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BALMAIN FOR REFUGEES

Committee of Balmain Uniting Church and the Wider Community

Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia.

Background

I write as the Supervisor of Balmain for Refugees, as a founding member of Bridge for Asylum Seekers Foundation and as the Convenor of the Coalition for the Protection of Asylum Seekers.

Balmain for Refugees (BFR) has over 40 Keyworkers [volunteer solicitors and community advocates] assisting failed asylum seekers in Villawood Immigration Detention Centre (VIDC) and the community to write ministerial intervention requests for refugee or humanitarian visas. As at January 2008, some 160[1] asylum seekers were on Balmain for Refugees register and a break-down of their situations is attached. Since its inception in early 2002 Balmain for Refugees estimates that more than 80% of asylum seekers we have assisted have obtained visas to remain in Australia.

BFR employs a part-time **Asylum Seeker Coordinator** to raise funds for the Bridge for Asylum Seekers Foundation. The name, Balmain for refugees, is now a misnomer since our Keyworkers come from all over Sydney. We receive triennial funding for the Asylum Seeker Coordinator from Leichhardt Council supplemented by grants from City of Sydney, Marrickville, Hornsby, Fairfield, Botany, Randwick, Strathfield, Waverley, Willoughby, Canterbury and North Sydney Councils.

The **Bridge for Asylum Seekers Foundation** (BASF) presently funds more than 130 asylum seekers on Bridging Visa Es by providing them with basic living costs, as well as rental, medical and educational costs when necessary. BASF is also making a submission to this inquiry.

The **Coalition for the Protection of Asylum Seekers** was formed as an interfaith and human rights coalition which drew up a Declaration[2] against removal of asylum seekers in response to mounting evidence of the deaths, disappearances and serious violations of human rights of people who have been removed by the Australian Government. It published studies of these cases.

While proposing certain improvements to the current detention system, this submission strongly supports the pre-election promise of the Government to release detainees within 3 months after health and security checks are carried out. It focuses in particular on the inadequacies of the refugee and humanitarian determination processes which have prolonged detention by years and failed to provide a just and fair determination of those requiring Australia's protection.

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[1] Attachment 1 . Statistical Summary

[2] Attachment 2 :Declaration by a Group of Leaders of Religious Communities on the Deportation of Asylum Seekers
3. A Sanctuary Under Review : An Examination of Australia's Refugee and Humanitarian Determination Process.

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1. Introduction Detention : A Crime Against Humanity

Since the Palmer Report and subsequent commitments by government to change the culture of the Immigration Department and the treatment of detainees, there has been a very significant change to a kinder and more respectful culture among Immigration and GSL staff in VIDC which is appreciated by detainees and by visitors. Use of mobile phones and emails and access to the internet have allowed asylum seekers to work on their own cases and to be in contact with legal and community representatives who help them with their cases.

However, detainees are under no illusion. They are prisoners in a prison with an indefinite prison sentence. No matter what you do to tinker at the edges of the detention system, the suffering and trauma experienced by detainees is carried throughout their lives to differing degrees. Immigration Detention is a most shameful part of Australia's history and constitutes a crime against humanity.

In a speech to the Victorian Parliament in 2003 Julian Burnside QC[3] stated :

> *As part of the process of implementing the International Criminal Court regime, Australia has introduced into its own domestic law a series of offences which mirror precisely the offences over which the International Criminal Court has jurisdiction. So, for the first time since Federation, the Commonwealth of Australia now recognised genocide as a crime and now recognises various war crimes and crimes against humanity.*
>
> *The Australian Criminal Code now recognises various acts as constituting crimes against humanity. Two of them are of particular significance in the present context. They are as follows:*
>
> ***268.12 Crime Against Humanity - Imprisonment Or Other Severe Deprivation Of Physical Liberty***
>
> *A person (the perpetrator) commits an offence if:*
>
> - *the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty; and*
> - *the perpetrator's conduct violates article 9, 14 or 15 of the Covenant; and*
> - *the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.*
>
> *Penalty: Imprisonment for 17 years.*
>
> *Strict liability applies to paragraph (1)(b).*
>
> ***268.13 Crime against humanity - torture***
>
> *A person (the perpetrator) commits an offence if:*

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[3] This speech was previously printed at Julian Burnside's website, the Scatt website, and the Sydney Morning Herald.

- *the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons who are in the custody or under the control of the perpetrator; and*
- *the pain or suffering does not arise only from, and is not inherent in or incidental to, lawful sanctions; and*
- *the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.*

Penalty: Imprisonment for 25 years.

(The Covenant referred to is the International Covenant on Civil and Political Rights, the ICCPR.)

The elements of these offences are relatively simple. For the first, the elements are as follows:

The perpetrator imprisons one or more persons;

That conduct violates Article 9 of the ICCPR;

The conduct is committed knowingly as part of a systematic attack directed against a civilian population.

Australia's system of mandatory, indefinite detention appears to satisfy each of the elements of that crime. Mr Ruddock and Mr Howard imprison asylum seekers. The United Nations Working Group on Arbitrary Detention has found that the system violates Article 9 of the ICCPR. Their conduct is intentional, and is part of a systematic attack directed against those who arrive in Australia without papers and seek asylum. A representative of the International Criminal Court has expressed privately the view that asylum seekers as a group can readily be regarded as "a civilian population".

2 Defining Detention

There are two basic categories of immigration detention.

Firstly, **controlled detention** includes detention centres and psychiatric or general departments of hospital where asylum seekers are guarded 24/7 by GSL Officers and have no autonomy.

Secondly, **Community Detention** including Residential Determination allows asylum seekers to live in the community without GSL guards. They have certain limitations such as regular reporting requirements, usually do not have permission to work or undertake study although children are allowed to go to school or preschool. Immigration pays for the basic accommodation, living and medical costs usually through the Red Cross.

Alternative Community Detention is a hybrid of controlled and community detention. In alternative community detention the asylum seeker is put in the care of Designated Persons [community volunteers] and cannot be alone at any time without a Designated Person being present.

Unfortunately, there is also the category of **Unlawful Detention** and issues around the hurried ejection of wrongfully detained asylum seekers into the community without adequate ID, accommodation or means of survival. A last minute phone call by Immigration to community advocates to take over where Immigration leaves off is not acceptable.

A the moment detention in all categories can last until the asylum seeker exhausts all forms of appeal and is either granted a permanent visa or is removed from Australia. Others are released on a range of conditions including very large bonds.

Right now almost every asylum seeker in any form of detention has been there for far more than 3 months.

3. Repeal Indefinite Detention Laws

All fair minded Australians were shocked to learn the 11 August 2005 High Court decision which ruled that 'stateless' asylum seekers can now be held indefinitely in Australian detention centres. In a 4-3 majority decision, the High Court ruled that federal law mandating detention of asylum seekers until they are either deported or granted refugee status is lawful. This decision followed an appeal hearing on behalf of two men, Ahmed Ali Al-Kateb, 28, and Abbas Mohammad Hasan Al Khafaji, 31, who are both 'stateless' and had previously been granted bridging visas pending the High Court decision but were to be returned to detention following the High Court decision. Although they were later given visas and released into the community, no such law should remain.

Any sections of the Immigration Act which allow an asylum seeker to remain indefinitely in detention must be repealed.

SECTION B

4. How long a person should be held in immigration detention and when should they be released following health and security checks.

Detention in this section refers to controlled detention where the asylum seeker has little or no autonomy and is controlled by institutional rules which are implemented by Immigration and GSL Officers. It includes centres like VIDC and residential housing within VIDC grounds, psychiatric units like Banks House in Bankstown Hopsital and anywhere guards are present at all time.

4.1 Honouring the Proposed Three Month Detention Limit

If the intention is to maintain the detention system at all, we strongly support the Government's policy that the period of detention should be limited to 3 months while health and security checks are undertaken. During this period new arrivals in detention may lodge a protection visa application, be awaiting the outcome of their application, lodge applications to courts or request ministerial intervention.

If it proves impossible for security checks to be obtained or completed within 3 months, detainees should be released as soon as health checks are complete providing there is an ongoing claim for protection which has not been finalised.

