amnesty international australia

Submission to the

Senate Legal & Constitutional References Committee

regarding the

INQUIRY INTO THE ADMINISTRATION AND OPERATION OF THE MIGRATION ACT 1958

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Submitted by

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The global defender of human rights

Introduction

This paper has been prepared by Amnesty International Australia for the Senate Legal and Constitutional References Committee's (the Committee) "Inquiry into the administration and operation of the Migration Act 1958".

Of particular relevance to Amnesty International Australia are issues surrounding:

- The mandatory detention of all unauthorised arrivals
- The provision of temporary protection visas to a select group of recognised refugees
- Elements of the refugee status determination system that do not incorporate Australia's broader human rights obligations.

In this submission Amnesty International wishes to highlight both the human rights obligations the Australian Government has to those fleeing persecution and how we see elements of the three issues outlined above undermining those obligations. In particular this paper addresses the question of the lawfulness of both the administration and operation of the Migration Act 1958 in the context of Australia's international obligations.

In providing a submission within the terms of reference of this Inquiry, Amnesty International Australia wishes to draw particular attention to submissions made to previous Senate Inquiries and the ensuing Committee reports published. Specifically this refers to:

- *A Sanctuary Under Review* (June 2000),
- the October 2002 report entitled *Select Committee on a Certain Maritime Incident*
- the March 2004 report; *Select Committee in Ministerial Discretion in Migration Matters.*

Amnesty International Australia would also like to draw attention to the issues raised in our July 2002 submission made by Amnesty International Australia to the Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention in 2002.[1]

The recent changes made by the Migration Amendment Act 2005 (the Act) are acknowledged by Amnesty International Australia as being a positive initial step. However areas of concern remain within the operation of the Act, and taking into account the changes that have been made.

It is also recognised that this submission comes at a time when further changes to the operation of the Act are taking place and the Palmer Inquiry[2] has highlighted areas of mismanagement by the Department of Immigration Multicultural and Indigenous Affairs (DIMIA) and made recommendations for change. Amnesty International Australia welcomes the Australian Government's adoption of these recommendations, however further form is required.

Amnesty International's recent report: *The Impact of Indefinite Detention*, *the case to change Australia's mandatory detention regime*[3], provides a comprehensive set of recommendations which, if implemented would ensure Australia's compliance with its

[1] http://www.amnesty.org.au/resources/submissions

[2] Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf

[3] *The impact of indefinite detention, the case to change Australia's mandatory detention regime.* June 2005. AI Index ASA 12/001/2005.

international obligations. A copy of the report is provided and forms part of Amnesty International Australia's submission for the Committee's consideration. The following submission is structured to be considered with the *Impact of Indefinite Detention* report. As such, Amnesty International's specific concerns regarding mandatory detention and the 17 recommendations to the Australian Government put forward in the report are summarised however are not reiterated in detail. It is considered important to address a number of recent developments, subsequent to the launch of the report, which affect the operation of the Act.

In this submission Amnesty International wishes to raise a number of important areas of concern which need be addressed by the Australian Government to ensure that it meets its international obligations to those fleeing persecution. In particular, Amnesty International is concerned to ensure that durable solutions are found for those in need of protection.

Amnesty International's work on refugees

Amnesty International aims to contribute to the worldwide observance of human rights as set out in the Universal Declaration of Human Rights and other internationally recognised standards. We oppose grave violations of the rights of every person, and support the right of people freely to hold and express their convictions and to be free from persecution by reason of their ethnic origin, sex, colour or language, and the right of every person to physical and mental integrity. We oppose abuses by state and non-state actors - such as opposition groups.

Refugee rights are a fundamental tenet of human rights. We work to prevent the human rights violations that cause refugees to flee their homes. At the same time, Amnesty International opposes the forcible return of any individual to a country where he or she faces serious human rights violations on return. We therefore seek to ensure that states provide individuals with effective and durable protection from being sent against their will to a country where they risk such violations, or to any third country where they would not be afforded effective and durable protection against such return.

In this regard, Amnesty International bases its work on the fundamental principle of *non-refoulement*, which can be found in several treaties including the 1951 UN Convention relating to the Status of Refugees and Article 3 of the Convention Against Torture and is recognised by the international community as a norm of customary international law, binding on all states.

Detention

Mandatory detention of unauthorised arrivals

Amnesty International has consistently taken the view that Australia's mandatory detention law and policy, which applies to all those who arrive undocumented, is both arbitrary and unlawful as a matter of international law. In 1998 Amnesty International released its report *A Continuing Shame*[4] which highlighted why mandatory detention is in breach of Australia's international obligations and the measures needed to address these breaches. Amnesty International's recent report

[4] *Australia, A Continuing Shame: The mandatory detention of asylum-seekers*, June 1998. AI Index Aus/POL/REF.

The impact of indefinite detention[5] (enclosed) addresses Australia's mandatory detention regime and in particular how it has allowed for prolonged and indefinite detention.
In summary the Amnesty International *The impact of indefinite detention* report recommends that the Australian Government should:

- **establish** a formal independent review process to assess on a case by case basis the necessity and proportionality of detention of all asylum-seekers and rejected asylum-seekers who are currently detained in Australia, including Christmas Island, and on Nauru.

- **ensure** that in future, asylum-seekers who arrive in Australia without adequate documentation are detained only when their detention is consistent with international human rights standards. Such legislation should be based on a general presumption against detention.

