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SUBMISSION: Inquiry into Immigration Detention in Australia

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1. About GetUp

GetUp is an independent, grass-roots community advocacy organisation giving everyday Australians opportunities to get involved in important political issues.

GetUp does not back any particular party, but aims to build an accountable and progressive political system – a system that operates upon core principles of economic fairness, social justice and environmental sustainability. GetUp is a not-for-profit organisation and receives no money from any political party or government. We rely solely on funds and in-kind donations from the Australian public.

1.1 Contact Details:

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2. Background

This submission, like all of our initiatives, is intended to give voice to the community. It has its foundation in their concern and passionate commitment to the issues surrounding immigration detention.



In 2006, our members called upon Senators to reject proposed changes to Australia's refugee laws to ensure no child that seeks asylum in Australia is put into detention. Our petition attracted the biggest subscription ever recorded for a GetUp campaign, with over 100,000 signatures, and culminated in 'Vote No' being written in the sky above Parliament House in the hours before the legislation was dropped.¹ The vitality of the campaign is testament to the community's deep and abiding concern regarding these issues.

A GetUp survey was conducted in January 2008 to determine the community's priorities for the new Government (GetUp's 'People's Agenda'). The results showed that of the 32,517 participants, 95.3% considered reform of the detention regime to be 'important', with 72.9% considering it to be 'very important'.²

And most recently over 32,000 people signed our petition with the following text:

'We call upon you to close a sorry chapter in Australia's history by bringing to an end Australia's inhumane detention regime.

We believe that detention should never be mandatory, indefinite or unreviewable.

Now is the time to right over a decade of wrongs and establish a just and fair immigration policy for the future.'

Members were also given the opportunity to express their views on these issues, and we received nearly 10,000 submissions conveying the concerns, values and vision of the community.

This submission is not intended to set forth comprehensive policy proposals. Our project has been to consult with the community and distil, from their comments, a statement of principles by which immigration detention policy should be formulated. We have included, throughout this submission, a sample of these comments in order to allow the Inquiry to gain the flavour of community sentiment.

We note that a public hearing is proposed in Sydney on Wednesday 5 November 2008, and GetUp would welcome the opportunity to appear and give oral evidence to the Inquiry.

3. Introduction

GetUp welcomes this inquiry into immigration detention. The length, conditions, and legal framework of immigration detention have inspired vigorous and impassioned controversy over the past decade. It is arguably the defining controversy of our time.

The answers to the questions posed by asylum seekers arriving uninvited to our shores are not easy. The issue appeals to our moral logic, fear, vision and empathy. It calls into question our understanding of the rule of law, national security and national identity. We hope, in this submission, to establish that the community is supportive of progressive change to the immigration detention regime and to convey their mandate for reform according to humanitarian principles.

The trajectory of immigration detention policy has, in recent times, been toward ameliorating some of the worst features of the regime. GetUp acknowledges that the release of most children into the community, the

¹ <http://www.getup.org.au/campaign/NoChildInDetention>

² <https://www.getup.org.au/campaign/peoplesagenda&id=274>

use of residence determination for vulnerable people, improvements to service delivery within detention centres including the mental health care of detainees, the new role for the Commonwealth Ombudsman to report on conditions and lengthy detention, the system of individual case-management, the closure of centres on Nauru and Manus Island, and the abolition of temporary protection visas are all important improvements and move toward a more humane approach.

GetUp applauds the Minister's announcement, on 29 July 2008, that the current model of detention will be 'fundamentally overturned' to ensure that 'detention in Immigration Detention Centres is only to be used as a last resort and for the shortest period practicable'.³ The policy outlined by the Minister will ensure that unauthorised arrivals are detained only for the purpose of health security and identity checks, and that continued detention must be justified by the Department.

But while the Minister's statement is an important step forward, it does not represent an end to our national discussion on how we treat the vulnerable people who come to our shores asking for help.

4. Australian Identity

"I want to live in a country with humane policies and be proud to be Australian."

- Kay, 5050

The way in which we, as a nation, have treated asylum seekers has called our collective values and character into question. The single most common sentiment expressed in the community submissions was that this policy has made people feel ashamed to be Australian. The Australian community wishes to be proud of itself, and fully subscribes to the idea of patriotism, but they refuse to be blindly patriotic.

"I feel more strongly about this issue than almost any other issue. To end mandatory detention for immigrants would make me feel proud to be an Australian once again. This is SO important in terms of being able to hold our heads up among the international community of people supporting human rights."

