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Protection not Punishment:

The reception of asylum seekers in Australia

Submission to the Joint Standing Committee on Migration

Inquiry into Immigration Detention

July 2008

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1 Introduction

1.1 A Just Australia

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 international human rights standards that Australia helped develop and has 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. Therefore our submission will generally cover these populations only.

1.2 Background to submission

Immigration detention is a policy area is of great public concern. The previous government held to a strict position, conceding little in their overarching policy of mandatory and indefinite detention.

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 that balances the above conflicting needs, and also remains humane and reflects traditional Australian values of fairness, equality and decency towards fellow human beings.

In accordance with our longstanding aims, AJA welcomes this opportunity to participate in this inquiry into immigration detention in Australia. However it must be noted that in general, none of the submissions made to this inquiry will be covering new ground. For a number of years, all expert evidence has pointed to the current approach to immigration detention being an appalling piece of failed public policy. It is inhumane, expensive, has dramatic mental health impacts and is an affront both to the rule of law and basic Australian values.

We hope that with this new inquiry, finally, the policy makers will listen to the policy experts and implement changes to the current system of immigration detention, to bring it back into line with mainstream legal systems and to reflect the traditional Australian values of decency and a fair go.

2 Summary of recommendations

Recommendation 1
Two changes must occur regarding the detention of children:

1. No child shall ever be detained within an Immigration Detention Centre (IDC) or any current Immigration Residential Housing (IRH) unit attached to an IDC.
2. A time limit set for use of community detention or residential determination after consultation with relevant child protection experts and welfare service delivery agencies.

Recommendation 2
30 day time limit for initial health, identity and security checks, as well as conducting a compliance risk assessment and a social service needs assessment.

Recommendation 3
After the 30 day initial period, ongoing detention by judicial order only, with automatic review every 30 days.

Recommendation 4
Improved training and written guidelines for Immigration Department staff and private detention service provider staff about the definition of *suspicion of unlawfulness*.

Recommendation 5
Create external oversight, possibly through the Commonwealth Ombudsman, to review all cases of immigration detention - not just those detained for longer than 2 years – to ensure that people are no longer being taken into immigration custody unlawfully.

Recommendation 6
Written guidelines and improved training for officers regarding the *continued suspicion* that a person is an unlawful non-citizen – including a requirement to investigate whether continued suspicion is warranted.

Recommendation 7
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.

Recommendation 8
Create an independent IDC regulator, with a mandate to investigate standards breaches and impose contractual penalties on detention service providers, and provide remedies for detained individuals.

Recommendation 9
An independent oversight body must be mandated to investigate any complaints by detainees, with an obligation to refer matters to the police or relevant authority.

Recommendation 10
As a matter of urgency, finalise the Memorandum of Understanding between Federal and State Police over police jurisdiction within IDCs.

Recommendation 11
Guidelines to allow individual detainees access to the media must be incorporated into the Immigration Detention Standards.

Recommendation 12
Criminal deportees should never be held in the same facility as asylum seekers or low security risk compliance cases.

Recommendation 13
New reception centres for asylum seekers should be built, with both minimum security and open hostel areas.

Recommendation 14
All IDCs should be located in urban areas to allow for proper service delivery and oversight.

Recommendation 15
If external IDC management continues, contracts should not be renewed with Global Solutions Limited (GSL) or any operator with a prison services background and instead should be granted to operators with a health or community service focus.

Recommendation 16
All detention service contracts should be re-written with an emphasis on welfare outcomes instead of security and compliance outcomes. These new key performance indicators (KPIs) should be drafted in consultation with external welfare agencies.

Recommendation 17
Implement an asylum seeker reception model based on the Justice for Asylum Seekers (JAS) Reception and Transitional Processing System model.

Recommendation 18
Immediately convene a roundtable discussion with relevant agencies to expedite this new approach.

Recommendation 19
Formation of a national Asylum Seeker Advisory Panel to provide policy advice on all asylum seeker related issues. This should include membership of key NGOs and legal advocates, with participation from advisers in the Minister's office and DIAC policy personnel. This panel should be mandated (and required) to engage in sector consultation, and all formal advice provided by advisory panels to be made public. This panel should in no way replace broad public and sector consultation undertaken by the Department.

3 Mandatory detention framework

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.

After the public outcry against indefinite detention of stateless persons who could not be easily returned to any other country, the Removal Pending Bridging Visa (RPBV) was introduced in 2005 to 'enable the release, pending removal, of people in immigration detention who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time.'[5] It must be noted that this visa is non-compellable, there is no formal application form for the visa and can only be granted at the invitation of the Minister.

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.*[6]

Essentially this means that once a 'reasonable suspicion' is reached, an officer must detain a person, but there is no statutory obligation to review whether the suspicion remains reasonable. The Australian Government Solicitor's Office maintained "the obligation is on the officer or officers involved to keep the person's circumstances under review and to seek to resolve their immigration status as soon as possible by further inquiry."[7] However, there is no defined timeframe imposed for when that review must occur.

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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 DIAC FactSheet 85 http://www.immi.gov.au/media/fact-sheets/85removalpending.htm

6 Palmer, 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau,* section 3.1.1.

7 Palmer, 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau.*

And even more disturbingly the Palmer Report goes on to state:

> *The Inquiry found that many of the DIMIA officers who were interviewed and who use the detention powers under s. 189(1) of the* Migration Act 1958 *had little understanding of what, in legal terms, constitutes 'reasonable suspicion' when applying it to a factual situation.*

There have been reforms of the processes within the Department regarding the regime surrounding the continued detention of suspected unlawful non-citizens. Another reform has been to allow the Commonwealth Ombudsman to review the cases of anyone held in immigration detention for longer than 2 years and to make non-binding recommendations to the Immigration Minister regarding those cases. However, two years is an unreasonably long period to hold a person without external review.