It is pleasing to note that as of July 2008 almost no asylum seekers in Villawood Immigration Detention Centre (VIDC) have been there for more than 2 years other than those with serious

criminal records. Two years is still far too long. The Minister should now release the large majority of asylum seekers in VIDC who have been in detention for more than three months. At the same time the Minister needs to ensure asylum seekers released from detention have shelter and income to survive until their cases are resolved. This is particularly the case for asylum seekers who have been in detention for long periods and whose now suffer psychological and physical trauma as a result.

We understand the Minister may have reservations about over-stayers using application for protection visas as a means of staying longer in Australia. The Bridge for Asylum Seekers Foundation requires that applicants for funding have a human rights or refugee claim specific to their own experience and come from countries which flagrantly abuse human rights or are unwilling or unable to protect their citizens from those who do. We rarely consider claims from India or claims from visitors from western democratic countries who want to see more of Australia. Over-stayers should be warned of the barriers to re-entry into Australia if they refuse to leave before they are detained. If they are detained they should be removed quickly and not left rotting in detention long after they have agreed to return as now happens.

On the other hand, present regulations concerning cancellation of visas are draconian when parents, particularly fathers, are suddenly detained leaving children and wives without the means to survive. There have been occasions when Immigration Officers were not aware that detained parents had children left in the community. Also, overseas students often have their visas cancelled and are unnecessarily detained when their universities and colleges indicate they are willing to allow the student to continue study despite minor breaches of study conditions.

Over-stayers who can prove long-term spouse relationships with Australian residents should not be detained particularly when they have children born in Australia. They should be allowed to apply for spouse visas in Australia. Some high profile examples including Siaosi Taufa[4] and his wife and 6 children should never occur. We commend the minister for using his discretion to grant some spouse visas in these circumstances.

As a general principle there should be far fewer situations where the law requires people to be detained. Australia has a very bad record of unlawful detention. The law/regulations should allow officers some discretion to act in a humanitarian way in these matters so that these people are not detained in the first place.

4.2 How to Implement a Faster and Fairer Refugee and Humanitarian Determination Process

The present drawn-out system of determining refugee and humanitarian applications needs basic reforms to achieve justice in the shortest possible timeframe. The refugee and humanitarian determination process we describe in [a] – [f] below should rarely take more that 12 months from the date of lodgment of a protection visa application. Sufficient competent staff and resources should be provided to do so. Lack of funding is a false economy if it prolongs the determination process and in turn results in seriously traumatized refugees incapable of supporting themselves and families when released into the community.

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[4] Attachment 3 : *Flawed System : Immigration Minister Chris Evans admits refugee process is a mess*, Ean Higgins, The Australian 30 May 2008

Many of the issues we raise have been considered by the Senate and Constitutional References Committee June 2000, the 2004 Senate Select Committee on Ministerial Committee on Migration Matters and the 2008 report into Ministerial discretion by Elizabeth Proust.

We believe the determination process we outline in [a] – [f] below to be a faster and fairer process.

[a] Complementary Protection Procedures

Complementary protection procedures should be implemented so that **assessments**[5] **of refugee and humanitarian** claims are made simultaneously in respect of any of the United Nations human rights instruments including the Refugee Convention. Humanitarian claims are currently only considered at the discretion of the minister under particular sections of the Migration Act such as Sections 417 and 351 when all other avenues of appeal have failed. These decisions are discretionary and non-appellable. Protection claimants who continue to challenge the decision of the Refugee Review Tribunal (RRT) may take years to exhaust their appeals to the courts followed by more years of ministerial intervention requests if they find no redress in the courts.

[b] Initial Interviews by the Minister's Delegate

The new Government should continue the trend towards **interviews by the Minister's delegate** (an Immigration officer) with all applicants for protection or humanitarian visas where a decision in their favour cannot be made on the papers. Where negligent or fraudulent migration agents have failed to submit truthful or detailed statements of claims[6], or failed to inform their clients of their right for to appeal to the Refugee Review Tribunal (RRT) or advised the applicant not to attend the Tribunal hearing, the delegate should recommend qualified migration agents who could be approached to take over the case. Current time limits should be set aside in these cases. There would be other emergency situations which might require similar intervention.

There is also continuing concern that refusals to grant protection visas by the delegate may be influenced by negative attitudes in the Department towards asylum seekers or that the delegate may be more concerned with deterrence policies than the human rights of the individual.

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[5] This Complementary Protection proposal has been developed by the Refugee Council Of Australia in 2004 in consultation with many community agencies including BFR, BASF and COPAS. It can be provided to the Standing Committee in the unlikely situation that it has not already been submitted.

[6] A High Court decision **SZFDE v Minister for Immigration and Citizenship [2007] HCA 35 (2 August 2007)** identified migration agent fraud and allowed the person to have their case reheard by the RRT. To stem the flow of the huge number of claims likely to be made the courts continually narrowed the terms of 'fraud'. However, where the claims of the asylum seeker have been explained in ministerial intervention requests, the Minister has allowed another protection visa application in strong cases.

Hearing tapes and discs and notes from delegate interviews should be available to the applicant at all times. Sometimes asylum seekers have claimed they did not say things that occur in the delegate's decision or that they did not behave in ways in the delegate's hearing later used against them by the Tribunal listening to tapes.

[c] Reviews by Humanitarian Tribunals

Review Tribunals should have **three members** from different disciplines one of whom is an experienced forensic lawyer. Other members should have expertise from a range of fields such as international human rights, the impact of torture and trauma, refugees and cultural differences. Specialists with expertise relevant to particular cases should be co-opted as consultants when necessary.

If the issue of fraudulent or negligent migration agents was not remedied by the delegate the Tribunal should send the case back to the delegate to assist the asylum seeker find a qualified migration agent and start the process again.

The Tribunal should be independent of the Department of Immigration and any fallacious political campaigns which are detrimental to asylum seekers such as Children Overboard or dire warnings Australia is being swamped by queue jumpers should be firmly pushed aside in decision making. Once detected, such political influence should be quashed by the Principal Tribunal Member who should brief Members accordingly. At the request of the 2004 Senate Select Committee, the Coalition for the Protection of Asylum Seekers (COPAS) wrote a supplementary submission supplying evidence of ministerial interference or influence on some RRT decisions in the past.

Unfortunately we continue to have little confidence in RRT's decisions where there appears to be an intention to fail the applicant from the beginning of a hearing. Some Tribunal members seem completely insensitive to the effect on the way asylum seekers respond in interviews if they come from police states like China and Burma or lawless states such as many African countries. What seems plausible or implausible, credible or not credible to an RRT Member born in a western democracy like Australia, bears little resemblance to the realities of life in the countries from which refugees come. RRT Members also need training in the religious context of those fleeing religious persecution who may have to share a few sacred texts between numbers of people and who may have very limited education or literacy in their own languages. Their strong simple faith in a higher power is what puts them in danger in communist states for example, not how knowledgeable they are.

The RRT needs to give far less weight than it currently does to information provided by DFAT whose brief is diplomacy and trade not human rights. Indeed the recognition of human rights breaches by countries such as China will likely be an impediment to DFAT's objectives.

The power of a single Tribunal Member to make a decision with life and death outcomes after a few hours of interviewing a frightened asylum seeker is not acceptable. At the moment the only way to reverse a Tribunal decision is to have the matter remitted by a court or to seek ministerial intervention. When these avenues fail and Keyworkers are convinced asylum seekers face serious harm if returned to their own countries, they keep writing more

ministerial requests. It has sometimes required three or more separate submissions for one individual before he or she is finally granted a visa. Our experience is that more than 80% of such cases finally receive permanent visas as a result. On the other hand, Balmain for Refugees does not write ministerial intervention requests for asylum seekers who claim to be refugees but who do not, we believe, face serious harm or breaches of their basic human rights.

The largest group of asylum seekers Balmain for Refugees is assisting is from China. Our concern is that the RRT seems determined to fail as many as possible. It is probable that the huge numbers of claims from Chinese asylum seekers is behind what often appears to be a biased approach by some RRT members. That bias may be conscious or unconscious. However, it is impossible to prove and no redress before courts on grounds of bias has ever succeeded as far as we know. The courts only consider increasingly narrow grounds based on legal error. Courts cannot decide whether a Tribunal has wrongly determined an asylum seeker is not a refugee.

Shane Prince makes the following observation after representing some 100 applications for review of decisions of the RRT in court.