- Jane, 2026

We are in possession of an open-eyed patriotism: not a love of country but a will to love country. We yearn to be proud of Australia but our deep shame surrounding the injustices of the immigration detention regime has undermined our national identity – in our own eyes and in the eyes of the world.

"I want to be a proud Australian, not ashamed of my country's actions. Please end Mandatory Detention and do us all proud"

- Belinda, 2066

4.1 Australian Values

"Detention centres are UNAUSTRALIAN!"

- Erika, 3169

We the Australian community regret that the immigration detention regime was established and continued in our name. Australian values have not been respected or even regarded in the treatment of these desperate and vulnerable people.

"The asylum seeker policies of recent governments has been an appalling statement of Australian values. Valuing a human being and 'giving them a fair go' are apparently as Australian as a donkey and Simpson, and Don Bradman. Yet we have systematically NOT applied these values over the past 10 years at least, and replaced them with fear and division. It will be seen as a decade of shame for Australia."

³ Senator Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (speech delivered at the Centre for International and Public Law, Canberra, 29 July 2008).

A useful statement of Australian values that, presumably, holds some authority, is the nine point summary of 'Values for Australian Schooling', distributed to all Australian schools in 2006 by the then Department of Education, Science and Training. This document provides, among other things, the following principles:

- Care and compassion: care for self and others;
- Fair go: pursue and protect the common good where all people are treated fairly for a just society;
- Freedom: ... stand up for the rights of others;
- Honesty and trustworthiness: be honest sincere and seek the truth;
- Respect: treat others with consideration and regard ...
- Understanding, tolerance and inclusion: be aware of others and their cultures, accept diversity within a democratic society, being included and including others.

It is not difficult to see that the current system of immigration detention has failed to live up to the standards that we have prescribed for our children. If we are to have any hope of expecting that our children – the future of Australia – will adhere to these values, we must accept the responsibility to effect these values at the level of government.

"It's time. Time to do better, lead with strength and compassion, demonstrate the principles that we would ask our children to replicate."
– Joanne, 3356

5. Real leadership

5.1 We expect our leaders not to exploit asylum seekers for political expediency.

"I felt deeply ashamed to be an Australian citizen as a result of Howard's deliberate exploitation of the most vulnerable, defenceless and desperate people for his own base political purposes of instilling fear into the community."
– Roger, 3124

The community is frustrated at the reduction of asylum seekers to political strategy. The vilification of asylum seekers as illegals, queue jumpers, child murderers, terrorists and spreaders of disease, and the deliberate misconstruction of the Tampa crisis and children overboard affair are irresponsible abuses of the public trust.

"For many years the culture and cynical manipulation of immigration detention and related issues has made me feel ashamed to be Australian."
– James, 2029

GetUp welcomes Senator Evans' acknowledgement that long term detention is tantamount to punishment,⁴ and we would hope that the demise of the tenuous distinction between detention and punishment marks a shift away from a political approach that attempted to shroud complex political issues in rhetorical distortions.

"Use honest English instead of deliberately deceptive language. Detention is keeping kids for an hour after school. Locking people up against their will is imprisonment. In civilised nations there is a due process to be followed before the punishment of locking people up against their will."
– Ian, 2131

⁴ 'Labor rejects the notion that dehumanising and punishing unauthorised arrivals with long-term detention is an effective or civilised response': Senator Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (speech delivered at the Centre for International and Public Law, Canberra, 29 July 2008).

If such a shift is underway, it has a long way to go. The maintenance of the concept of 'excised' territory – within which Australia has diminished responsibility toward asylum seekers – is a fallacy at international law. The 1951 Refugee Convention, from which our legal obligations to asylum seekers arise, admits no designation of areas within our territory to which Convention obligations will not fully apply.

"Close the Christmas Island detention Centre and reverse the laws excising offshore islands from immigration law."
- Roger, 4518

The excision of territory underpins a dual system, which makes an arbitrary distinction between those that arrive on a valid visa, and those that arrive without authorisation. This system exposes the latter group to institutional disadvantages, despite the fact that they stand the highest chance of being genuine refugees.

5.2 A better brand of leadership

"Our shameful past treatment of refugees, fuelled by fear, must end. We need leadership that can bring out the commendable qualities in Australians, not fear and hate."

- Gail, 3220

We reject the model of leadership that reduces asylum seekers to a political problem and attempts to 'solve' it by harsh treatment. We have a hopeful vision of leadership that has the courage to take a clear-eyed look at asylum seekers and recognises them for what they are: vulnerable fellow human beings that deserve to be treated with dignity and respect.

