A Just Australia

Campaigning for just and compassionate treatment for refugees and asylum seekers

31 July 2009

Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Senate Committee Members,

A Just Australia (AJA) was formed in July 2002 as Australians for Just Refugee Programs in response to spiralling community concerns about the treatment of asylum seekers and refugees. Currently, A Just Australia comprises over 12,000 individual supporters, 120 non-governmental organisations and over 70 prominent Australian Patrons.

We are particularly concerned that policy and law should be consistent with the human rights standards that Australia has developed and endorsed. AJA recognises that such policy needs to balance the conflicting needs of adhering to our national cultural heritage of a fair-go and meeting our international obligations while still paying due regard to domestic security needs or the broader national interest.

While some reforms have been achieved in policy and practice, AJA continues to campaign for an Australia with policies toward refugees and asylum seekers that at all times reflects respect, decency and traditional Australian generosity to those in need, and still advances Australia's international standing and national interests.

AJA is privileged to enjoy a pivotal role within the refugee advocacy sector and is actively promoting the translation of these basic principles into legislative reform. This has not been achieved to date. Any future government still has the potential to very easily return to the indefinite detention of families, mandatory, non-reviewable incarceration of asylum seekers and unfair determination processes for refugees.

AJA believes that reform of the immigration detention regime must happen for all caseloads but our mandate is to work on asylum seeker and refugee related issues. Our submission will generally cover these populations only.

We thank you for the opportunity to provide a submission on the Migration Amendment (Immigration Detention Reform) Bill.

Yours truly,

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1 Introduction

Immigration detention is a policy area of great public concern. The previous government held to a strict position, conceding little in their overarching policy of mandatory and indefinite detention to be used as a deterrent to potential asylum seekers.

For a number of years, all expert evidence has pointed to the approach of the past two decades to immigration detention as being an appalling piece of failed public policy. It is inhumane, expensive, has dramatic negative mental health impacts and is an affront both to the rule of law and basic Australian values.

Advocacy groups and many thousands of concerned citizens worked tirelessly to gain acceptance of some basic principles: that children should not be detained; that detention should be humane; that indefinite detention can be rectified with community release; and that the Australian people have a basic right to know what our government is doing in our names.

Many continue to hold grave concerns for the treatment of people within immigration detention, particularly for asylum seekers. This degree of concern will not abate until there has been substantial reform to achieve a system of immigration detention/reception that is humane and reflects traditional Australian values of fairness, equality and decency towards fellow human beings.

The Migration Amendment (Immigration Detention Reform) Bill goes some way towards outlining the above values. However, we remain concerned that the values are implemented in a discretionary way. There are neither time limits to ensure that detention is not indefinite or prolonged, nor is there any mechanism to enforce release in the cases of detention that does not meet the new values of detention for managing risks to the community.

Another key concern we have is the continued use of Christmas Island. It is unclear as to whether these amendments will apply to people being detained on Christmas Island under excision laws. And even if they do apply, they are impossible to implement for individuals due to the lack of support services and infrastructure on Christmas Island to ensure asylum seekers are not detained after health, identity and security checks are completed. This is of grave importance because by far the majority of detained asylum seekers are located on Christmas Island, rendering much of these reforms meaningless for the very detainees who are of greatest concern to human rights advocates.

The key areas of reform found in the Migration Amendment (Immigration Detention Reform) Bill are:

- Defining the purpose of detention
- Affirming mandatory detention
- Detention of children
- Community access for detained people
- Places of detention
- Residence determination

2 Summary of recommendations

Recommendation 1
That proposed changes to define the purpose of detention being to manage risks be amended to include time limits and external review.

Recommendation *2*
That any affirming of mandatory detention not be passed, as mandatory detention is in its very nature arbitrary and thus in breach of our international obligations under the International Covenant on Civil and Political Rights (ICCPR).

Recommendation 3
That time limits be set for initial health, identity and security checks, as well as conducting a compliance risk assessment and a social service needs assessment.

Recommendation 4
After the initial time limit, ongoing detention by judicial order only, with automatic review every 30 days.

Recommendation 5
We propose that a community-based alternative to detention in Australia include the following elements, based on the Reception and Transitional Processing System model outlined by Justice for Asylum Seekers alliance in 2002.