> The present system is a ridiculous cat and mouse game which is created by the system itself. Applicants get blamed for raising technical points in Court (for example see former Justice Madgwick's article in the AFR on 2 May 2008), even as the Act is changed on a regular basis to only allow judicial review on the most technical of grounds. Applicants are blamed for bringing unmeritorious cases to Courts, even though the law does not permit them to argue the merits of their asylum claims. Applicants get branded unmeritorious because of their high rates of failure in the Courts, when the law is changed for the stated purpose of preventing them from winning against the Minister and they do not have access to legal aid for representation in Court. Most applicants, in my experience, only approach the Court because it is their only option having been disbelieved on the most flimsy grounds by a RRT which looks first to whether it can discredit a person and then considers their claims and the forensic errors of the Tribunal are not open to review.

Certain patterns for refusing asylum seekers protection can be detected again and again. The most pervasive one is to find the asylum seeker not credible on a series of petty inconsistencies such as remembering precise dates of events which happened years ago. Once found not to be credible, all documentary evidence and witnesses supporting the claims of the asylum seeker are often also assumed not to be credible and their evidence given "little or no weight".

So it is ironic that some Tribunal Members exhibit an inconsistency in the way they consider the use of bribes. For instance, many Tribunal Members will claim that the Chinese are able to bribe officials to produce all kinds of documentary evidence to support their claims and therefore such evidence should be given little or no weight. At the same time the Tribunal rejects claims by the same asylum seeker that he or she was able to bribe his or her way through the various obstacles which might otherwise prevent exit from China. The ability to leave China using a passport in one's own name is considered to be proof that the person has not come to the attention of the authorities and therefore is not in danger of persecution.

If refugee advocates had more confidence in the refugee and humanitarian determination process, we would be much more willing to accept the decisions and not get involved so often in further appeals. No one wants to clog up the courts or write ministerial intervention

requests but at the moment there is little confidence in many of the decisions made by the RRT.

[d] Applications to federal courts could be largely eliminated by repealing Section 48A and 48B of the Migration Act. The proposal is outlined by Shane Prince[7].

> Further, s48A should be repealed. This would obviate the need for Ministerial intervention- and many Court cases. Instead, new applications could be made to the Tribunal by leave. The applicant would have to convince the Tribunal that leave should be given – this could be shorter than a full hearing. Obviously, any person who seeks to abuse this system would be denied leave. If this were a fair and real process (rather than a mere processing sham) I doubt that there would be any need for cases in the Courts.

[e] The Courts as a Last Resort

> Lastly, the Act needs to be simplified. Judges will always need to exist as a last resort to ensure justice, the legislation should let them do that according to their own good common sense rather than seek to prescribe particular outcomes by defining the field for technical victory by the Minister. The technicalities (for which applicant's are blamed) are only a product of the legislation. I see no reason why the simple and readily understood rules of procedural fairness should not suffice to ensure there is a proper safety valve to prevent abuse of power.

Leave would be granted according to guidelines which would include changes in personal or country circumstances which would endanger the applicant or the availability of new evidence supporting a protection claim.

If the Minister accepts this recommendation to use Tribunal members to decide applications for leave to apply again for a protection visa, the role of Balmain for Refugees might be to write leave to appeal applications in lieu of writing ministerial intervention requests which is currently its major program.

[f] Ministerial Discretion

The Minister should retain his discretion to intervene for unique cases which might arise though it is hard to foreshadow the circumstances. The Proust report recommends the Minister retain personal discretionary powers in exceptional circumstances such as when citizenship is to be revoked or in matters of national security

Another circumstance requiring ministerial discretion is when failed asylum seekers are returned to their countries and are tortured, imprisoned, or forced to be continuously on the run because of the persecution they claimed as refugee claimants in Australia but were not believed. Where the persecution can be substantiated the Minister should use his discretion to return the asylum seeker to Australia.

> Anecdote[8] : Frances Milne
> I refer to the recent case of a Chinese pro-democracy and human rights protestor who committed suicide in China on 14 June 2008. Mr Zhang, [a pseudonym] on being returned to China in April

[7] Attachment 4 : Email from Shane Prince
[8] Details can be made available on request and in confidence.

2007, was detained on arrival and interrogated and tortured for 15 days. On his release he fled to another province rather than risk being apprehended by his local Public Security Bureau (police) again. Over the succeeding 12 months Mr Zhang lived as a fugitive without registration outside his own province. I desperately sought his return to Australia both by informal negotiations with senior Immigration personnel allocated to liaise with me by the Minister and then by a formal application to the Minister on 13/12/2007. Urgent updates informed the Minister that Mr Zhang reported a dramatic increase in random household searches for unregistered 'undesirables' in the run-up to the Olympics and that he was terrified he would be caught. When it became quire clear to Mr Zhang that Australian Immigration authorities had no intention of doing anything to enable him to return to Australia, he decided to suicide rather than be caught and tortured a third time (he had been detained for 6 months in China because of strike action he had organized before he fled to Australia).

The failure of Immigration to properly brief the Minister of Mr Zhang's request to return to Australia and the incompetence the Department in failing to give Mr Zhang's claims any priority are responsible for his death. This is precisely the sort of issue in which the Minister should exercise his discretion.

Anecdote : Debby Nicholls

A second case concerns a young man deported last year to an African country where he feared disproportionate punishment for a minor political crime. The police came searching for him as soon as he returned to his home town, so he immediately went into hiding in the south of the country. The police regularly question his close friend in Dar es Salaam about his whereabout. He remains in hiding without medication for his psychotic condition, experiencing frequent thoughts of self-harm and with daily uncertainty about whether he will be found by the authorities before his case can be resolved through an application for a 202 visa. Once again, we believe this is precisely the sort of issue for which the Minister should exercise his discretion.

5. Transition Proposals to Speeding up Decision Making :

Certain transition arrangements such as speeding up ministerial intervention decisions seem to be already in place, although the determination process for one detainee and three other cases we know of in Community Detention has already exceeded the three month limit[9]. Some families who have never been in detention are experiencing lengthy delays. Allowing a Tribunal member, preferably a Magistrate or an experienced forensic lawyer to decide requests for leave to apply again for a protection visa, would eliminate the need for the Minister to make 99% of the discretionary decisions now before him. These changes could be trialled immediately.

Balmain for Refugees **commends** the following measures introduced by the new Minister, the Hon Chris Evans :

- Granting of Section 48B claims while asylum seekers with strong claims are in court. Prior to this asylum seekers needed to choose between seeking review of an RRT decision in the courts or requesting the minister to intervene to allow an asylum seeker to apply again for a protection visa based on new evidence or changed circumstances. Since courts had strict requirements that applications for review must be lodged within 28 days of the RRT decision most asylum seekers choose to take up this option while they may. Large sums of time and money are saved by this approach.

[9] On 19 July, one of the Community Detention asylum seekers in question was admitted to Banks House after threats of self-harm and is still threating self-harm because of the despair he is feeling about his future, a despair which could have been avoided by a timely decision.

- Many more asylum seekers are being released from detention under a range of provisions whose conditions are not fully understood by Balmain for Refugees but appear to be more lenient than previously .
- The Minister is allowing a request for ministerial intervention to be lodged without any details while Balmain for Refugees allocates Keyworkers to research and write detailed ministerial intervention requests. In response the Ministerial Intervention Unit (MIU) acknowledges in writing the receipt of the request and gives 14 days from the date of the acknowledgment to lodge the detailed request. This removes the anxiety that while a request is being written the person may be removed from Australia.[This was confirmed by the Canberra Office although the Sydney Office seemed to know nothing about it].
- The Department often contacts both the asylum seeker and the Keyworker acknowledging receipt of a ministerial intervention request. This is helpful because most asylum seekers do not understand English and may not inform their Keyworker.

Improvements Needed to eliminate Repeat Ministerial Intervention Request

Balmain for Refugees recommends :

(a) All rejection letters in response to ministerial intervention requests should summarise the reasons for the rejection. It is not sufficient to merely state "does not meet the guidelines".
Rationale : At the moment Keyworkers are left guessing why a request has been refused. FOI requests to find out the reasons may not arrive for 6-12 months even when marked 'urgent'. When Keyworkers are convinced the asylum seekers faces a real chance of serious harm if removed from Australia, the Keyworker will keep sending requests until the request is accepted or the person is removed. This is a waste of time for all concerned and most unfair. However, Balmain for Refugees' policy to keep requesting ministerial intervention when we believe the Minister or ministerial intervention unit (MIU) had made a wrong decision has been vindicated time and time again by the asylum seeker eventually being granted a permanent visa after years of trauma in detention.