"Is it so much easier to stir up fear and hatred than to show leadership by insisting on doing what is decent and right."
- Darri, 2131

The community is increasingly aware of the interaction between the influences government leadership and community opinion on this issue. We, as a community, have learned that government can be very effective in shaping our opinion. In fact, one of the most striking things about our study is the sense that the community feels betrayed on this issue: they have been led toward an expression of the worst parts of their nature.

"LEAD us towards principles we can believe in rather than prejudices we ought to be ashamed of!"
- Neal, 3015

It should be noted that this issue is one that drives votes.

"This issue is the major reason I voted against the previous government. If this one does not dismantle these inhumane laws, I will vote against it as well."

- Jouh, 4879

And the public expects to see real solutions to the injustices of the past.

"It's hardly believable that it happened at all, let alone that it should still be going. This is not the time for pusillanimity - the circumstances have never been more favourable for overdue reforms."

- Bill, 2265

5.3 Our laws should accord with the international instruments to which we are signatory

"We cannot allow laws to remain on our books which contravene international laws to which we have agreed."
- Robert, 4068

Australian community uses international instruments as a standard by which it can assess and judge

domestic law and practice. The fact that the immigration detention regime is in breach of international law is well established and does not need further exposition here. It is important to note, however, that the reforms announced by the Minister may not bring Australia into line in this regard.

The Minister was unclear on the extent to which the announced reforms will apply to those unauthorised arrivals that are detected within the 'excision zone' and moved to Christmas Island for processing. He indicated his intention that the new immigration values apply to these individuals 'as much as possible'.

The announcement of policy by which the current model of immigration detention was, apparently, 'fundamentally overturned' effectively reserved the right to exclude the excised areas from the application of the seven immigration values. This is a most serious defect in the new model unveiled by the Minister. The question of whether immigration detention policy will be in breach of article 31(1) of the Refugee Convention – which provides that a Contracting State will not impose penalties on asylum seekers on the basis of their unauthorised arrival – remains open.

If we are ever to restore public confidence in the integrity of the immigration system, we must start by ensuring that the system of immigration detention be reformed to bring it into compliance with Australia's international obligations. This means that the seven 'immigration values' must apply to all asylum seekers subject to our jurisdiction.

"Australia should start by recognising in practice human rights and International Law."

- Michael, 2218

Further, we must ensure that these values find expression in changes to the law, so that the reforms have some stability and are not subject to quiet mutation or contradiction as a result of changing political circumstances or changes of government.

"Please keep up the good work, and don't stop until mandatory detention, one of Howard's cruel pillars, is legislated out of existence."

- Peter, 3072

6. Honesty, transparency and accountability

6.1 The government must be accountable for detention of asylum seekers

"We can and must insist on accountable, open and responsible leadership from our government, policy makers and leaders."

- PD, 4160

The various abuses suffered by those in immigration detention have generated considerable controversy and are the subject of continuing community concern. We wish to respectfully submit that the private-sector management of these services has failed to result in an adequate level of transparent accountability.

"Immigration secure centres, should they be necessary, must be run and staffed by Government employees who remain accountable for their actions to the Government and thus to the people."

- Martin, 7300

We recognise that the Government has determined to finalise the current tender process and grant contracts to private providers. This decision was made in light of the resources already spent on the tender process and the time that would be required to establish alternative providers within the public service. We submit, however, that the Government's commitment to ensuring that 'detention centres [are] managed by the public



sector⁵ is a vital prerequisite to real government accountability for the regime. If community faith in Australia's immigration system is to be restored, the public sector should assume responsibility for the provision of detention services at the expiry of this next round of contracts.

On this point, GetUp endorses the comments made jointly by the Law Institute of Victoria, Liberty Victoria and The Justice Project in their submission to this Inquiry, at [5.4]ff.

6.2 Restricted Media Access

"I strongly support the principles advocated by GetUp and their partner organisations as further measures for just and transparent treatment of refugees in Australia."

– Rosalie, 2576

By all accounts, the immigration detention apparatus has been resistant to media access and scrutiny. The 2002 'Democratic Audit of Australia' paper relates the experience of journalists who were not permitted to come within 800, and then 1000 metres of Woomera detention centre during protests in 2002.⁶

GetUp endorses the sentiments of the Australian Press Council, which said that:

*'the real issue is the right of the Australian people to know what their government is doing in their name. This right to know is effectively denied by the interview ban and other restrictions, because reporters have no means of verifying the information the government provides to them.'*⁷

This lack of transparency undermines democratic values, and should be remedied as a matter of urgency.