Other reforms include increased use of various methods of release of children and other vulnerable caseloads from Immigration Detention Centres (IDCs). However, many of these people are being released either into residential housing centres (separate 'family friendly' compounds but still within the IDC framework) or into community detention, which not only also has onerous and inhumane conditions attached, but is, in many cases, unnecessary for people who pose no compliance or flight risk.

However these 'policy' reforms must be matched with legislative reforms that reinstate time limits and allow for external – preferably judicial – review of the detention of people beyond those time limits. Under current Australian law any government could easily go back to the practice of detaining children in remote desert camps in appalling conditions.

3.1 Justifications for mandatory detention

There are three main justifications used for the current practice of mandatory detention of asylum seekers: (1) that is a deterrent, (2) that it is necessary to conduct health, identity and security checks, and (3) that it allows for more streamlined processing by the Department to have people 'on hand' for interviews.

The first premise – that it is a useful deterrent - is in breach of Australia's Constitution, which requires that judicial power be exercised only by courts. Punitive detention is generally held to be a judicial power. But conversely, arguments that immigration detention is not a punishment and is for administrative purposes only are also illogical. Short of death or torture, the removal of liberty is the strongest punishment generally imposed by legal systems. To assert that it is done for non-punitive reasons does not make it any less a punishment for people on whom 'administrative' detention is imposed.

The second argument – the need to conduct checks – is rendered irrelevant by the fact that the Department generally only conducts these checks at the end of a visa process. Once a person has been granted a visa, these checks are then made just prior to their release. Those checks could be made at the start of the process instead, allowing for the release of those who pass them.

The final argument – that it allows for more streamlined processing – does not justify detention. No reasonable person could justify the deprivation of a person's liberty, or indeed the expense of detention, on the grounds that it is more convenient for the bureaucracy.

3.2 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[7]. 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[8] further states that 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*[9], 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.[10]

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[7] UN Human Rights Committee ruling in *A v Australia* (1997)

[8] UNHCR *Revised Guidelines on the Detention of Asylum Seekers* (1999)

[9] UN Human Rights Committee ruling in *A v Australia* (1997)

[10] All above information taken from: Dr Jane McAdam, and Dr Ben Saul, 16 June 2005, *Briefing on Mandatory Immigration Detention for Federal Government Parliamentarians.*

4 Time limits

The criteria that should be applied in determining how long a person should be held in immigration detention.

A Just Australia remains firmly opposed to the current system of indefinite 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.[11]

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.

4.1 Initial checks – 30 days

30 days should be sufficient time to conduct health, identity and security checks, as well as conducting a compliance risk assessment and a social service needs assessment. This time limit should apply both to unauthorised entrants who make an immediate application, as well as those who are detained for compliance issues and then subsequently make a protection visa application. Whether or not a person is a future compliance/flight risk or has made a bona fide protection claim would then be part of the assessment process for possible continued detention after the 30 day initial period.

A Just Australia further recommends that all unauthorised entrants who make an immediate claim for asylum should never be detained in any of the existing IDCs. Instead, Australia should maintain separate reception facilities. This recommendation is further outlined in section 8.2

4.2 Ongoing detention – 30 day review

Any ongoing detention should only be by judicial order when a proven need has been shown under security or compliance grounds, with automatic review at most every 30 days. The judicial review should be able to order release on a bridging visa, community detention with monitoring options, or where required, continued detention in a secure facility.

4.3 Children

While the Migration Act has been amended to include the statement "children should be detained as a measure of last resort" the indefinite detention of children within a detention centre is still allowable under Australia law. This *must* be rectified.

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[11] 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

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 and are attached to the IDCs, and community detention also creates hardship when it extends beyond a short-term option.

Two changes need to apply to the detention of children: that no child shall ever be detained within an IDC or any current IRH unit attached to an IDC and a time limit be set for the use of community detention (residence determination) after consultation with relevant child protection experts and welfare and service delivery agencies.

4.4 Bridging visa option for time limits

Another option for initiating time limits on detention for protection visa applicants is to expand the use of bridging visas for people who have made a protection visa application. Eligibility criteria could include: (1) that they have made a protection visa application and they have been held in detention for 30 days and (2) that they have passed health and security checks and a compliance/flight risk assessment. Part of the compliance assessment would include a review of their immigration status history in Australia and whether they appear to be making a bona fide claim for protection.

This bridging visa would then automatically confer review rights at the Migration Review Tribunal where the compliance/flight risk assessment would undergo merits review for people refused a bridging visa. This visa class would then also confer judicial review for applicants who were held in detention for longer than 30 days. However this application and review process would have to be significantly streamlined in order not to result in de facto prolonged detention.

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.[12] 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.

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

Recommendation 1
Two changes must occur regarding the detention of children:

1. No child shall ever be detained within an Immigration Detention Centre (IDC) or any current Immigration Residential Housing (IRH) unit attached to an IDC.

2. A time limit set for use of community detention or residence determination after consultation with relevant child protection experts and welfare service delivery agencies.

Recommendation 2
30 day time limit for initial health, identity and security checks, as well as conducting a compliance risk assessment and a social service needs assessment.

Recommendation 3
After the 30 day initial period, ongoing detention by judicial order only with automatic review every 30 days.

5 Release from detention

The criteria that should be applied in determining when a person should be released from immigration detention following health and security checks.