(b) The guidelines for writing ministerial intervention requests under Sections 417 and 48B should be widely available and in the languages of asylum seekers. We also note this is supported in Recommendation 8 of the 2004 Senate Select Committee on Ministerial Discretion.
Rationale : Many asylum Seekers in VIDC spend their time writing their own ministerial intervention requests but find they are rejected because they do not meet ministerial guidelines. The Ministerial Intervention Unit faces a mountain of incompetent requests when some asylum seekers are quite capable of writing their own if they knew what was required.

[c] The Department needs to systematize priorities which need urgent attention from the Minister
Rationale : The asylum seeker mentioned in 4.2 [f] above committed suicide in China because the Department had simply filed his case among the many other requests despite monthly updates on his increasing danger of detection. It almost beggars belief that no priority was given this man to return to Australia and no solutions were suggested . It took Mr Zhang's death to elicit the Department's assurance it would develop guidelines for establishing the relative priorities of cases.

It also appears that the Minister remains completely unaware of matters marked URGENT until a Departmental officer accepts the urgency and places the matter before him. It is the Minister who bears the brunt of any adverse publicity, it would also seem to be in the Minister's own interest that the situation be rectified.

SECTION C

Terms of reference 3,4 &5 *Detention Infrastructure and Services*

These matters need no transition strategies and require immediate implementation.

6. Provision of Information in the Languages of Asylum Seekers

6.1 Translation of Important Information

Detainees have never had access to information in their own language about what is happening to them or what their options are. Verbal instructions by case officers who speak the appropriate language or use interpreters suffer from the ambiguous role of case officers who are both prison officer and conveyor of unwelcome advice or information. Many detainees are so frightened of their case officers they do not understand the instructions or advice they are given. Detainees do not have independent legal advisors they can turn to. All their legal and immigration documents are in English. Even detainees with a basic knowledge of English would find some of the English almost impossible to understand.

When detainees do not understand their rights to apply to the courts for instance, they miss the deadlines for appeals and their options are reduced and their danger of being returned to persecution is increased.

Volunteer keyworkers often have to start from the beginning and explain why the protection application was refused and start from the beginning to find out why the applicant fears persecution. Where fraudulent agents are involved, a completely new account of persecution may emerge.

Anecdote 1. from Frances Milne

It was not until the Minister granted a Chinese woman a second opportunity to apply for a protection visa again that her real story came to light. Her migration agent had claimed she had been a nurse persecuted by the authorities for organizing a nurses' strike. At the RRT hearing the conversation went something like this :

RRT Member : "Explain what happened after you organized the nurses' strike"
Reply : "I did not"
RRT Member "So you have never organized a nurses strike ?"
Reply : "No I never have"
RRT Member "Are you are nurse ?"
Reply "No I have no qualifications and have never worked except at home looking after the children."
RRT Member "Then your claims are false ?"
Reply "I never knew what my migration agent said. I just signed blank forms and paid the money. I did not know the migration agent said I was a nurse."

When her actual claims were teased out by the RRT, she was granted a protection visa even though her claims sounded less dramatic than the story fabricated by the migration agent.

6.2 Provision of Interpreters and translators

Other situations involve new arrivals and use of detainees as interpreters in dangerous situations.

Anecdote 1. from Veronica Spasaro.

One Friday morning our catholic mass held in visiting area was spectacularly interrupted when a truly totally hysterical, older woman ran up to the priest when he was right in the middle of mass and started yabbering away incomprehensively in her own language.

She was distraught because she only spoke Russian, had been brought in the previous night and knew nothing about anything; where she was, why she was there, how to get warmer clothes, when to get food etc. (imagine, she could not understand any of the announcements and none of the guards spoke her language). She has spent the whole previous night isolated in that way and was nearly out of her mind. She approached the priest because it turns out she was catholic and thought this could be her source of help. We resolved the situation by calling for a man in stage 3 at that time who someone knew was the only person to be able to speak her language just a bit. How cruel and stupid and unnecessary the whole saga was!

Anecdote 2 from Frances Milne

At 5pm one night Immigration officers at VIDC decided to transfer a number of Chinese detainees to Stage 1 which, predictably, would evoke strong opposition because of the dreadful conditions in Stage 1. Instead of using a qualified on-site interpreter they used a reluctant Chinese detainee whose English was less than perfect. To his alarm the detainee 'interpreter' found he was supposed to communicate this forced removal to Stage 1 to angry Chinese detainees who knew nothing about it and demanded explanations from Immigration, explanations which were not forthcoming. As a result the detainee interpreter found himself in the middle of a violent fracas. The riot squad arrived in full armour and forcibly overwhelmed the violent detainees but also grabbed the detainee interpreter because he was also in the room. He resisted and remonstrated that he was interpreting but no one listened to him. He was thrown against the wall, tied up and after being taken to hospital to have his wounds stitched, he was put in Stage 1. He remained in Stage 1 for months where he feared he would be beaten up because he assisted Immigration and GSL by acting as interpreter. He was later moved back to Stage 2.

Use of other detainees to act as interpreters for visits to the doctor is also obviously unsatisfactory.

Solutions will cost money but for Immigration to fail to properly fund GSL to provide independent accredited interpreters on site is unjust and dangerous.

7. Prison Rules

The whole detention punishment system is based on prison rules, the most cruel of which are the rules for putting detainees in the isolation units (The Management Unit). The punishments for perceived 'misbehaviour' are a public statement that detention centres are for criminals. The culture of punishment is punitive and the incident files then sent to Canberra are not given to asylum seekers to respond to and may be used as character assessments in the final decision of the Minister. These incident reports may be part of the reason the person is denied a visa.

Other rules seem arbitrary and depend on the officers in charge. They need to be formalized preferably by consultation with detainees and advocates.

8. Treating Suicidal Asylum Seekers

On return from hospital suicidal asylum seekers are placed under 24 hour supervision in the Management Unit which is reported to be a squalid isolation cell. It appears to detainees to be a form of punishment for trying to suicide.

The Housing section of VIDC is the more appropriate place for suicidal people to live. A full range of qualified trauma staff need to be available and in attendance. After the person has recovered they should be released into residential determination community care. Funds should be made available for this option.

No suicidal asylum seekers should ever be shot with stun guns. Immigration and Police officers involved in attempts to prevent suicide should be well trained and capable negotiators.

9. Stage 1

On 10/1/2008 the SMH 10/1/2008 published the article *Villawood Targetted as Worst in Country.* Stage 1 is reported to be a dangerous place to be and asylum seekers should not be placed there. More likely Stage 1 is full of ex-prisoners who have served their punishments for serious crimes in Australia and are not welcome back in their own countries or are in danger of execution or death for crimes committed and already punished in Australia. No human being should live in Stage 1.

10. Other Issues include :

Boredom and Chronic Fear and Anxiety.
Overmedication
Same food – the menus do not reflect the reality of what is served or the cultures of the detainees .
Reluctance of Immigration and GSL to consult medical specialists in a timely fashion and failure to provide detainees with information about their diagnoses, partly because of lack of interpreters.

These will undoubtedly be covered by other submissions. They become minor issues if asylum seekers are not kept in detention more than 3 months.

11. Alternative Detention

Asylum Seekers in alternative detention need much more freedom. Having been the Coordinator of one alternative detention "Pilot Scheme', I consider the scheme unworkable if it still exists. It was claustrophobic for the asylum seeker to be personally supervised all day every day in alternative detention as was required. The dozen or more volunteer 'designated officers' from the community found it impossible to mount a 24/7 service and Immigration recognized this and turned a blind eye. In the anecdote below the primary carer, who offered accommodation and assistance, has encapsulated the issues which emerged.

Anecdote : by Christopher Baulman, Designated Person

No subtleties, no privacy – he is in detention, however it is dressed up. His experience has brought him to the edge of madness and the brink of suicide. He has family to think of back home and deportation hangs on his every word.

He came for a new life and freedom, but he must learn about us in a crash course while under the most intense and skeptical scrutiny. To entrust everything to this rough and dehumanising culture – is that what is required for Australian citizenship?

