whole of government basis.
9.	**Operational process – INZ take and retain responsibility for claimants that are subject to restrictions on their freedom**
	INZ needs to take and maintain responsibility for ensuring that detention only occurs in accordance with the Convention (ie as an exceptional measure of last resort), ensuring that detention is replaced with less restrictive conditions as soon as possible (including proactively working with claimants to that end), and monitoring that those conditions remain appropriate and in accordance with the principle of minimum intervention. Where short or long term detention is properly justified, INZ should ensure that refugee claimants are held under appropriate conditions and have access to the support, information, care and facilities that the UNHCR Guidelines require. Recognising the critical importance of effective legal representation and judicial oversight to ensure compliance with international obligations and domestic human rights law, INZ should

	consider working with the Ministry of Justice to facilitate resolution of the practical legal aid issues that are affecting the warrant of committal hearing processes and the proposed roster of refugee lawyers for newly arrived claimants. INZ should be routinely collecting and compiling data so that at all times it has a full and transparent overview of the status of refugee claimants who have not been granted a visa, including the demographics of those detained, where they are detained, for what reason and for how long, what steps have been taken or are underway to facilitate their release into less restrictive controls, where their refugee claim is up to in the process, and so on.
10.	**Short term detention (without warrant) of new arrivals**
	INZ should not default to short term detention but rather for each case explore whether an RRRA to the ASST hostel or similar can be arranged directly from the airport. Where short term detention is justified for the purpose of identity or security checks, INZ should progress these at speed. Biometric checks should be undertaken immediately and consequent decisions made without delay. INZ must also ensure that: • Information is provided at the time of the arrest of the reasons for the detention and the person's rights, and the legal processes that are underway, in a language and in terms they understand; • Free and appropriately qualified legal assistance is provided without delay (consideration should be given to the roster of refugee lawyers proposed by the IPT); • Claimants have or are provided with climate appropriate clothing, basic personal and hygiene items and culturally appropriate food; • Medical and mental health checks and support are provided as soon as possible, and that staff dealing with newly arrived claimants have appropriate training; • Claimants are provided with access to the New Zealand Red Cross; • The ASST and/or similar other agencies are permitted to provide information for claimants; • Access to the internet and phone in appropriate time zones is facilitated to allow claimants to make contact with their home country to obtain documents to assist in establishing their identity. Consideration should be given to revisiting proposals for a bespoke short term civil detention facility close to Auckland airport as an alternative to Police custody. If Police operational requirements mean that Police are unable to routinely accommodate any of the above this will be essential.
11.	**Detention at Corrections facilities should not occur**
	For the very rare situations where longer term detention of a refugee claimant is justified, detention at a Corrections facility is not appropriate. INZ should engage with Ara Poutama Aotearoa (Corrections) to determine whether civil detention arrangements for public safety or extended supervision orders could provide a template for one-off bespoke arrangements for refugee claimants posing a serious threat to public safety or risk to national security. Any such arrangements must meet the requirements for conditions of detention outlined in the UNHCR Guidelines and other relevant international and domestic obligations applicable to places of detention. They must also be appropriate to meet the particular needs of the refugee claimant, and staff will require the appropriate training in relation to asylum, sexual and gender-based violence, and the identification of the symptoms of trauma and/or stress. The conditions of detention should as far as possible not obstruct the person's ability to work with their lawyer and advance their claim for refugee status.

Annex C: the review process

1. My review comprised three overlapping phases.

2. I was tasked with reviewing the current guidance in the INZ Operational Manual and Compliance Standard Operating Procedures, and the warrant of commitment processes and procedures, to assess whether they are congruent with New Zealand's international human rights obligations. My terms of reference acknowledged that the current guidance in the Operations Manual has not been updated to reflect the 2012 revised UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention. I was advised by MBIE that this work was underway, but it was not finished by the time I completed my review.[60]

3. I was asked to select and review representative samples of cases from the period 2015 to 2020, and to interview INZ compliance officers to determine whether INZ has been operating in accordance with relevant sections of the Immigration Act 2009, the guidance in the Operational Manual and the SOPs and consistently with the UNHCR Guidelines. I spoke to a number of INZ compliance officers from across the country, who gave me a valuable range of perspectives. Due to covid conditions in Auckland however there was considerable delay in obtaining access to files, the last of which I received in mid-December.

4. To ensure an independent selection of files, I asked INZ to provide me with complete lists for the 2015 – 2020 period of all refugee claimants held in detention, and all people subject to lesser restrictions, with basic data about each claimant. I then selected a number of those files aiming to get a broad sample of circumstances, although with no attempt at statistical robustness. I also invited some of the lawyers I spoke to to identify particular files that they thought would be useful for me to review, and included those as well.

5. I was asked to meet with identified civil society stakeholders, including representatives of:

    5.1 The United Nations High Commission for Refugees (Canberra);

    5.2 The Immigration and Protection Tribunal

    5.3 Amnesty International Aotearoa

    5.4 The Refugee Council of New Zealand

    5.5 The Asylum Seekers Support Trust

    5.6 The New Zealand Association of Immigration Professionals

    5.7 The New Zealand Law Society

    5.8 The Auckland District Law Society.

6. My terms of reference also allowed me to interview any other person or organisation as I saw fit. I have exercised this permission to speak to:

    6.1 New Zealand Red Cross

[60] I was provided with a draft on the evening before I was due to deliver my draft report, so unfortunately could not take this into consideration in any detail. However, my high level review of the draft confirms that the basic structural issues with the framework, and the conflation of immigration and Convention objectives in the guidance, remain.

6.2 Other MBIE officials (including a member of the legal team that conducts the warrant of commitment court processes for INZ, and the current refugee claimant welfare adviser);

6.3 A representative of Te Āhuru Mōwai o Aotearoa, the Māngere Refugee Resettlement Centre.

7. I was also approached by other members of the refugee bar who provided me with a range of useful materials and thoughtful perspectives.

8. I asked for and obtained a range of data from MBIE that helped inform this review.

9. I provided my report in draft, as requested in my terms of reference, on 18 February 2022.

10. The Royal Australian and NZ College of Psychiatrists provided a late written submission: unfortunately their letter to MBIE advising that they wished to participate in the review did not make it through to me, and I am grateful that they were able to pull together written materials at very short notice.

11. I am immensely grateful for the time and attention all these organisations and people generously gave to assist with this review, and for the open and frank cooperation of INZ and its compliance officers and officials. The overwhelming response from all quarters was extraordinarily positive: while nobody was in favour of the present system, and many expressed concern that it had allowed to be continued for so long, generally everyone I spoke to was encouraged and pleased that this review was underway, hopeful that this indicated a real prospect of positive change. Independent agencies, and in particular the UNHCR, were also supportive of the many positive features of how New Zealand more generally deals with asylum claims.

12. That last point is important to bear in mind: New Zealand does well internationally in many aspects of its refugee processes, and the very negative conclusions reached in my review on the particular issue of detention of a small number of asylum seekers should not detract from that. However, the reverse is also true. The numbers involved here may be small compared to the vast majority of refugee claimants in New Zealand who have a better experience, but the experience of those detained is terrible. As I say in my report, small numbers do not excuse this: on the contrary, with such small numbers we ought to be able to do much better.