Recommendation 6
That amendments halting the detention of children in IDCs be passed.

Recommendation *7*
That no child shall ever be detained within an IDC or an IRH unit attached to an IDC.

Recommendation *8*
That a time limit be set for any form of detention, including the use of community detention (residence determination) after consultation with relevant child protection experts and welfare and service delivery agencies.

Recommendation *9*
That there is an independent child guardian appointed for unaccompanied children

Recommendation 10
As a matter of urgency, all children must be relocated to the mainland for current and future arrivals.

Recommendation 11
That amendments relating to immigration officers granting temporary community access be passed.

Recommendation 12
That amendments relating to places of detention be passed.

Recommendation 13
That regulations be created that specify conditions for differing types of detention, including security, reporting requirements, conditions of accommodation and support services, as well as time limits.

Recommendation 14
That amendments relating to delegating powers for residence determinations be passed.

Recommendation 15
Ensure that the new policy for detention applies (and can be implemented in a real sense) to all immigration detention, including in excised locations.

Recommendation 16
Immediately codify minimum standards for immigration detention, with enforceability both on a contractual basis between the Immigration Department and any detention service provider, but also on an individual basis for detainees whose rights have been breached, with an established legal remedy for those individuals.

3 Amendment - Purpose of detention

The Bill legislates the principle that the purpose of detention is to manage risks to the Australian community and to resolve immigration status. That detention in an Immigration Detention Centre (IDC) should be a matter of last resort and should be for the shortest practicable time.

While these changes may not seem significant, these are important principles, which will have a significant roll-on effect to the manner in which immigration detention is managed for individuals.

This change underlies the policy shift towards using detention for health, character and security checks. Once a person has passed these checks and is found to be complying with the immigration process, they would be released from an IDC using a variety of mechanisms depending on their security or accommodation needs e.g. bridging visas or residence determination.

Previously, indefinite detention was the default for all unauthorized arrival asylum seekers, whether or not that detention was actually necessary. Human rights advocates have long argued that if a person is not a risk to the community, and is complying with the immigration process, what is gained by detaining them at great financial and human impact cost?

However, there is a contradiction inherent in this portion of the amendment. All unauthorized entrant asylum seekers will be detained in an IDC until health, security and identity checks are completed. In the case of Christmas Island, this will include all boat arrivals. Whether or not that detention will be for shorter periods than in previous years, detaining everyone means detention will not be a matter of first resort as this amendment will require, it will still be a matter of first resort.

More importantly, the Australian experience shows that there is no need to detain unauthorised entrant asylum seekers for these checks. To date, this caseload has not been any security risk to the community. If there has never been a risk to date, continued expenditure on detention is an unnecessary waste of money. It would also be a breach of the principle of last resort which implies no unwarranted detention.

Health checks can also be conducted while asylum seekers are in the community. Australia has thousands of temporary overseas arrivals each day who do not undergo health checks prior to being allowed into the Australian community. Therefore it is unnecessary to require asylum seekers – many of whom are from the same countries as other entrants – to pass rigorous health checks prior to release from detention. For the majority of asylum seekers, both health and security checks can be conducted using community based accommodation models. Any other system is both a waste of money for the Australian taxpayer, as well as an unnecessary infringement on the liberty of asylum seekers.

The primary problem with the proposed change is that there are no defined time limits in which to conduct health, identity or security checks. So while the legislation would now reflect the purpose of detention being to manage risks, there is no independent and enforceable remedy available to individuals if detention goes beyond that purpose. Safeguards for an individual's liberty from detention by the state is a vital part of a democracy, and must be implemented as a matter of priority. Other forms of detention in Australia – prison and mental health – have such safeguards. This issue is expanded on later in this submission.

Recommendation 1
That proposed changes to define the purpose of detention being to manage risks be amended to include time limits and external review.

4 Amendment - Affirming mandatory detention

The Bill affirms mandatory detention and clarifies the grounds under which an immigration officer must detain a person (within the migration zone). It creates an additional mandatory requirement for immigration officer to determine a detainee's identity, whether a detained person is of health, security or character concern, and to resolve the immigration status.

4.1 Background to mandatory detention

The retention of mandatory detention is a great disappointment to advocates.