> Current immigration processes are destructive and dehumanising for all concerned, breeding problems and attitudes we all must deal with sooner or later.
>
> If our economy can't afford to welcome as many good people as would like to join us and to treat them with dignity, we need a new way or we will sow a bitter crop indeed. That is what I got from my experience as 'officer Chris'.

Alternative detention should not require 24/7 supervision. Conditions of alternative detention should ensure the health and well being of the asylum seeker not the rigid rules of the detention system.

SECTION D COMMUNITY BASED ALTERNATIVES

Section D Terms of Reference *Community Based alternatives to detention*

Ideally there should be no detention and asylum seekers should participate fully in the society while their claims are being examined as occurs in New Zealand.

> Anecdote : Failed Mongolian Asylum Seeker by Bruce Milne
>
> In September 2002 a failed Mongolian asylum seeker was assisted by Balmain for Refugees to reach NZ where he applied again and was successful in obtaining a protection visa. As soon as he arrived a migration welfare agency and the migration barrister who were alerted to his pending arrival, organized his application for a protection visa. From the time he claimed protection and before his application was lodged, he was eligible for social security, free medical and psychiatric assistance, access to an employment agency which secured him a part-time job. On arrival he was given a small room in a hostel and $200 to go to a designated supermarket and buy food and other provisions.

Initial health and security checks are sufficient and no further health and security checks should be necessary once a person is deemed to be a refugee or deserving of a permanent visa on humanitarian grounds. At present another health and security check is required after the granting of a permanent visa and can hold up the actual receipt of the visa for 6 months more of unnecessary suffering and limitations.

The necessity for Police Clearance from any country in which the detainee has lived for over 12 months in the past 10 years should also be re-examined.

All community based alternatives to detention should allow asylum seekers to work if they can get jobs or provide them with basic income if they cannot. Such income can be distributed by the Red Cross as now occurs for asylum seekers in residential determination (community detention) and in alternative community detention.

12. Funding for Balmain for Refugees and Bridge for Asylum Seekers Foundation

The work currently carried out by Balmain for Refugees and the Bridge for Asylum Seekers Foundation in lieu of any government provision of the essential services these community organizations provide. If the Government wants to continue to harness the good-will of volunteers it needs to fund their infrastructure.

Balmain for Refugees

While ministerial intervention requests remain a last resort for asylum seekers, the work of Balmain for Refugees will continue. As already explained, if our proposal to repeal Sections 48A and 48B of the Act is accepted, BFR would transfer its efforts to writing submissions seeking leave to apply again for a protection visa, unless the Minister decides to fully fund migration agents to carry out the work.

In all events BFR's work is expanding and it needs some government funds to employ a small secretariat to allocate and follow up keyworkers, and keep an accurate and up-to-date records of each case. Fortunately, many young and older solicitors and final year law students are keen to provide pro-bono assistance and take on the responsibilities of a keyworker. Funding is also required for translating and interpreting services. These are a continual drain on our resources though we use competent volunteer interpreters if they are available. Balmain for Refugees could be given access to TIS free of charge.

Bridge for Asylum Seekers Foundation

Virginia Walker would like to add the following to her previous submission dated 30 June 2008

Bridge for Asylum Seekers supports a 3 month limit to detention of asylum seekers. This would, as mentioned above, result in a substantial increase in the number of Bridging Visas being granted and a proportionate increase in the assistance being required from BASF.

Although obviously not all the BVE holders would qualify for assistance, the Foundation would nevertheless need to have extra funding for those who would otherwise be accommodated at Villawood Immigration Detention Centre at Government expense. Despite all the Foundation's fund raising efforts, we are currently struggling to find funds even for the BVE holders now on our books.

We would therefore request that Federal funding be made available to Bridge for Asylum Seekers Foundation in case of a shortfall in the future.

13. Community Detention (Residential Determination)

Residential determination options should never separate husbands from their families. Unless there is a history of violence or similar problem within the family, families should remain together.

> Anecdote 1. Frances Milne
>
> A woman and two small children were given BVEs to live in the community while the father remained in VIDC. The family pleaded that they needed the father outside with them. The mother became so distraught and distressed she begged for her family to live in Stage 4 Housing at VIDC and refused to renew their visas so that the mother and children became unauthorized non-citizens and, as such, would have to be put in detention. They family were put in housing together and finally got protection visas.
>
> Anecdote 2. Frances Milne

A woman with an adult disabled son and 5 year old daughter was in residential determination in the community and expecting a caesarian birth of her third child. She begged to have her husband released from detention to mind the children during her confinement and afterwards. Immigration failed to give any reassurances about what would happen almost up to the day of the caesarian birth so the woman and children refused to leave the visiting area after one visit and came into the residential quarters instead of leaving. The detainees made up beds and shared rooms etc. When Immigration found out they were thrown out of the detention centre and days later were put into Housing. Why the failure of Immigration to make timely arrangements ? It's an unnecessary cruelty. After 3 months in detention, however, the five year old is showing signs of withdrawal and asking why her family cannot go our on picnics together anymore.

Anecdote 3.

The most distressed young people I have ever seen in detention were teenagers in the residential housing complex at Baxter Detention Centre. I have detailed accounts of their suicidal levels of distress as their mothers sank into utter depression and their fathers remained in Baxter IDC.

14 Release from Detention on a Bridging Visa E

Rules about the size of bonds for a Bridging Visa E are not known and appear ad hoc and arbitrary.

If, as already foreshadowed, the Minister fears abuse of the protection visa process, the Bridge for Asylum Seekers Foundation is an alternative mechanism for providing living costs to asylum seekers on Bridging Visa Es who are unable to find work or do not earn enough to survive. All asylum seekers should be encouraged to undertake volunteer activities.

15. Unlawful detention

Anecdote : Mr Hassan Tawbe by Margaret Hetherton

This is a case in which it would appear that poor administrative practices by the Department of Immigration led to a cooperative person, who had been assessed safe to live in the community on arrival, being detained at huge expense for seven months when he was willing to leave the country.

The examples of poor administrative practice are:

- In November 2004 within 28 days of a negative RRT decision Hassan Tawbe voluntarily went to the Department of Immigration for advice. The officer copied his passport, visa , copy of s 417 letter to Minister etc. but failed to advise Mr Tawbe that his visa needed to be renewed and was not extended to cover the period of the Minister's consideration. He was also given no advice about his options.
- 2 weeks later, Mr Tawbe was placed on the Department of Immigration overstayer's list but he was not advised. He continued living in the community waiting for a response from the Minister for his ministerial intervention request which he testifies he did not receive.
- On 3 January 2006 Mr Tawbe was picked up and sent to VIDC. There he was told that all options were closed and that he would have to return to Lebanon. After the initial interview in which he signified his willingness to return to Lebanon, he was held for four months before he was able to access to a Department of Immigration caseworker about this.When this happened his case officer in VIDC gave him an Application to the Federal Magistrate's Court.

Mr Hassan Tawbe was eventually released on a Bridging Visa E in July 2006 and is awaiting a response from the Minister for his second ministerial intervention request.

16. Release from Detention with No ID

There are increasing numbers of cases where asylum seekers released on Bridging Visas with work rights and access to Medicare, are not given ID from Immigration to enable them to open a bank for cheque payments from Bridge for Asylum Seekers Foundation or access Medicare.

Anecdote : Janice Thompson

Mr Guo was released from VIDC after his successful appeal in the Federal Magistrates Court which remitted his case to the RRT to be decided "according to law". He is on a BVE with both work rights and medicare. However, he has encountered the following problems.

No Migration Lawyer/Agent Available
Despite being told by his Immigration case officer Mr Guo had access to a migration agent through IAAAS funding to prepare his case to the RRT, he was told by his migration agent that all the agents who receive this funding were too busy so he would not be assisted at all. He would have to attend the RRT without representation. I have another asylum seeker in the same situation and know that others have also. I suggested his case officer seek to defer his hearing until a migration agent is available but this should not fall to me.