6.3 Detention in remote places

"Please stop the inhumane and unjust practice of indefinite mandatory detention. In particular I'd like to see the end of the Christmas Island Detention Centre - it is wrong to try to dehumanise refugees and limit their access to legal and community support by placing them in remote and inhospitable locations."

– Anne 4017

GetUp commends the Government's abolition of the 'Pacific Solution' under which asylum seekers were transported to Manus Island and Nauru for detention and the processing of their claims for asylum.

We are disappointed, however, at the announcement that unauthorised arrivals at excised places will be processed at the Christmas Island detention facility. Offshore processing severely limits transparency and accountability for immigration by effectively limiting the access of legal and welfare groups, the media, and family. It is inappropriate in light of the vulnerability of those detained, the seriousness of any deprivation of a person's liberty, and the injustices of the very recent past.

Community faith cannot be restored if there is a sense that we are still hiding asylum seekers away.

"Scrap the Christmas Island Detention Centre, and if we are to detain people, then do it where the people can be witness."

– John, 2615

⁵ Labor Party, 'National Platform and Constitution' (2007), at [153].

⁶ Norman Abjorensen 'Not Good News: Australia's Shrinking Media Freedoms' (2002) *Democratic Audit of Australia*, Australian National University, 24.

⁷ 'Access to Refugees' (2002) 14(1) *Australian Press Council News*.

7. A fair go

7.1 Progress

GetUp welcomes the introduction of a reversal of the onus regarding ongoing detention, so that a departmental decision maker will have to justify why a person should continue to be detained after initial checks have been conducted.

In addition, GetUp approves the decision that asylum seekers will now receive publicly funded advice and assistance, and the external scrutiny by the Immigration Ombudsman.

There are, however, a number of respects in which the unfairness of the current system remains unaddressed.

7.2 Review of decision-making

"The decision to detain someone should be open to review by the legal system and there needs to be transparency about these decisions."
- Jeanette, 2300

The immigration detention regime currently permits the deprivation of liberty without any system of effective review.⁸ The Minister has announced that reform of this system will ensure that asylum seekers have access to review of negative decisions by 'independent' professionals.

"It seems to me that one of the most important reforms needed for the detention system is that the decisions of departmental officers must be subject to judicial review."

- Alan, 2969

The introduction of some form of review will ensure that decision makers are aware of the gravity of the decision to detain, and it may improve the standard of decision-making. Further, a system of review will offer detainees some redress if the decision to detain is incorrect. It is important to note, however, that under the policy outlined by the Minister detainees but will not have access to independent merits review of their detention by an Australian court or tribunal for administrative review. The review will be conducted by 'independent professionals'.

The effectiveness of any system of review will hinge upon the powers given to the review body and, in particular, the question of whether it has the power to order the release of the detainee if detention is found to be unlawful (contrary to the principles enshrined in the ICCPR). In the absence of such a power, review is merely 'formal' and detention would remain in breach of Article 9(4) of the ICCPR.⁹

GetUp is concerned that any evaluation that is not conducted by an Australian court or administrative tribunal will fall short of the community expectations of review, and would fail to give asylum seekers a fair go according to the principles of our modern democracy. We submit that the Government should establish a system of review under which Australian courts and tribunals can order the release of a detainee if they find that the detention is unlawful or unreasonable.

"Dear Minister Evans, While the policy changes are more than welcome, the failure to declare the intention of embodying the changes in law and the failure to deliver judicial oversight of the Immigration dept.'s administrative actions which can so traumatically affect people's lives, mean we have not restored refugees' rights and still fall a long way behind compliance with international human rights' standards."

- Anne, 2044

⁸ *Al Kateb v Godwin* (2004) 219 CLR 562.

⁹ See *A v Australia*, Comm No. 560/1993, Human Rights Committee, 59th session, 24 March -- 11 April 1997, UN Doc CCPR/C/59/D/560/1993.

8. Humane treatment

8.1 Basic principles

"Many thanks for your considerations in this important aspect of moving Australia to a better state ... may you have the courage to imagine walking in the shoes of those who take desperate measures to pursue the possibility of a brighter future."

– Sally, 6531

We would be remiss if we failed to mention the overwhelming number of people who used their comments to reflect with empathy upon the plight of those who have been subject to immigration detention. They posed the question of how they might feel if put in that unenviable position, and reflected upon their answers with humble sensitivity.

"It is impossible to truly understand what it must be like to have your world turned upside down by war, famine and/ or oppressive governments unless you have lived through it. To one day have a job, house and family and the next to be without a home, see your loved ones die and live in constant fear. Thankfully the vast majority of Australians have never had to experience this.