Mandatory detention laws were introduced in 1992. Prior to this, Australian laws *allowed* for the detention of certain persons, but did not *require* that detention. The 1992 amendments both imposed an obligation on immigration officials to detain 'designated persons'[1] but also prevented judicial review of detention.[2] However, the legislation did impose a 273-day time limit on detention.[3]

In 1994, legislation was introduced that expanded the definition of who had to be mandatorily detained to 'all persons who either arrived without a visa or who were in Australia on an expired or cancelled visa.' The amendment removed the 273-day time limit on detention and instead provided that an unlawful non-citizen could only be released from detention on the grant of a visa, removal or deportation from Australia. The limitations on judicial review of detention that were introduced in 1992 remained.[4]

Mandatory detention without the safeguards of time limits or external review has created the regime that allowed for:

- the unlawful detention of people with valid visas, many of whom had psychological issues, most notably Cornelia Rau
- indefinite detention of stateless people
- extended detention - of many years - of people who were then proven to be refugees or to have valid humanitarian grounds to remain in Australia
- the prolonged detention of children, who suffered grave psychological effects as a consequence.

4.2 Mandatory detention in international law

The UN Human Rights Committee (HRC) has ruled that Australia's mandatory immigration detention policy breaches Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), which states:

> *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*.

The HRC considered Australia's laws arbitrary because all unauthorised arrivals were detained without distinction, irrespective of the need to detain a particular person.[5] The Committee recommended alternatives to detention.

However, the HRC did not prohibit *all* immigration detention. The HRC accepted that detention *will not be arbitrary* if it is necessary in the circumstances, for example to prevent absconding, interference with evidence, or because of a lack of cooperation. However, these factors must be assessed on an individual basis, and not by detaining whole groups regardless of individual risk factors. Further, both the need for detention and its duration must be a proportional response, and detention must not continue when it is no longer justified.

In addition, Article 9(4) of the ICCPR provides that:

> *Anyone deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

Remedies for violations of the right to review of detention must also be effective, as stated in Article 2(2). The right of review applies as equally to asylum seekers as to citizens, even where a person has entered a country without permission. For asylum seekers, UNHCR Guideline 5[6] further states that

[1] Migration Act 1958 (Cth), - s189 (1) 'If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.'
[2] Migration Act 1958 (Cth), s183 'A Court is not to order the release from custody of a designated person.'
[3] Migration Amendment Act 1992 (Cth), s54Q(2)(b).
[4] See HREOC *A Last Resort* Chap 6. http://www.hreoc.gov.au/human_rights/children_detention_report/report/chap06.htm
[5] UN Human Rights Committee ruling in *A v Australia* (1997)
[6] UNHCR *Revised Guidelines on the Detention of Asylum Seekers* (1999)

there should be automatic and independent review of a detention order, regular periodic review of its necessity, and the right to challenge the necessity of detention.

The HRC found that Australia was also in breach of Article 9(4) in the case of *A v Australia*, since the courts were not empowered to effectively review detention and order the release of a person.

Instead, the courts could only *formally* assess whether a person fell within the legislation authorising detention, but not whether there was *really* a need to detain a particular individual. Applying a lesser standard of justice to foreigners also undermines equality before the law.

Finally, Article 31(1) of the Refugee Convention prohibits countries from penalising people who arrive directly from persecution, as long as they present themselves without delay and provide good reasons for entering without permission. Australia breaches this provision by giving bridging visas to those who enter on valid visas and then apply for asylum, while detaining those arriving without permission. There is no objective justification for treating some asylum seekers differently.[7]

The Minister states:

> *First, in accordance with the Government's Key Immigration Detention Values, and reflecting Australia's international human rights obligations, detention that is indefinite or otherwise arbitrary is not acceptable. Item 1 of Schedule 1 to the Bill will embed this value in the Act, by introducing a statement of principle in Part 1 of the Act that, first, a non-citizen must only be detained in an immigration detention centre as a measure of last resort and secondly, that if a non-citizen is detained in an immigration detention centre, then detention will be for the shortest practicable time.*[8]

The changes proposed in this Bill will allow for earlier release from detention than previous law or policy. However, the policy still creates an arbitrary detention regime, as mandatory detention requires that all unauthorized entrant asylum seekers are detained until they pass checks, as opposed to detaining only those for whom it is shown to be necessary. Thus the Australian government policy of mandatory detention is still arbitrary and in breach of Article 9(1) of the ICCPR, as well as other areas of international law outlined above.