Medicare.
He went to Medicare with a letter written by DIAC - "*Letter for Medicare Enrolment and Tax File Number – No Valid Travel Document*" - intended to assist Mr Guo with both his Medicare application and his Tax File Number application. He was able to complete a Medicare application but the letter produced within a couple of days was not acceptable (I believe that it used to be) to the RTA for a Photo Id card. He will need to wait a few weeks before he can get his Medicare card although he can now pay for any medical care and get it reimbursed. However, the Medicare card is a form of id - and this is something that Mr Guo needs - but it will take 4 weeks at least!! Quite often the Medicare card arrives just as the BVE expires, and the process has to start all over again.

Tax File Number.
I spoke with the ATO and was told that the on-line TFN application process as well as the normal TFN application office processes would not work - a visa number is needed if there is no passport number available. And the BVE does not have a number. Finally, I had to write a letter (see attached) which I was told to address to a special team within the ATO who would issue a TFN - but not for another 4 weeks. Without the TFN, Mr Guo will be taxed at an excessive rate. When Mr Guo does finally get a TFN, it will provide yet another form of id.

ID (for bank acounts, etc)
Mr Guo has no passport (he came on a false passport), he has no bills being sent to his address (he is living with a friend although, having been just released from VIDC, he wouldn't have had any bills this soon) and he has not yet got a Medicare card or a TFN. He has no receipt or any document with his signature on it.

I have spoken with Mr Guo's case manager. The problem for DIAC, they tell me, is that there is no proof yet that Mr Guo is who he says he is. But it is not satisfactory that it will be more than 4 weeks before Mr Guo can be established with some form of ID and with a TFN. Additionally, how anyone would manage without assistance is beyond me. I've been twice to the RTA, once to Medicare, spent a considerable time investigating id options and TFN material on the internet and also some time on the phone. Someone without English would have had no chance at all.

Those of us assisting the distribution of BASF funds have to withdraw funds from our own accounts [if we have sufficient balances] and buy money orders. Immigration should provide ID sufficient to open bank accounts and to satisfy Medicare requirements when people are released from detention.

17. TPVs and Permanent Visa Applicants in Limbo

There is deep concern for refugees who were granted Temporary Protection Visas because they arrived on " false documents". We understand from friends working with refugees that the new government is no longer giving TPVs to people in these circumstances but is granting some other more humane visa to these people. If this is correct, it is a great step forward.

Our concern is for those who were given TPVs under the Howard Government and are still restricted by all the conditions attached to those visas. The Labor Party Conference did decide that, once they came into government, they would do away with the TPV system but to date has not taken any action to help these very vulnerable people.

It seems that it would not be difficult for the minister to decide to waive the three year waiting period for those on TPVs and allow them all to apply for permanent protection immediately. They could then be asked to do medical, police and security checks and, if they passed these, be granted permanent protection. After all their claims for protection were recognized when they were granted visas.

There are a number of refugees who are suffering a great deal as a result of the restrictions on their TPVs. For example:

Anecdote 1. : from Jenny Toisuta

1. A mother of 4 children (aged 14-21) was assisted by friends with the cost of applying for a passport and visa in a false name after her husband was killed in front of her when they were attending a meeting of GAM in Aceh.

She was forced to leave her children behind and grieves for them and worries about them endlessly. Her youngest child has dropped out of school. She cannot afford fees for the older ones to continue their education and they cannot find work as unemployment is extremely high in Aceh.

Her mother (the children's grandmother) says the responsibility of caring for them is too much for her. She wants to marry off the older daughter, who now has a boyfriend. It is the custom in Aceh for a marriage to be arranged for a girl when she is still young. This woman is beside herself. She does not want her daughter to be married like that. She also knows that if she married she will never be able to sponsor her to come to Australia and so may never see her again.

2. Anecdote 2. from Jenny Toisuta

A man who left his wife and child (now 7 years old) behind is grieving because his son will no longer talk to him on the phone. He cannot forgive his father for staying away so long – (according to the child) his father should either return or bring the family to Australia.

There are many other cases like these. It would make such a difference if the Minister could move to end this system.

3. Anecdote . Jenny Toisuta

Parents of two children with Permanent Protection Visas given the Opportunity for "Aged Parents Visas"
A young couple fleeing persecution for their political opinion arrived in Australia on 21st January 2001 on business visas using false names so that they could escape. Their first child was born one month after their arrival. They applied for protection immediately through A1 Migration (whose license to practice was

cancelled by MARA in December 2004). Their applications at the Departmental and RRT levels were rejected due primarily to atrocious service from their migration agent.

In September 2004, RACS lodged an application for a protection visa for their first son. He was found to be a refugee by the RRT and granted protection on 4 August 2005. In 2008 he was granted Australian Citizenship. Their second son (born in 2006) was found to be refugee by a delegate of the Minister in September 2006.

On 24 March 2007, the former minister granted the parents (then aged 33 and 28 years) six-month tourist visas and the opportunity to lodge Aged Parents Visas. As the two sons were financially unable to support the parents, Balmain Uniting Church acted as sponsors and the Aged Parent Application was lodged in May 2007. We understand that due to the cap on these visas, it will be 12 years before this will be approved.

In the meantime the couple have bridging visas with work rights and Medicare but no access to Centrelink (except for Family Tax benefit), no access to English classes through AMEP, no access to vocational training at TAFE, limited employment opportunities and no photo ID (because they do not have enough points for the RTA). This is in contravention of Australia's responsibilities under the UN Convention on the Rights of Children as Australia is denying them basic rights, which would support them to bring up these two children.

A Psychiatrist who interviewed the parents last week was very concerned about their level of stress and insecurity. In particular the uncertainty about their status is preventing the mother from putting behind her the trauma of a raid by DIMIA on their home in 2003 and the subsequent detention of her husband in Villawood as well as perceived threats by DIMIA that she and her infant son would also be detained. She suffers nightmares and cries frequently. The father is still distressed by the disappearance of his brother and the murder of his sister by Security Forces in his home country.

Finally, Balmain for Refugees thanks the Standing Committee for the opportunity to make this submission and hopes it is of value.

Yours sincerely

Frances Milne
Balmain for Refugees

ATTACHMENT 1

Statistical Summary of Balmain for Refugees (BFR) Register for Period Jan – June 2008

All detainees in VIDC for more than two years have been released into the community the last having been released mid June 2008. A program of checks on returnees is now in place.

Status	Numbers	Comments
Permanent Visas Granted following ministerial intervention request	27	Includes a family with 2 children. Children have permanent protection visas. Parents given right to apply for aged parents visa but not eligible for visa for 12 years.
Return Pending Bridging Visas following ministerial intervention request	2	May not know outcomes for years of living with uncertainty
In detention awaiting response to ministerial request	57	
In community waiting response to ministerial request	57	
Voluntary return (to China)	1	
Forced removals to danger in 2007 whose returns were requested by BFR	2	One committed suicided on 14 June 08 rather than submit to more torture from police. No details to be provided of the other.
Forced removals – unsure of outcome	8	While most cleared customs on arrival we need a three month check to establish whether local authorities have harassed or persecuted them.
In detention or community – no further action by Balmain for Refugees	6	Balmain for Refugees has checked claims and does not consider person to be in danger in own country.
TOTAL	160	

ATTACHMENT 2

Declaration by a Group of Leaders of Religious Communities on the Deportation[10] of Asylum Seekers

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We, leaders of Australia's religious communities, call on the Australian Government to stop immediately the deportation of asylum seekers to countries of origin or third countries whose governments have not demonstrated their willingness and ability to offer effective protection. We make this statement in response to mounting evidence of the deaths, disappearances and serious violations of human rights of people who have been removed by the Australian Government, after their claims for protection have been rejected.

We hold a vision of a society which "acts justly and shows mercy" *(Micah 6:8)*, where "justice flows like a river, and righteousness like a never-ending stream" *(Amos 5:24)*. We reject a world where "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" - Universal Declaration of Human Rights *(UDHR)*. We remember with pride that Australia has been a formative influence and early signatory to the major humanitarian international instruments designed to bring about a just and peaceful world.