A Just Australia believes that any person who has made a protection visa application, and who poses no health, security or compliance risk should be released from detention. We recommend a 30 day time limit for the Department to conduct those checks. Part of the assessment process for the Department to apply for a judicial order for continuing detention would also include a compliance risk assessment, where people may have applied for a protection visa only as a mechanism to gain release from detention.

A range of release options exist for people with differing needs and compliance levels: Bridging visas with or without reporting requirements, release into the care of community groups or NGOs, with or without reporting requirements, or accommodation within a facility which can have a range of security options. These ideas are expanded further in section 8.2.

6 Oversight of detention

Options to expand the transparency and visibility of immigration detention centres

6.1 Background

There is very limited oversight of the immigration detention regime and the centres themselves, both in terms of legal oversight and public scrutiny.

6. 2 Oversight of the lawfulness of detention

The deprivation of liberty is the most serious infringement of a person's rights. To detain a person with no recourse to legal oversight or remedy flies in the face of accepted fundamental legal principle. However, the immigration detention regime operates entirely outside of the normal accepted standards of our mainstream legal system.

Investigations into the unlawful detention of an Australian resident and the deportation of an Australian citizen did much to highlight the extraordinary powers – without oversight - of immigration officials.

The 2005 Palmer Report found that there was no process of review sufficient to provide confidence that the power to detain a person was being exercised lawfully, justifiably or with integrity.[13]

The follow-up 2005 Commonwealth Ombudsman report found:

"DIMIA officers are authorised to exercise exceptional, even extraordinary, powers. That they should be permitted and expected to do so without adequate training, without proper management and oversight, with poor information systems, and with no genuine quality assurance and constraints on the exercise of these powers is of concern. The fact that this situation has been allowed to continue unchecked and unreviewed for several years is difficult to understand."[14]

Additional training for Department officers, or an improvement in Departmental culture, is required, but will not entirely solve this problem. There is also a need for external oversight of the whole process whereby an officer decides a person is a suspected unlawful non-citizen and what happens to that person afterwards.

The Commonwealth Ombudsman also investigated cases of unlawful detention, and found over 240 cases. The Ombudsman now has an ongoing role to investigate cases of people detained for over 2 years. This is an unacceptably long period to keep a person detained before external review.

> **Recommendation 4**
> Improved training and written guidelines for Immigration Department staff and private detention service provider staff about the definition of suspicion of unlawfulness.

> **Recommendation 5**
> Create external oversight, possibly through the Commonwealth Ombudsman, to review all cases of immigration detention - not just those detained for longer than 2 years – to ensure that people are no longer being taken into immigration custody unlawfully.

6.3 Oversight of duration of detention

Once an Immigration officer has detained a person on the basis they are a suspected unauthorised non-citizen, there is no time limited requirement to investigate the continued validity of that suspicion. The Ombudsman found:

"DIMIA officers, from field level to senior executive, seemed to have had little understanding of their responsibilities under the Act—other than a mistaken belief that they *must* detain a person and that when the person is detained the detention is absolute. The seriousness of taking a person's liberty did not seem to be reflected in their actions. Some officers also asserted that the accepted order of events was to detain a person 'reasonably suspected', then gather evidence or information to

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[13] Palmer, 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau,* p viii.

[14] Commonwealth Ombudsman, 2005, *Inquiry into the Circumstances of the Vivian Alvarez Matter,* p68.

support that action. The fact that a detainee loses their liberty seemed to be accepted as a consequence of both the operation of the Act and the detainee's own doing and circumstances brought about by the detainee's own actions."[15]

Recommendation 6
Written guidelines and improved training for officers regarding the *continued suspicion* that a person is an unlawful non-citizen – including a requirement to investigate whether continued suspicion is warranted.

6.4 Oversight of detention conditions

A High Court Case[16] 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.[17] 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.

Immigration detention services are provided in accordance with the Immigration Detention Standards (IDS), developed in consultation with HREOC and the Commonwealth Ombudsman's Office.[18]

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 7
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.

Recommendation 8
Create an independent IDC regulator, with a mandate to investigate standards breaches and impose contractual penalties on detention service providers, and provide remedies for detained individuals.

6.5 Oversight of treatment of detainees

While there have been significant improvements to the treatment of people inside Immigration Detention Centres, much of this has been forced by media and general citizen oversight. The actions of committed Australians have resulted in improvements to conditions such as calling people by name not a number, outside excursions, improved food, improved cultural sensitivity, access to school and TAFE classes and better overall living conditions.

Every improvement has been hard-won by a committed advocacy movement and usually fought against by the Department and the detention services contractors. Generally, the attitude of both towards immigration detention seems to have been that all policy decisions are based on creating

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[15] Commonwealth Ombudsman, 2005, *Inquiry into the Circumstances of the Vivian Alvarez Matter,* p68.

16 Behrooz v Secretary of the Department of Immigration and Multicultural Affairs (2004) 208 ALR 271.

17 Chapter III of the Constitution requires that judicial power be exercised only by courts. Punitive detention is generally held to be a judicial power.

18 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]

efficiency and the easiest working conditions for themselves, not for the best interests or rights of the individuals inside IDCs.

In the past, A Just Australia has noted with some concern, the use of Red1 compound within the now closed Baxter Detention centre as a "behaviour modification" regime. This is a prime example of the unregulated nature of conditions within the overall immigration detention regime. It is hard to find any lawful basis for allowing detention officers employed by a private company the power to arbitrarily impose the punishments of separation and isolation on people who have never been charged nor found guilty of any offence.

The unregulated ability for both the Department and the IDC private service operator to impose separation and other punishments for behaviour infractions still exists.