4.3 Requirement to resolve cases

It may appear redundant to legislate a requirement to resolve cases. However, in the past there has been a serious problem with cases lying unresolved for years, as there was no impetus – legal or cultural – on departmental officers to speedily finalise immigration cases. This led to people languishing for years in detention or in the community unable to put down roots or integrate properly into the Australian community.

The 2005 Palmer investigation into the detention of Cornelia Rau highlights the problems inherent in the requirements to detain under “reasonable suspicion grounds”, where there is no outside impetus, or indeed obligation, to trigger review of that suspicion.

> *Section 189(1) provides that if an officer knows or reasonably suspects a person is an unlawful non-citizen the officer must detain that person. Because of the use of the word ‘must’, the section has been viewed as a mandatory provision in its entirety.*
>
> *The prevailing view* [of the Department] *seemed to be that, for the reasons just given, there was neither cause nor justification for a review of the operation of the power to detain on reasonable suspicion and that, once exercised, the power of detention remained lawful until an event occurred that resulted in the release of the person. Although this view was sincerely held, in the Inquiry’s opinion it is erroneous and has led to flawed practice.*[9]

The proposed change will go some way to resolving this issue. However, like other changes within the Bill, the change merely documents a principle in a non-binding manner. No enforceable time limits are

[7] All above information taken from: Dr Jane McAdam, and Dr Ben Saul, 16 June 2005, *Briefing on Mandatory Immigration Detention for Federal Government Parliamentarians*.
[8] Migration Amendment (Immigration Detention Reform) Bill 2009 Second Reading Speech
[9] Palmer, 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau,* section 3.1.1.

imposed, and there is no remedy for individuals if an officer does not seek to resolve their case as soon as practicable. We believe that time limits with an enforceable remedy are a necessary part of truly implementing this principle.

4.4 Time limits

Prolonged - or even indefinite – detention is still allowable under the proposed changes. There is no specific time limit imposed either or detention or on the resolution of immigration status.

We remain firmly opposed to the system of mandatory detention that applies to all unlawful non-citizens. We would recommend that time limits and judicial review should apply in general to the immigration detention regime. However our area of interest is for asylum seekers, and the following time limit recommendations relate to people applying for a protection visa.

We note the Minister's July 29th announcement regarding changes to the use of detention, essentially based upon the sound principle that detention beyond initial health, identity, security and flight risk checks used only when shown to be necessary for security or flight risk and that detention within an IDC should be a matter of last resort, not first resort.[10]

The Minister announced a few key changes based on the above principle: that regarding the ongoing detention of a person the onus of proof will be reversed with the Department having to justify why a person should be detained, that detention will be reviewed by a senior departmental officer every 3 months, and that the Ombudsman will review detention cases after 6 months instead of 2 years.

While we applaud the policy changes, we believe that the new approach does not yet go far enough to reform the detention regime. It is unclear to what body a Departmental officer must justify detention - if it is an internal or external check. DIAC does not have an appropriate track record of internal reviews, given that this is the same department that in recent years has unlawfully detained hundreds of people and unlawfully deported an Australian citizen. Continued detention beyond a reasonable time limit for identity checks must be subject to external review. And this review must have the power to order release, rather than make non-binding recommendations. Current mainstream legal practice makes judicial review the most appropriate form of review to apply to immigration detention.

We strongly advocate that in order for the principles outlined by the "New Directions in Detention" policy to be enacted, time limits on detention as well as external review with enforceable remedy is a necessary component.

Recommendation 2
That any affirming of mandatory detention not be passed, as mandatory detention is in its very nature arbitrary and thus in breach of our international obligations under the International Covenant on Civil and Political Rights (ICCPR.)

Recommendation 3
That time limits be set for initial health, identity and security checks, as well as conducting a compliance risk assessment and a social service needs assessment.

Recommendation 4
After the initial time limit, ongoing detention by judicial order only, with automatic review every 30 days.