We uphold the principle that "everyone has the right to freedom from persecution (*Articles 3,4,5,7,9 &10,* UDHR) and hold the following related principles, which Australia has accepted, to be inviolable:

- Everyone has the right to seek and enjoy, in other countries, asylum from persecution (*Article 14, UDHR).*
- No refugee or person granted refugee protection should be returned to a country where life or freedom would be threatened *(Article 33, Refugee Convention and Protocol).*
- The obligation of all states not to expel, return or extradite a person to another state where there are substantial grounds for believing that the person would be in danger of being subject to torture *(Article 3.1, Convention Against Torture*).
- Children shall not be separated from their parents against their will, ... except where such separation is necessary for the best interests of the child (*Article 9, Convention on the Rights of the Child*)

We note that asylum seekers are an insignificant minority in the numbers entering Australia, and while we recognise the right and responsibility of Australian governments to control migration, we believe this right should be exercised in a way which preserves people's safety.

We are particularly concerned about :

- the evidence that the Government has removed and continues to remove, people who later are recognised as refugees;
- asylum seekers being turned back at airports before their claims have been registered or assessed;
- the return of those whose claims for asylum do not fall within the narrow Refugee Convention and Protocol definition of a refugee, but who are in need of protection for specified humanitarian reasons including serious human rights violations, sexual abuse and generalised violence, imprisonment, torture and death;
- the deportation of parents causing separation from their children.

Accordingly, we call for Australia to be a place of refuge. We call on the Australian Government to offer safety, justice and hope for people fleeing serious human rights violations, so that they:

- may, subject to any order of a court, live in safety and freedom in the community while their claims are assessed;
- are ensured full legal rights and access to fair, accountable and transparent application processing and review procedures;
- can apply for protection on specified humanitarian grounds;

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[10] "Deportation" and "removal" are used interchangeably in this Declaration, although "removal" is the term used in the Migration Act in relation to asylum seekers and others who have no lawful status and no applications in process.

- may settle permanently in Australia when they are found to have a protection need as a refugee or on humanitarian grounds.

We call on Australia to seek humane solutions. People whose claim for protection has been rejected after a just and fair determination process have the right to a humane removal process. This involves:

- assistance to seek protection, residence and family reunion in other countries;
- freedom from indeterminate, long-term detention while a suitable country is found.

We recommend that the Australian Government immediately cease the practice of

1. removing asylum seekers to either countries of origin or third countries whose governments have not demonstrated their willingness and ability to offer effective protection;

2. removing asylum seekers whose claims have been rejected but who are in need of protection for other humanitarian reasons;

3. removing asylum seekers to a third country where there is a possibility of forced deportation to their home country;

4. separating parents from their children as a result of deportation;

5. administering chemical restraints for the purposes of subduing or sedating asylum seekers during forced deportations.

We further recommend that the Australian Government :

6. uphold our moral obligation to help those at risk and ensure that people are treated humanely at all times;

7. allow, subject to any order of a court, all asylum seekers to reside in the community, with rights and support, whilst their applications are processed and until they are granted protection;

8. enact legislation to give effect to Australia's non-refoulement obligation under the International Covenant on Civil and Political Rights, Convention on the Rights of the Child, and Convention Against Torture.

9. ensure that asylum seekers' full legal rights are upheld and that they have access to fair, accountable and transparent application processing, accredited interpreters and translators, and full access to administrative and judicial review;

10. grant residency on humanitarian grounds to asylum seekers who are not determined to be refugees but who are in need of protection for other humanitarian reasons;

11. grant residency on humanitarian grounds to asylum seekers who are not determined to be refugees but who cannot be returned, or are unwilling to be returned to countries whose governments have not demonstrated their willingness and ability to offer effective protection;

12. review the merits and use of the Minister's discretionary powers to determine whether these powers are exercised in an accountable and transparent manner

13. allow onshore applicants to apply for residency on humanitarian grounds, with a determination and review process similar to that of refugee protection applications;

14. provide all necessary assistance for asylum seekers to reunite with family members in other countries, to seek protection in other countries, or to apply to migrate to other countries, ensuring that they reach countries which offer effective protection, permanent residency and cultural and social rights

15. monitor the outcomes of deportation to ensure that where humanitarian concerns arise, including the serious violation of human rights, disappearance, or death of a person removed from Australia, this information informs the Government's decisions relating to deportation.

20 November 2002

ATTACHMENT 3

Flawed System

Ean Higgins | *May 30, 2008*

FOR the Taufa and Hwang families, their fates came down to the whim of the right government minister.

The Hwang family from South Korea and the Taufa family from Tonga endured wrongful detention by Immigration Department officers who failed to follow departmental policy and the law, and suffered psychological trauma and having their families split by deportation.

Both cases are going to cost Australian taxpayers millions, first for the cost of locking up and deporting people, then in compensation for doing so illegally.

But the case of the Hwang and Taufa families displays a more fundamental problem with the way Australia deals with foreign nationals trying to stay in the country on asylum or compassionate grounds.

After years of administrative and tribunal reviews and court cases, the fates of the Hwangs and the Taufas were ultimately not decided by the courts. They were decided by a minister who overruled the courts and tribunals and decided to let the families stay.

The Hwangs were knocked back in their applications for ministerial intervention by former Coalition immigration minister Amanda Vanstone but were reprieved this month by Labor incumbent Chris Evans.

The Taufas were rejected by Vanstone but approved in one of the last acts of her outgoing successor, Kevin Andrews.

As one government source says, the system is like tax avoiders dragging the government through courts and being ordered to pay, and the Treasurer deciding in individual cases which ones to let off.

Lawyers who act for asylum-seekers object to the system because it replaces normal principles of law and due process with a sort of court of Versailles, where the king decides on personal caprice who goes to the Bastille.

"You've got a minister of the crown as the only person in the country who can personally decide the fate of literally thousands of people," says the head of the Melbourne-based Refugee and Immigration Legal Centre, David Manne.

The right of ministerial intervention lies in various parts of the Migration Act, most notably section 417, which applies to asylum-seekers, and section 351, which applies to immigration more generally. The act gives the minister the power to overturn decisions of the Immigration Department, the tribunals and the courts, based on their discretion.

While initially designed as a one-in-1000 option for the minister to intervene in exceptional cases - much like government pardons - it has become the standard route of last resort for most asylum-seekers, who number about 2300 in Australia.

It is a system Evans has vowed to change. But while his department considers a review of ministerial discretion by policy guru Elizabeth Proust that's expected to lead to legislative change, he is doing it himself.

Evans says that in the three months to March 31, he resolved the cases of 472 people who applied for ministerial intervention after their cases were rejected by the department and one of two review tribunals. He granted 187 visas, 116 to asylum-seekers who had been rejected by the Refugee Review Tribunal: section 417 applications. The other 285 applicants, including many who have been in Australia for more than a decade, can expect a knock on the door from immigration officials and explusion.

Evans has criticised the process of playing God with unfortunate people's lives and he clearly does not enjoy it. He told Senate estimates this week that he intends to reform the system to get rid of most of his inherited powers of ministerial intervention.

"I don't think primarily that decision-making power should be in the hands of the minister except in exceptional circumstances, and this is no longer an exceptional circumstance, it's part of the system," he said.

"People go the ministerial intervention route as a way of getting cases resolved that aren't properly dealt with in the system or as the next level of appeal. It is a question of whether that is good public policy and I don't think it is."

For the Taufa family, their 15-year battle with the Immigration Department ended happily yesterday when they were reunited as legal permanent residents after four years.

The Taufas' lawyer, Michelle Byers, admits her clients did not always do the right thing. Siaosi Taufa and his wife, Kalolaine, came to Australia in 1993 on occupational training visas. They stayed and Siaosi worked illegally after their visas expired. In 1996, Siaosi applied for an asylum visa, his only option to try to stay, even though Tonga is not oppressive. The Department of Immigration rejected his request and in February 2004 he was arrested, briefly detained and escorted on a plane back to Tonga. But what the department failed to take into account was that Siaosi Taufa had a valid bridging visa.

In a big and widely reported verdict known as the Srey decision three months earlier, in November 2003, the Federal Court had ruled that a certain group of prospective immigrants had not been properly notified that their visa application had been rejected.

The court ruled that their visas therefore remained valid. Siaosi Taufa was one of them, but deportation officers remained oblivious.

Meanwhile, the department picked up Kalolaine Taufa and the six children the couple had brought into the world in Australia and they were locked in Villawood Immigration Detention Centre in western Sydney.

"On October 19, 2004, we were caught by people from DIMIA (the then Department of Immigration and Multicultural and Indigenous Affairs) ... three or more of them," Kololaine Taufa wrote in a legal statement. According to psychological reports, they were traumatised by the experience.