A Just Australia notes with great concern the number of allegations made by detained people of serious abuse, assault and breaches of duty of care. Yet in the face of these numerous serious allegations, not one major complaint to the police has been upheld. Conversely, many detained people have been found guilty of major and minor behavioural infractions, resulting in penalties from isolation and segregation within the migration detention centres to, in some cases, prison terms. It is difficult to accept that every single allegation made by detainees is unfounded. This therefore makes it difficult to accept that the Department is the proper oversight body for conditions in immigration detention centres.

A detainee at Baxter alleged that he had been assaulted by a guard. An advocate called the Port Augusta police to lodge a complaint on his behalf and was told by the officer that "we know all the guards at the center and they are good people who wouldn't do that, so we are not going to investigate."

Of additional concern, are the many allegations that the inhumane treatment of asylum seekers was done for the purpose of encouraging 'voluntary' returns. This has been a policy of great political strategic importance and many advocates and detained asylum seekers have contended that individual immigration officers have deliberately engaged in inhumane, and in some cases unlawful, activities designed to create a positive outcome for previous government policy.

While this case study is not specifically about immigration detention, without the system whereby a person can be held incommunicado in separation detention, it would not have been possible to deport this child away from her custodial parent.

Mr A had been in immigration detention with his daughter since 2001, first in Curtin then in Baxter. Mr A had been repeatedly threatened by the Department Centre manager that he would take the daughter away from Mr A if he did not give up his claim for protection and return home to Iran.

In July 2003, Mr A was put into the management unit as punishment because he refused to submit to a strip search in front of his then 7 year-old daughter. While being held incommunicado, the Department officer secretly arranged for the removal from Australia of the daughter. She was taken to her mother in Iran.

The Department did not tell Mr A they were taking his daughter and made every effort to conceal the fact from him, by first separating him from his daughter by confining him in the management unit, then telling him that she was out shopping while she was being removed from Australia. The Department thus ensured that not only could Mr A not exert his legal rights to prove he had lawful custody of his child, but he was not even able to say goodbye to her. The Department also ensured that there was no official and proper assessment of what was in the child's best interests, as there was no application made to the relevant child protection authorities or to the Family Court to decide custody. In essence, the Department made a decision relating to a child custody dispute.

This action was in breach of Australian family law, and has never been properly investigated by the Department.

Noting these past serious breaches of acceptable treatment, and indeed breaches of Australian law, it is of concern that there has merely been a policy change that has halted these practices, with no change to the legal framework. There is nothing to stop any future government from engaging in immigration detention practices that allows these activities to resume.

Recommendation 9
An independent oversight body must be mandated to investigate any complaints by detainees, with an obligation to refer matters to the police or relevant authority.

Recommendation 10
As a matter of urgency, finalise the Memorandum of Understanding between Federal and State Police over police jurisdiction within IDCs.

6.6 General transparency and visibility

Over the past years, the Department of Immigration and the detention service providers Australasian Correctional Management (ACM) and Global Solutions Limited (GSL), have exhibited great paranoia regarding media or public scrutiny of both IDCs and the detainees themselves. In most cases the media is barred from interviewing detained people who wish to participate. While there are privacy issues at stake, particularly for asylum seekers who may not wish to be inadvertently identified, media interviews could easily have been accommodated in the private interview rooms used for legal visits.

Additionally, many people who were high profile in their condemnation of the detention regime were later banned from visiting detention centres as repercussions to their actions.

> I have travelled to Baxter detention facility 5 times since it opened, in the capacity of a private citizen and also as the immigration policy adviser for a federal politician. In both capacities I have been given the runaround and they have attempted to block access to certain areas or stop us seeing high profile detainees.
>
> I have been banned twice from Baxter. Once was because they said I was having inappropriate conversation with women in the Woomera Housing Project. That conversation was informing them of their legal rights.
>
> During visits in my official capacity to Baxter, centre management offered a soccer outing to detainees on the day that our visit was scheduled – this was the first and only time these men were ever offered an outside excursion.
>
> During a visit to Villawood detention centre in an official capacity, they refused entrance to the general visits area for the politician I was accompanying, citing security reasons claiming that his presence may create a riot.
>
> *A Just Australia National Coordinator, Kate Gauthier*

Recommendation 11
Guidelines to allow individual detainees access to the media must be incorporated into the Immigration Detention Standards.

7 Infrastructure options

The preferred infrastructure options for contemporary immigration detention.

7.1 Different facilities for different needs

The one-stop shop approach to immigration detention facilities is an inappropriate way to accommodate people with highly differing security needs and potential immigration outcomes. Currently, vulnerable asylum seekers and low-security risk compliance cases are held in the same facilities as violent criminal deportees. Although they are now generally held in separate compounds, there are shared service areas.

In the past, young male Afghan asylum seekers have been held in the same compounds as criminal deportees awaiting removal, where they were harassed and assaulted.

Recommendation 12
Criminal deportees should never be held in the same facility as asylum seekers or low security risk compliance cases.

Recommendation 13
New reception centres for asylum seekers should be built, with both minimum security and open hostel areas.

7.2 Remote detention

The use of remote detention centres was developed as a mechanism to reduce legal, media and public oversight of IDCs and the treatment of detainees.

Australia returned 42 unaccompanied child asylum-seekers to Afghanistan from Nauru at a time when asylum-seekers were not being returned from mainland Australia due to the increasingly unstable security situation. It is difficult to see how it is in the best interests of an unaccompanied child to return them to an area described in security reports at the time as having an absence of the rule of law.

Returning asylum seekers to Afghanistan from mainland Australia would have been noted by advocates and the media and would have created negative public comment. The lack of monitoring in remote detention led directly to the removal of these children from Nauru.