[10] Senator Chris Evans, Minister for Immigration, July 2008, *New Directions in Detention - Restoring Integrity to Australia's Immigration System* http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm

4.5 International detention time limits

Country	Time limits / Guidelines for review of detention
Austria	Maximum length of detention is normally 2 months, but can be extended for up to 10 months.
Canada	Immigration authorities only detain non-citizens for security reasons, in cases of failure to establish identity, or if they are deemed likely to skip proceedings. Detainees can appeal to the Immigration and Refugee Board (unless their identity is in doubt). The Immigration and Refugee Board reviewed non-identity-based detention cases 48 hours after detention, again within 7 days, and then every 30 days thereafter [11]. Detainees may be released on certain conditions (e.g. bonds). The duration of detention is short- the average stay in prisons was 18 days, while in immigration detention centres it was only 8 days. Canada allows asylum seekers to move freely within the country.
Czech Republic	Maximum length of detention is 180 days for adults and 90 days for unaccompanied minors from the age of 15 to 18 (minors under the age of 15 are not detained). In order to detain a person there has to be an administrative procedure followed by an administrative decision on the reasons for detention.
Finland	In 2005, out of 640 detainees, the average length of detention was 17 days. The longest was 103 days. The court reviews the legality of a person's detention every fortnight.
France	32 days.
Germany	18 months.
Hungary	12 months, with automatic court review after 6 months.
Norway	Asylum seekers can only be detained for four weeks at a time. This period can be renewed by the authorities, but should not exceed a total of 12 weeks unless the police consider the case to be exceptional.
Portugal	No detention.
Slovak Republic	180 days.
Spain	40 days.
Sweden	Detains asylum seekers very selectively and also applies other alternative restrictions very rarely. Children may not be held in detention for more than 3 (or in extreme circumstances, 6) days.
Switzerland	Up to 60 days. Most are held for less than 1 month.

* Information in this table is derived from research undertaken in July 2008

4.6 Alternatives to detention

Community-based alternatives to detention have been successfully implemented in many countries including those of the European Union, Canada, New Zealand and the United States. In particular, residence in the community without restriction has been shown to be an effective alternative to detention for 'destination' countries (those countries where long-term protection is sought) as opposed to 'transit' countries such as Malaysia or Pakistan. Reports from Canada, New Zealand, the United States, Germany, Denmark, Finland, Norway, the Netherlands, Sweden, Switzerland and the United Kingdom (all 'destination' countries) have found that the procedural compliance level of asylum seekers in community-based programs is very high (95% or higher)[12]. It is noted that a 2001-03 study of community-based asylum seekers in Melbourne reported a 100% compliance rate[13].

Studies from overseas and here in Australia have shown that well-programmed community-based alternatives to detention are more cost-effective and more compassionate, without compromising the standard of security and protection that Australia needs. In addition, UNHCR reports have concluded

[11] http://www.refugees.org/countryreports.aspx?id=2124

[12] UNHCR, 2006. Alternatives to Detention of Asylum Seekers and Refugees, pp. 26-32, http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf

[13] Between February 2001 and February 2003, the Hotham Mission in Melbourne conducted research to track 200 asylum seekers (111 'cases' including families) living in the community on Class E bridging visas, of whom 31% were former detainees. Hotham Mission reported that not one asylum seeker of the 200 absconded during the two year period, despite the fact that 55% had been awaiting a decision for four years or more, and despite the fact that 68% were found to be at risk of homelessness or were in fact homeless. Information from: Hotham Mission Asylum Seeker Project, 'Welfare Issues and Immigration Outcomes for Asylum Seekers on Bridging Visa E, Research and Evaluation,' November 2003.

that compliance with the asylum procedure by community-based asylum seekers is maximised by ensuring that they had access to accommodation, basic welfare, health services, legal advice and competent case management[14].