Just imagine though if the tables were turned and you found yourself in the situation that faces refugees... I know I would hate to find myself locked up after I had managed to escape this hell. Treated worse than a common criminal with my only crime being that wanted to survive and call Australia home."

– Kellie, 2750

It is clear that the community is not, as some would have us believe, an uninformed and apathetic bunch that single-mindedly pursues self-interest. We are informed, engaged, and care for our fellow human being, regardless of their race or place of origin. Our treatment of asylum seekers must proceed upon this basis.

We welcome the humane values that inform the sixth and seventh of the Government's seven immigration principles:

- '6. People in detention will be treated fairly and reasonably within the law; and
7. Conditions of detention will ensure the inherent dignity of the human person.'

8.2 Indefinite detention is unacceptable

"Indefinite detention simply exacerbates the anxiety and stress most refugees suffer from. This leads to serious mental health problems. Humane treatment for suffering people is essential."

– Jan, 2118

The devastating effects that indefinite detention can have upon asylum seekers are well documented. The GetUp community finds the practice of indefinite detention, which offers only suffering and despair to some of the world's most desperate and traumatised people, to be tragic and abhorrent.

"Any system which locks up anyone indefinitely is inhumane."

– Kathryn, 5050

GetUp applauds the shift in approach that will see asylum seekers detained for a minimum period while health, security and identity checks are conducted. GetUp supports the Minister's contention that 'Detention that is indefinite or otherwise arbitrary is not acceptable'¹⁰ and that 'Detention in Immigration Detention

¹⁰ Number four of the Government's seven immigration principles: Senator Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (speech delivered at the Centre for International and Public Law, Canberra, 29 July 2008).



Centres is only to be used as a last resort and for the shortest practicable time'.¹¹

This shift must be formalised by amendment to the *Migration Act 1958* (Cth).

8.3 Children must never be detained

"Please ensure that children are never detained again."

– Elizabeth 6169

The GetUp community welcomes the commitment to put an explicit ban upon the detention of children in immigration detention centres. A mere policy shift away from the practice is insufficient to satisfy the community that this abhorrent policy has been brought to an end. The ban must be legislated.

"Please ensure through this review that we never ever detain people again in an inhumane and unjust way. Children and their parents should never be detained - ever."

– Andrew, 4031

9. Our hope for the future

"Hard to believe it got this far. Such devastation of souls & hope. So now with the tides of change it is time, as a nation, to show empathy & respect for the vulnerable, desperate & displaced. Let's bring Australia back into the future!"

– Rachel, 2579

The momentum created by the abolition of the Pacific Solution, the demise of Temporary Protection Visas and the recent announcement of major reform to the broader immigration detention regime in accordance with humanitarian principles has given us a great sense of optimism.

"My vision for Australia is a society that knows and feels and practices compassion."

– Catherine, 3032

This is notwithstanding the magnitude of the task of ensuring that the principles outlined by the Minister in his address on 29 July 2008 survive the parliamentary process and are enacted into law, and notwithstanding the fact that – for the reasons discussed above – these principles are only the first step toward the kind of immigration policy to which we aspire.

Our hopes are grand but they are fragile. Progressive voices have been shut out of the discussion on this issue for so long that many of us can barely believe that we are being given an ear. We trust that our leaders will listen to our hopes and advance a humane and principled agenda of reform.

"We had hopes that this government would act more responsibly than the last. Please don't disappoint us"

– Dee, 4520

¹¹ Number five of the Government's seven immigration principles: Senator Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (speech delivered at the Centre for International and Public Law, Canberra, 29 July 2008).



10. Conclusion

Recovery from the worst aspects of the immigration detention regime will take a long time, both for those who were subject to the system as detainees and for broader Australian society. Immigration policy has caused unimaginable suffering to asylum seekers and has corroded our national pride and undermined our trust in our elected leaders.

While the announcement of major reform to the immigration detention regime is welcomed and celebrated, the proposed changes do not provide an answer to all of the humanitarian concerns that have been advanced by the community. We are uncertain about whether and how these reforms will apply to unauthorised asylum seekers in excised areas. Significant problems of accountability and transparency remain unaddressed, and we are concerned that the proposed mode of review will be insufficient to protect the interests of asylum seekers and provide an adequate check on the decision-making power of the Department.

We are hopeful that this is but the first step toward a better, more humane future. The Australian community has responded to the complex issues raised by unauthorised immigration via a return to core values. These values provide the touchstone of their response to a huge range of political and social questions. GetUp endorses this approach wholeheartedly, and hopes that the principled approach of the community will be recognised as the leadership that it truly is.

Thank you for your consideration,
The GetUp team