Remote detention centres create the following problems:

Reduced access to legal advice. Migration Agents and lawyers cannot afford to travel to remote centres to interview clients, and/or the travel time severely reduces the total time that can be spent on casework. Interviews have to be conducted either by phone or video conferencing, or in person under severe time limitations.

Service delivery problems. Remote locations with limited community infrastructure and no local NGOs impact on the ability to deliver services to the same level as IDCs in urban locations.

Increased costs. There is a significantly increased cost of remote IDCs. The building of infrastructure, the increased running and maintenance costs, and increased costs to the Department of processing applications due to officer travel and communications costs.

Limited oversight. The remote location means there is very limited oversight by the media, by monitoring bodies such as the Ombudsman and the Human Rights Commissioner, as well as by legal and welfare advocates and the general public. The remote location means any visitor – official or otherwise - has a limited window of time near the IDC, allowing for centre management to continue the use of short-term banning of visitors who have return travel commitments.

Reduced access for visits
Members of the general public have played a vital role in visiting detention centres – both as an oversight mechanism, but also to provide invaluable emotional support to asylum seekers. In addition, many visitors are family members. Placing IDCs in remote locations severely reduces the ability for supporters and family members to visit.

In 2003 I traveled on the Freedom Bus trip around Australia to visit the onshore detention centres. In Western Australia we met with a heavy police presence – as we approached most small towns a police car came to meet us and followed us through the town. We were often stopped for a 'random' breath test and a vehicle inspection.

At Geraldton we stopped to give a talk at the local church on detention issues. The local police arrived and ostentatiously took down the license plate numbers of all locals who had come to hear us talk. Locals reported to us that they felt very threatened by this intimidation. About 100 km from Port Hedland we received our first permanent police escort – by the time we reached Port Hedland we had about 6 police cars following us in convoy. I found the heavy police intimidation throughout the trip to be very confronting, and it did not match my views of the political freedoms I assumed we had in Australia.

Four of us – a zoology professor, a social work student and a retired grandmother – left the Freedom Bus group in Port Hedland to travel to Derby, WA to visit Curtin detention centre. We had a police escort for the entire 85km journey and our car 'coincidently' broke down along the way due to a damaged fuel line.

I had spent about 3 months trying to get approval to visit Curtin, being bounced back and forth between ACM, the private detention contractor at the time, the Department of Immigration and the Defence Department – who owned the land the IDC was located on. I eventually got permission for 4 people to visit for one day only, but I cannot stress enough how much of a run-around I got in trying to organise permission.

On the morning of our scheduled visit we were informed our permission had been revoked because we had travelled in WA on the Freedom bus. We were told that we were a security risk because we had "fraternised with an undesirable element." After great pressure was put on the Department and the Centre management from the public, our visit was eventually allowed to go ahead two days later. When we arrived there were four federal police waiting for us at the gate. As each of us handed over our identification, it was checked off against a file the police carried for each of us. I found this very intimidating as the police were showing – or implying – that they had dossiers on each of us.

During our visit an officer was stationed about 12 feet away from our group. When I asked a woman about her treatment, she put her hands across her mouth and with her eyes indicated the guard nearby. Whether or not she would face repercussion for speaking out, she clearly felt there was a credible threat that would happen.

There was a much higher level of despair among people detained at Curtin than the other centres. A large part of this was due to the remoteness, which meant that fewer than a dozen visitors ever made it to Curtin.

The purpose of my trip to Curtin was to make contact with detained people and to deliver toys and underwear to the children and women. For this highly seditious act I was stonewalled, bullied, intimidated and possibly put in harm's way by the sabotage of our vehicle.

A Just Australia National Coordinator, Kate Gauthier

Recommendation 14
All IDCs should be located in urban areas to allow for proper service delivery and oversight.

8 Detention services

Options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing, Immigration Transit Accommodation (ITA) and community detention.

8.1 Private Contracting

There is an inherent moral issue at stake in allowing profit-making from the deprivation of liberty of any person, be it for administrative or punitive reasons. Although this goes beyond the scope of this inquiry, that moral problem should be kept in mind during decision-making about immigration detention.

Moral questions aside, there are grave problems with using outside commercial contractors to provide immigration detention services, particularly the security services.

Blurred lines of accountability
There are many instances where arguments regarding responsibility of service delivery between the Department and service delivery contractors have resulted in unacceptable living conditions for detained people.

Choice of provider
The current contractor Global Solutions Limited (GSL) has a background as a prison service provider. Many of GSLs staff in IDCs come from, and were trained for, a prison environment and are thus highly inappropriate to work with the vulnerable caseloads found in IDCs.

This choice of service provider also gives an indication of the approach that the Department takes towards immigration detention - that the primary focus is on compliance and security rather than good welfare outcomes.

> **Recommendation 15**
> If external IDC management continues, contracts should not be renewed with GSL or any operator with a prison services background and instead should be granted to operators with a health or community service focus.

> **Recommendation 16**
> All detention service contracts should be re-written with an emphasis on welfare outcomes instead of security and compliance outcomes. These new key performance indicators (KPIs) should be drafted in consultation with external welfare agencies.

Increased costs
There is no evidence to show that there have been reduced costs associated with an outside contractor providing security services within immigration detention. While there may appear to be some reduced costs on a per detainee basis, there are many costs that would not exist if the centres were Commonwealth-managed, such as the contract tender process and oversight of contractor service delivery.

A Just Australia also believes that there would be another cost benefit to providing humane, Commonwealth operated IDCs, in that there would be much less money spent in oversight by the Ombudsman, HREOC, NGOs and individual advocates.

Reduced Services
Commercial operators have a profit-making incentive to reduce costs wherever possible. This will inevitably have a negative impact on the conditions for detainees, public safety and employee conditions.