Recommendation 5
We propose that a community-based alternative to detention in Australia include the following elements, based on the Reception and Transitional Processing System model outlined by Justice for Asylum Seekers alliance in 2002[15]:

- All asylum seekers arriving in Australia without a visa are housed in a closed Reception Centre for an initial assessment period (of 2-4 weeks, for example), where:
  - Identity, security and health checks will be undertaken;
  - They are assigned a caseworker who will inform them of their rights and the application process;
  - They are given a psycho-social risk and needs assessment;
  - They have access to legal advice through the Immigration Advice and Application Assistance Scheme (IAAAS); and
  - They can lodge their claim for asylum.
- The Reception Centre should be completely separate from existing immigration detention centres, as these centres also accommodate high-risk, possibly violent criminal deportees.
- Families, unaccompanied minors, adults who have been cleared for identity/security/health/psycho-social risk, and those with other exemption criteria, are moved into 'structured release' programs (which could include the Asylum Seeker Assistance Scheme ASAS[16] or the Community Care Pilot CCP[17]).
- Asylum seekers who may warrant further investigation, or long-term detainees, are released into a separate community-based program such as an 'Open Hostel' system, where stricter compliance measures may be used (such as more frequent reporting requirements).
- Asylum seekers deemed to be a high security risk, or at risk of absconding prior to return, are detained in a closed centre. Legislation must be in place to enforce automatic review of an asylum seeker's detention at set intervals (every 30 days for example) by an independent adjudicator.
- Bridging Visas with work rights should be given to all community-release asylum seekers.
- Case management for each asylum case is provided by a specified case worker, who may have some of the following responsibilities: providing information on rights and processes, arranging referral to other service providers, administering living assistance schemes, communicating decisions of the department/RRT, risk prevention, ongoing assessment and preparation for immigration outcomes including return counseling.

5 Amendment - Detention of children

The Bill legislates that children must not be detained in an IDC, and the best interests of the child should form a primary consideration on deciding where else to detain them.

Generally, children are no longer held in the main compounds of IDCs. They are either put into Immigration Residential Housing (IRH) or into community detention – generally referred to as residence determination. However IRH units are simply more humane mini-detention centres in some cases attached to the main IDCs, and community detention also creates hardship when it extends beyond a short-term option.

[14] UNHCR, 2006. Alternatives to detention of Asylum Seekers and Refugees, op. cit.
[15] In *Alternative Approaches to Asylum Seekers: Reception and transitional processing system*. June 2002. A report published by Justice for Asylum Seekers (JAS) Alliance. JAS is an alliance of over 25 Victorian-based community organizations, including Amnesty International, Oxfam Community Aid Abroad, the Brotherhood of St Lawrence, St Vincent de Paul Society, and churches from the Catholic, Uniting, Anglican, Baptist and Church of Christ faiths representing congregations numbering in the hundreds of thousands.
[16] ASAS (Asylum Seeker Assistance Scheme) is managed by the Red Cross and provides income support to cover basic living expenses (89% of Centrelink Special Benefit).
[17] CCP (Community Care Pilot) provides a holistic case-management approach to vulnerable people in the community in the immigration process.

In addition, we remain very concerned that there is no independent child guardian appointed for unaccompanied children. The current system whereby the Minister or a delegated person is the guardian, is highly inappropriate.

We also note the critical situation for children on Christmas Island. Although children are not held in the main detention centre, there is a profound lack of services and infrastructure to provide adequately for asylum seeking children's needs on the remote island.

Recommendation 6
That amendments halting the detention of children in IDCs be passed.

Recommendation 7
That no child shall ever be detained within an IDC or an IRH unit attached to an IDC

Recommendation 8
That a time limit be set for any form of detention, including the use of community detention (residence determination) after consultation with relevant child protection experts and welfare and service delivery agencies.

Recommendation 9
That there is an independent child guardian appointed for unaccompanied children

Recommendation 10
As a matter of urgency, all children must be relocated to the mainland for current and future arrivals.

6 Amendment - Community Access

The Bill legislates allows for immigration officers to grant temporary community access without the need for the person to be in the company of or restrained by an immigration officer or other person.

We wholeheartedly support this proposed change.

In the past, detained people were unable to attend medical and other necessary appointments and other outside events due to the highly inefficient system for gaining approval for such excursions. Delegating this power to immigration officers will streamline the process.

Recommendation 11
That amendments relating to immigration officers granting temporary community access be passed.

7 Amendment - Places of detention

The Bill clarifies that the Minister can determine locations other than the IDCs to be places of detention.

We wholeheartedly support this proposed change.