"Her entire upper body was observed to be trembling as she recalled with horror (facial grimacing) the many occasions when more than one live rat was found in the rooms where she and her children slept when held in immigration detention," the psychological report prepared this month says of Kalolaine Taufa. "She spoke of the continuing hardship caring for six children without her husband by her side."

After 9 1/2 months in Villawood, the family was released as a result of a policy decision by prime minister John Howard that detention of children was wrong.

Byers claims they should not have spent so long in detention, first because under policy guidelines children were to be locked up only for short times and only as a last resort, and also because in April 2005 the eldest child, Judy, became an Australian citizen, having reached the required age of 10.

The department does not accept the detention of the children was unlawful but it does admit the detention and deportation of the father was illegal. Even then, according to Byers, the evidence suggests the department at some later point discovered it had wrongly deported Siaosi Taufa, but did not act until the lawyer raised the issue.

The Hwang family has not been as lucky. Mother Young He is in Australia while her husband remains in South Korea after being deported. The Hwangs, who arrived in 1997 on visitor visas and eventually applied for protection visas, made headlines in 2005 when their two children, Ian and Janie, were seized from their classrooms at a Sydney public school and put in Villawood.

The department eventually admitted it had made a mistake, but not before the children had watched another detainee try to kill himself by drinking bleach.

Vanstone came under fire for initially trying to defend the action. But the department accepted that the children also had valid visas when arrested, again as a result of the Srey decision, and had been wrongfully detained.

Byers also represented the Hwangs and admits the family's record is not spotless. The father, Hoon, was expelled after being convicted of fraud. Byers applied on behalf of the mother and children to Vanstone to be granted permanent residence through ministerial discretion. A document obtained by The Australian shows that one of Vanstone's officers, Tanja Ferguson, wrote back to Byers asking whether, if Vanstone granted the request, the mother would sponsor the father. When Byers responded honestly that the answer was yes, that was as far as the application went.

"Vanstone just didn't like the family," Byers claims. Fortunately for the Hwangs, Evans did and a couple of weeks ago decided they would be some of the lucky ones granted a ministerial reprieve.

Byers is negotiating another compensation deal with the department for the Hwangs and, as part of it, will try to get the father back in.

While Byers is grateful that many of her clients have been able to stay as a result of ministerial discretion, she, like Manne, thinks the system is unfair.

"You should take it through the courts and that is where you finish, not with the minister," she says.

Some of the people who were unlucky in Evans's latest round of reviews face a grim future. Bangladeshi Hafizur Rahman had sought asylum based on his activism in one of his country's political parties, many of whose leaders have been jailed by the country's military-run "interim government".

Rahman was legally employed as a printer in Sydney's western suburbs and, after other legal avenues failed, he applied to Evans for ministerial intervention.

His boss, Iain Ramsay, wrote a letter of support saying Rahman was an excellent worker and was learning new skills valued by the company. Evans gave Rahman the thumbs down and he has to leave the country by June 6 under an expulsion order.

Whether or not he is persecuted for his politics back in Bangladesh, he faces an impoverished life in a country he no longer regards as home. Had Rahman married and had children in the 12 years he has been living here, he might have attracted the sort of compassion Evans showed the Hwangs.

But Rahman says that would have been wrong. "How could I marry anyone in the uncertain position I've been in?" he asks.

Ean Higgins is a senior writer with The Australian.

ATTACHMENT 4

----- Original Message -----
From: Shane Prince
To: 'Frances Milne'
Sent: Monday, May 19, 2008 5:02 PM
Subject: Policy issues
Corrected Version

Dear Francis,

Thank you for sending me the submissions- I found it most helpful.

My suggestions are as follows:

1. All migration agents must be solicitors so that the existing (and quite effective) minimum standards regime applying to solicitors will protect these vulnerable applicants. This is make fraud cases far less likely given that solicitors have much more invested in their training and standing and so much more to loose than fly by night migration agent operations. The Department will save money by utilising existing monitoring and disciplinary mechanisms and standards will increase. During a period of adjustment, migration agents who are not legally qualified would be permitted to continue so long as they are subject to effective supervision by a solicitor.

2. Either have a truly inquisitorial process or a truly adversarial process at the RRT and not the present meaningless hybrid. My view is that an adversarial process is much more likely to impartially get to the truth.

3. If an inquisitorial system is to be adopted and the decision maker is to also be the prosecutor, as is effectively the present system, then there must be three Tribunal members as you have suggested. There must be an obligation (as there is on European inquisitorial judges) to find evidence supportive of the claims as well as evidence refuting the claims. In the inquisitorial system, representatives should also have an opportunity to make submissions or question the applicant or witnesses (even if it is after the inquisitor's questions - as happens in Europe).

4. If an adversarial system is to be adopted then the Department should be able to justify the Delegate's decision and the applicant should be represented. In this model, the Tribunal could consist of one person, however they would have to be truly neutral and no statistics could be kept on their rate of rejection or acceptance of appeals. There is no reason why that function cannot be given to existing Federal Magistrates holding dual appointment as Tribunal Members and exercising the function as a non-judicial body- in the same way that Federal Court holding dual Commissions as AIRC members have traditionally dealt with administrative matters or members of other administrative panels holding dual commissions. I cannot stress strongly enough that each Tribunal must have at least one real practicing lawyer or judge who is trained in forensic reasoning and logic and can safely arrive at conclusions about credit and the like without resorting to labelling or ill-disciplined thought.

5. The present system is a ridiculous cat and mouse game which is created by the system itself. Applicants get blamed for raising technical points in Court (for example see former Justice Madgwick's article in the AFR on 2 May 2008), even as the Act is changed on a regular basis to only allow judicial review on the most technical of grounds. Applicants are blamed for bringing unmeritorious cases to Courts, even though the law does not permit them to argue the merits of their asylum claims. Applicants get branded unmeritorious because of their high rates of failure in the Courts, when the law is changed for the stated purpose of preventing them from winning against the Minister and they do not have access to legal aid for representation in Court. Most applicants, in my experience, only approach the Court because it is their only option having been disbelieved on the most flimsy grounds by a RRT which looks first to whether it can discredit a person and then considers their claims and the forensic errors of the Tribunal are not open to review.

6. It is also imperative that access is available to applicants to Departmental officers to have their claims reconsidered even while their cases are before the Courts. I have seen hundreds of thousands of dollars wasted by the Minister in running arcane legal arguments (many of which have been unsuccessful) only to see that the applicants are eventually either found to be refugees or given humanitarian visas. It is also ridiculous that so many resources are used to resist cases where the only detriment to the Minister is having the RRT reconsider the decision. I estimate that I have acted in at least 100 of these matters, I do not recall a single one of my clients (even those who have lost in the Courts) who have been returned to their country of origin, whether they have been ultimately successful at the RRT, granted asylum by other countries (which is embarrassing to me as an Australian), allowed to apply for asylum again and been successful, or obtained humanitarian (or, inexplicably, some other category of visa). Accordingly, hundreds of thousands of taxpayer dollars have been wasted (even where the Minister is successful in Court) when the matter could have been simply re-determined by the RRT for a very small cost. I have seen countless examples of such waste because the Department and its legal advisors seem to go onto autopilot and simply respond to the legal arguments, rather than considering whether costs could be avoided by other means- no prudent commercial litigant would ever behave in such a way. Indeed, when all lawyers have an obligation to advise their clients about ADR alternatives, I have never once seen the Minister or his lawyers entertain such an idea (let alone suggest it) in relation to these cases.

7. Further, s48A should be repealed. This would obviate the need for Ministerial intervention- and many Court cases. Instead, new applications could be made to the Tribunal by leave. The applicant would have to convince the Tribunal that leave should be given – this could be shorter than a full hearing. Obviously, any person who seeks to abuse this system would be denied leave. If this were a fair and real process (rather than a mere processing sham) I doubt that there would be any need for cases in the Courts.

8. Lastly, the Act needs to be simplified. Judges will always need to exist as a last resort to ensure justice, the legislation should let them do that according to their own good common sense rather than seek to prescribe particular outcomes by defining the field for technical victory by the Minister. The technicalities (for which applicant's are blamed) are only a product of the legislation. I see no reason why the simple and readily understood rules of procedural fairness should not suffice to ensure there is a proper safety valve to prevent abuse of power.