Lack of remedy
Because of the nature of the contracts only the Department has the ability to enforce conditions within the contract. However, given the highly charged public scrutiny of detention services, the Department has a vested interest in making it appear that all IDCs, and the service providers, are working well. Recommendation 8, to create an external IDC regulator, will help with this problem.

9 Alternatives to Detention

Options for additional community-based alternatives to immigration detention by:

9.1 Inquiring into international experience

9.1.1 Introduction

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). It is noted that a 2001-03 study of community-based asylum seekers in Melbourne reported a 100% compliance rate[19].

There are also examples of successful measures to ensure compliance for persons who have been found not to be in need of international protection. Successful projects have involved return counselling and/or monitoring of people released while awaiting removal. For persons found not to be in need of international protection but who cannot be returned to their home countries, reporting requirements are successfully used in a number of States. This is as an alternative to the inhumane prospect of indefinite detention, which is a clear breach of Article 9(1) of the International Convention on Civil and Political Rights (ratified by Australia in 1980).

9.1.2 Supervision requirements

The level of security involved in community-based programs need not be intensive for the program to be effective. A UNHCR study of 34 member states showed that for community-based alternatives to detention, restrictive programs involving close supervision or monitoring, for the purpose of ensuring compliance with asylum procedures, are seldom if ever required in 'destination' States[20].

The Vera Institute of Justice in the United States concluded after a 3 year study that asylum seekers with decisions still pending do not need to be detained to ensure their appearance at hearings or interviews. Moreover, 'they also do not seem to need intensive supervision.' Reports from both the Vera Institute and the US Department of Justice have shown a relatively high compliance rate for non-detained asylum seekers appearing for their hearings. The Vera Institute's community-release programs reported a 93% appearance rate for asylum seekers. Under the program, asylum seekers were required to report regularly in person and by phone so that their whereabouts could be monitored, and were also provided with information on the consequences of failing to comply with immigration laws. It cost 55% less for an asylum seeker to be on a supervised release program as opposed to detention under this program[21].

Other NGOs in the United States also provide volunteer sponsors/sureties and a fixed place of accommodation for asylum seekers. These NGOs have found similarly high rates of compliance. For example, over a 4-year period International Friendship House in Pennsylvania had one resident out of 100 who absconded. A community 'circle' of sponsors in the same area housed 45 asylum seekers over five years, none of whom absconded. The Refugee Immigration Ministries in Boston also sponsored the release of 45 asylum seekers over three years, all of whom complied with the conditions of their release and appeared for their hearings[22].

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[19] 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.

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

[21] UNHCR, Alternatives to Detention of Asylum Seekers and Refugees. op. cit. p. 27

[22] UNHCR, Alternatives to Detention of Asylum Seekers and Refugees. op. cit. p. 28

Another model coordinated by the United States Lutheran Immigration and Refugee Services involved the release of asylum seekers to community shelters. The shelter staff reminded participants of their hearings, scheduled check-in phone calls with the INS, and accompanied the asylum seekers to their appointments. The project boasted a 96% appearance rate[23].

A comparison of programs in Canada also supports the notion that highly intensive community-based supervision does not necessarily add to increased compliance[24]. For example, the state-funded Toronto Bail Program sponsors the release of detainees into its supervision, which is conducted primarily by means of regular reporting requirements and unannounced visits to the asylum seeker's residence. The Bail Program has had an extremely high rate of success with its client base. In comparison, several homeless shelters in Toronto that volunteered to provide a fixed place of accommodation for homeless asylum seekers enjoyed equally high rates of compliance but without the intensive supervision undertaken by the Toronto Bail Program. The shelters merely supported former detainees with services (including legal counsel), and often operated a curfew, but did not play any other surrogate enforcement role.

Finally, a study compared the practices of rather restrictive Cantons (districts) in Switzerland, where refused asylum seekers are often detained, with more liberal Cantons who use detention only as a last resort. The study concluded that the quota of successful removals differed only very slightly, whereas the costs differed a lot[25].

9.1.3 Examples of accommodation provisions

In Sweden, asylum seekers are taken initially to the Carlslund Refugee Reception Centre, where they spend at least 2 weeks in order to complete the initial application and to assess any health or support needs. After that time an asylum seeker will be moved to one of Sweden's regional refugee centres while they await a decision. If the applicant has family or close friends in Sweden they can choose to live with them, which over half of all applicants do. Regional refugee centres are essentially a number of furnished, self-catering flats and apartments ('group homes') for families or for groups of single asylum seekers. The flats are in small communities close to a central office reception, which includes childcare and recreation facilities. Asylum seekers must visit the reception office at least monthly for their allowance, news on their application as well as updating their need and risk assessment[26].

In Denmark, all State assistance is conditional upon residence in open centres run by the Danish Red Cross. Residents must be present to collect financial assistance every fortnight, but there are no other restrictions on freedom of movement to ensure compliance with the procedure. Staff leave the centres unattended after 5pm every night[27].

In New Zealand, the Mangere Accommodation Centre holds asylum seekers in 'community detention' as well as recognized refugees. The only differences in the control of those detained and non-detained are: detainees must request permission to leave the centre during the day, as opposed to notifying the management of an intended absence, and detainees may not stay away overnight while the quota refugees may. To date, permission for day release into the community has never been denied and only 5% of residents are supervised during day release. Only one of 159 asylum seekers 'detained' in Mangere between September 2001 and 2004 has ever absconded. The environment of the centre, where specialised staff treat detainees and refugees alike with dignity and respect, is cited as a factor in its successful record. In part, this must also be attributed to New Zealand's relatively high recognition rates and the fact that the Mangere detainees receive prioritised processing[28].