In some cases, a person may be determined to be required to remain in immigration detention, but be of a lower security or compliance risk that does not require detention in an IDC. Alternate places to detention gives the Department the flexibility required to ensure that all situations can be appropriately accommodated.

However, the issue of greater transparency around the differing levels of detention must be addressed. Detention places can vary between an IDC, a Residential Housing Project, Immigration Transit Accommodation, a hospital ward, a community-based house (for Residence Determination) and so on. There is no clarification around the different types: what is the security level for detainees in each, what is the eligibility for each type of accommodation etc. Without documenting the differences between an IDC and a residential housing project (where children can be detained) then it is problematic to oversee RHPs and Residence Determination, which are put forward as more humane forms of detention.

Recommendation 12
That amendments relating to places of detention be passed.

Recommendation 13
That regulations be created that specify conditions for differing types of detention, including security, reporting requirements, conditions of accommodation and support services, as well as time limits.

8 Amendment - Residence determination

The Bill allows the Minister to delegate the power to allow people to be housed in alternate detention accommodation (residence determination).

We wholeheartedly support this proposed change.

In the past, the release of people from IDCs into alternate detention arrangements was often significantly delayed due to the time it takes to have a busy Minister personally sign off on the release. Along with the streamlining of other Ministerial powers, this change will delegate the decision-making to a more appropriate departmental level.

Recommendation 14
That amendments relating to delegating powers for residence determinations be passed.

9 Christmas Island and excision

We remain highly concerned about the continued detention of asylum seekers on Christmas Island. It is unclear whether the new amendments will apply to people detained under excision laws. In any case, it is impossible to implement the new approach under the excision regime. All asylum seekers processed under excision must remain outside the migration zone until visa processing is completed. There is not enough community accommodation, so many (currently the majority) asylum seekers on Christmas Island must therefore be detained for the entire duration of their protection visa processing, well past any need to detain only for health, security and identity checks.

Thus the policy of excision and the use of Christmas Island is in direct conflict with the policies contained in the Migration Amendment (Immigration Detention Reform) Bill. This means that the most vulnerable people within the detention regime (boat arrival asylum seekers) are the ones who will be detained the longest under the worst conditions.

Recommendation 15
Ensure that the new policy for detention applies (and can be implemented in a real sense) to all immigration detention, including in excised locations.

10 Detention conditions

We remain concerned that minimum standards for the conditions of detention are still not codified in the Migration Act.

A High Court Case[18] in 2004 tested the lawfulness of the conditions of detention. The case revolved around the argument that immigration detention is administrative, and if conditions are unduly harsh it becomes punitive in nature and is no longer for administrative purposes only, and would thus be in breach of Australia's Constitution.[19] The High Court found that the Commonwealth has the power to provide for immigration detention, regardless of whether the conditions of detention are harsh and inhumane.

This ability to impose inhumane detention is exacerbated because while there are codified minimum standards for prisons (generally in State legislation) there are no minimum standards enacted for Immigration Detention. This means that violent criminals have greater legal protection against inhumane conditions than refugee children.

18 Behrooz v Secretary of the Department of Immigration and Multicultural Affairs (2004) 208 ALR 271.
19 Chapter III of the Constitution requires that judicial power be exercised only by courts. Punitive detention is generally held to be a judicial power.

Immigration detention services are provided in accordance with the Immigration Detention Standards (IDS), developed in consultation with HREOC and the Commonwealth Ombudsman's Office.[20]

While the IDS help ensure that people in immigration detention are treated with respect and dignity, they are not enshrined in legislation and do not provide people in immigration detention with access to effective remedies for alleged breaches of their human rights. Even if the IDS were enshrined in legislation, while indefinite mandatory immigration detention continues in Australia, the mental health of detainees may still be fundamentally compromised as a result of prolonged immigration detention.

Recommendation 16

Immediately codify minimum standards for immigration detention, with enforceability both on a contractual basis between the Immigration Department and any detention service provider, but also on an individual basis for detainees whose rights have been breached, with an established legal remedy for those individuals.

20 Written replies by the Government of Australia to the List of Issues (CAT/C/AUS/Q/4) prepared by the Committee Against Torture to be considered during the examination of the fourth periodic report of Australia (CAT/C/67/Add.7), [140]