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[23] The Trend Toward the Criminalization and Detention of Asylum Seekers. Sharon A. Healey, *Human Rights Brief* Volume 12, Issue 1, start p14 (2004)

[24] UNHCR, 2006. Alternatives to detention of Asylum Seekers and Refugees, p. 26

[25] European Council on Refugees and Exiles, 2005. The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation? http://www.ecre.org/files/Reception%20Report_FINAL_Feb06.doc

[26] Asylum Seekers in Sweden: An integrated approach to reception, detention, determination, integration and return. Grant Mitchell, August 2001.

[27] UNHCR, Alternatives to Detention of Asylum Seekers and Refugees. op. cit. p. 31

[28] UNHCR, Alternatives to Detention of Asylum Seekers and Refugees. op. cit. p. 162-163

Spanish legislation gives asylum seekers the rights to housing in reception centres immediately after they submit a claim for asylum. It is also possible for asylum seekers living outside of reception centres to receive a cash allowance to cover all of their costs, amounting to the level of the official minimum wage. However this is rarely put into practice, since most asylum seekers seem to be accommodated in reception centres[29].

Other countries that provide either accommodation in a reception centre, or an allowance for the asylum seeker to arrange their own accommodation include Austria, Finland, France, Germany, Greece, Ireland, Italy, Norway, the Netherlands, Switzerland and the United Kingdom[30].

9.1.4 Examples of access to health services

Austria, Canada, Finland, France, Greece, the Netherlands, Norway, Poland, Spain, the United Kingdom and Sweden all provide free access to health services[31]. In Sweden, all asylum seeker children receive the same medical coverage as Swedish children. Luxembourg provides for free medical treatment during the first three months of the asylum application, but after this period asylum seekers have to pay for their medical visits, though they are able to claim back up to 80% of the total cost incurred[32].

9.1.5 Examples of access to legal advice

Asylum seekers are entitled to legal advice on their applications in many countries, including Hungary, New Zealand, Sweden and the United Kingdom. An example of a recent change to improve access to legal representation in the UK is the 2006 Solihull pilot. Under this scheme, a number of legal representatives' firms have contracted to take on asylum seekers' cases on arrival. The legal representative is ensured an interview with their client before the substantive asylum interview and, crucially, they may then sit in on that interview and advise and intervene as appropriate[33].

9.1.6 European Union legislation enforcing the rights of asylum seekers

The EU *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* (the 'Reception Directive') establishes minimum standards for the reception of asylum seekers in the European Union, to ensure 'a dignified standard of living and comparable living conditions in all Member States'[34]. The Direction specifies provisions for material support, access to health care, freedom of movement, family unity, schooling and the education of minors, employment and access to vocational training. States may also introduce or retain more favourable provisions in the field of reception conditions, as long as they are compatible with the Reception Directive.

In terms of accommodation and health care, the Reception Directive states that what ought to be provided should guarantee an 'adequate standard of living' and 'necessary health care', which further extends to include 'necessary medical or other assistance to applicants who have special needs'. It is also clearly stated that material reception conditions should be available to applicants when they make their application for asylum.

9.1.7 Case Management Approaches

A case management approach involves the holistic oversight of an asylum application from beginning to end by one designated case manager. This approach not only serves as a non-intrusive form of monitoring, but improves accountability, understanding of the application process by the applicant, the likelihood that the applicant feels that his or her claim has been properly assessed and thus the likelihood of accepting the case decision.

The United Kingdom introduced a new model of asylum processing in March 2007, where each asylum seeker has a named 'case owner' who is responsible for dealing with all aspects of their

[29] European Council on Refugees and Exiles, op. cit. p. 7
[30] UNHCR, Alternatives to Detention of Asylum Seekers and Refugees. op. cit.
[31] European Council on Refugees and Exiles, op. cit. p. 27
[32] European Council on Refugees and Exiles, op. cit. p. 8
[33] UK Refugee Council. Report on the New Asylum Model, August 2007, p. 8. http://www.refugeecouncil.org.uk/policy/briefings/2007/nam.htm
[34] European Council on Refugees and Exiles, op. cit.

case from initial interview to final integration or removal[35]. This was the first time that there was one individual who was familiar with the whole of a particular case and could explain what was happening. This has greatly increased the ability of an applicant or their representatives to obtain information about the progress of an application (i.e. accountability).

Sweden has a similar system, in that each asylum seeker is given a caseworker who explains the refugee determination process and their rights and entitlements while awaiting a decision. The caseworkers also ensure their asylum application is processed correctly and that interpreters and legal representation are sought if needed. Caseworkers also refer clients for medical care, counselling and other services, such as the opportunity to participate in some form of organized activity such as English or Swedish lessons if they are not working. Caseworkers are required to provide 'motivational counselling', preparing the asylum seeker for all possible immigration outcomes and to assess the risk of absconding on a negative decision[36].

9.2 Community-based alternatives

How a community-based alternative may be utilised in Australia to broaden the options available within the current immigration detention framework

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 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[37].

Indeed, the provision of adequate levels of support to destitute community-based asylum seekers is seen as not only an ethical but also a legal obligation by the State. A 2004 ruling by the House of Lords in the United Kingdom upheld a court's decision that failure to provide basic support to destitute asylum seekers was a breach of their human rights as defined by Article 3 of the European Convention on Human Rights[38].

A Just Australia proposes 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[39]:

- 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)
    - they can lodge their claim for asylum

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[35] UK Refugee Council. Report on the New Asylum Model, August 2007. op. cit.

[36] Asylum Seekers in Sweden: An integrated approach to reception, detention, determination, integration and return. Grant Mitchell, August 2001. For a copy of this report contact Grant Mitchell: asp@sub.net.au

[37] UNHCR, 2006. Alternatives to detention of Asylum Seekers and Refugees

[38] The conjoined cases *Adam, Tesema and Limbuela* v *Secretary of State for the Home Department,* [2004] in May 2004. In these joined cases, the Secretary of State appealed to the Court of Appeal (Civil Division) against the grant of judicial review of his decision not to provide support to three asylum-seekers who had not claimed asylum "as soon as reasonably practicable". The Court of Appeal dismissed the appeal on the ground that collectively, the policy of the Secretary of State would have the effect of crossing the threshold of Article 3 of the European Convention on Human Rights in the case of a substantial number of people, even though in any particular individual case that might not be so. That policy was therefore adjudged unlawful as violating Article 3. On appeal, the House of Lords dismissed the Home Office's appeal.

[39] 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.

- The Reception Centre should be completely separate from existing immigration detention centres, as these centers 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[40] or the Community Care Pilot CCP[41]).
- 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 Visa's 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.

Recommendation 17
Implement an asylum seeker reception model based on the Justice for Asylum Seekers (JAS) Reception and Transitional Processing System model.

Recommendation 18
Immediately convene a roundtable discussion with relevant agencies to expedite this new approach.

9.3 Cost effectiveness

Comparing the cost effectiveness of community-based alternatives to detention with current options.

The costs of community-based alternatives to detention are far lower than the cost of keeping asylum seekers in detention centres. Given that high compliance rates for asylum seekers in community-based programs have been demonstrated both in Australia and overseas, it is clear that community-based programs are more cost effective.

At a 2004 Senate Estimates hearing[42], DIMIA quoted the following detention costs per person per day:

Villawood	$111
Maribyrnong	$248
Perth	$589
Port Hedland	$286
Baxter	$310

In contrast, the cost of supporting an asylum seeker living in 'low security' arrangements in the community is estimated at $60 per day. This figure is based on existing services provided to asylum seekers by the Hotham Mission and Australian Red Cross. Alternatively, 'medium security' accommodation (e.g. in a hostel) is estimated at $110 per day.

This costing includes accommodation, food, assistance and security, and is based on comparative costs from aged care homes and the NSW parole system, which have similar levels of security and services[43].

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[40] 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).

[41] CCP (Community Care Pilot) provides a holistic case-management approach to vulnerable people in the community in the immigration process.

[42] Question on Notice, Additional Estimates Hearing. Immigration and Multicultural and Indigenous Affairs Portfolio, 17 February 2004

Of course, off-shore detention centres incur a far greater cost, not only to establish but also to maintain. The restructure of Christmas Island detention centre, initiated under the Howard government, cost Australian taxpayers $318 million, and will continue to cost $32 million a year just to maintain even without detainees. Altogether, almost $1 billion was spent on the 'Pacific Solution' and Christmas Island detention facilities since 2001, for less than 2000 people processed. Thus, the average cost for off-shore detention since 2001 has been over $500,000 per person.

A comparison with the cost of parole and community-release services by State Departments of Correctional Services also demonstrates the cost effectiveness of community-release programs. For example, in 2006/07, the national average cost per day per inmate was $184.47 (and as high as $195.76 in NSW.) In contrast, for the same time period, the national average cost of community-based correctional services was $11.40 per day per inmate.[44]

10 The way forward

None of the information contained in this submission is new. Advocacy groups and welfare agencies have been talking until we are blue in the face about the problems with the current detention regime and the conditions within IDCs. Quite frankly, it's beyond a joke that we are still putting forward the same evidence to yet another inquiry.

In recent years, the approach taken to this issue has been to achieve good political outcomes, not good policy outcomes. Immigration detention is shrouded in secrecy, with little or no allowance for oversight or scrutiny. It is unacceptable in a liberal democracy not only that such a system is allowed to operate outside our rule of law, but also that policy-makers have thumbed their noses at all expert evidence showing that the current detention regime is a fundamentally flawed policy.

10.1 Advisory Panels

It is high time that the Australian Government engages fully and responsibly with experts in the development of policy. Although positive steps have been taken recently to improve the stakeholder engagement process, there are elemental flaws in the overall approach that must be rectified.

The system for providing advice and policy feedback to the Minster for Immigration and the Department of Immigration needs reform. Problems include forums in some states are not replicated in others, having few meetings per year restricts ability for roundtable discussion about policy ideas (in many cases there are merely 5 minutes per participant to put forward policy suggestions, with no potential for feedback) and advisory panels are 'siloed' in the issues they review.

Currently, there is no advisory body to provide policy advice across the whole issue of onshore asylum seeking. There is the Detention Health Advisory Group (DeHAG) and the Immigration Detention Advisory Group (IDAG), but there is no formal advisory panel to take a whole of issue approach to asylum seeker policy advice.

In addition, there must be external oversight of the membership of these advisory panels. One member of IDAG is the former Immigration Minister at the time that mandatory detention was introduced – probably not the most independent of advisers regarding the success of his own legislation.

Recommendation 19
Formation of a national Asylum Seeker Advisory Panel to provide policy advice on all asylum seeker related issues. This should include membership of key NGOs and legal advocates, with participation from advisers in the Minister's office and DIAC policy personnel. This panel should be mandated (and required) to engage in sector consultation, and all formal advice provided by advisory panels to be made public. This panel should in no way replace broad public and sector consultation undertaken by the Department.

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[43] *The Better Way: Refugees, detention and Australians*, published by the Justice for Asylum Seekers (JAS) Network in September 2004. Available at http://www.thebetterway.info

[44] NSW Department of Correctional Services 2007 Annual Report, p. 47