- **specify** in national law a statutory maximum duration for detention which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.

- **ensure** that detained asylum-seekers have regular and automatic access to courts empowered to review the necessity of detention and to order release if continued detention is found to be unreasonable or disproportionate to the objectives to be achieved.

- **establish** a new class of bridging visa for any future arrivals that allows for asylum-seekers to remain in the community with rights and entitlements as outlined above.

- **implement** a *complementary protection* model to provide for future asylum-seekers who do not meet the full and inclusive interpretation of the definition of refugee under the Refugee Convention but nonetheless are in need of international protection.

- **ensure** that any actions taken by the government to negotiate the forcible return of a rejected asylum-seeker are in full compliance with Australia's international human rights obligations.

Since the release of the report a number of important events and developments have occurred which affect the operation of the Migration Act and issues addressed in the report. In particular we wish to briefly comment on the power of the Ombudsman to examine and make recommendations for individual cases that have been in detention over two years, the application of the Removal Pending Bridging Visa (RPBV), the findings of the Palmer Inquiry and specific concerns relating to the health care of those in detention.

2005 Amendments: the Ombudsman

On the 17 June 2005 the Prime Minister announced that:

[5] *The impact of indefinite detention, the case to change Australia's mandatory detention regime.* June 2005. AI Index ASA 12/001/2005.

> Where a person has been in detention for two years or more there will automatically be a requirement that every six months a report on that person must be furnished by the Department to the Ombudsman. The Ombudsman will assess that report, providing his assessment to the Minister who must then table the assessment in Parliament.

Amnesty international has consistently called for independent monitoring of detention centres. It is significant that the Ombudsman's reports are required to be tabled in Parliament and will therefore provide increased transparency regarding the detention of people for more than two years. However, it is concerning that the Minister remains under no obligation to act on the tabled reports.

Further Amnesty International is concerned that section 486L of the Act, as amended, outlines that the 'detention report starting time' does not commence until a person has been held for a period of 2 years. This time period is excessively long considering that the initial detention of a person is not subject to review or investigation, and the mounting evidence that detainees who are in prolonged or indefinite detention have a high-risk of mental ill-health.

Removal Pending Bridging Visa

It is noted that the RPBV was introduced to address the fact that under the Act certain detainees, in particular those who are stateless, could remain in detention indefinitely. However, Amnesty International has several concerns regarding the visa, including:

- the discretionary nature of its application;
- the limited number of long-term detainees it appears to apply to;
- the potential for a non-transparent and sudden departure when the Australian Government deems it appropriate to return home; or alternatively
- the prospect of remaining indefinitely on the visa with limited rights regarding travel and family reunion.

Amnesty International Australia has welcomed the recent amendments to the RPBV, providing greater flexibility in its application. However, this visa still requires a Ministerial invitation and there is no review of how invitations are determined. The RPBV is not a durable solution and is not in line with Amnesty International's recommendation that a model of complementary protection be adopted in Australia.[6] The RPBV holder remains without certainty of their future, cannot offer longevity to a potential employer and has no prospect of family reunion.

It is of further concern that the RPBV ceases when the Minister gives notice in writing and there is an absence of any definition of what determines 'practicable' removal. In theory, Amnesty International Australia holds this omission to mean that a person who accepts such a visa can be denied any removal notification period. This is in comparison to the theoretical 48 hour period applicable in other removals. Further, removal is not reviewable and may result in entry to a country in which the person faces human rights violations. Such outstanding issues and concerns highlight the need for appropriate guidance for DIMIA staff to ensure visa requirements are applied in a consistent and informed manner in order to avoid undue stress and potential *refoulement*.

Children and families out of detention

[6] Insert to the Report: *Australia: The impact of indefinite detention –the case to change Australia's mandatory detention regime*. Amnesty International June 2005

Recent amendments to the Migration Act have been made to ensure that families with children in detention will be placed in the community, under community detention arrangements, with conditions set to meet their individual circumstances. Amnesty International has welcomed the recent removal of all children, with their families, from immigration detention centres.

Despite the amendments however, there is a still the possibility of children entering the detention system as, under Section 4AA of the Act, minors can still be detained 'as a last resort'. An unaccompanied child has been very recently held in Baxter for a period of approximately 4 weeks despite the Government's claims that unaccompanied minors would not be placed in detention centres. When questioned in Parliament on 20 June 2005 regarding the detention of children the Prime Minister responded with the following: "… the changes that the government has outlined are, I believe, valuable improvements, but they do not in any way undermine the current policy. The current policy retains mandatory detention. It is mandatory detention with a softer edge but nonetheless mandatory detention."[7] Given such statements, Amnesty International Australia has serious concerns regarding the implementation of the amendments to the Act. This concern is heightened considering the non-compellable and discretionary nature of many of the changes.

Also related to concerns regarding the level of power afforded to the Minister is section 197AD of the Act and the revocation of 'residence determination'. Part of Amnesty International Australia's concern is again, the non-reviewable nature of the power. Perceived non-compliance and therefore revocation can result in a family being placed into a Residential Housing Project (RHP) or an individual transferred to a detention centre.

Palmer Inquiry

Amnesty International Australia (AIA) welcomes the findings of the Palmer Inquiry (the Inquiry) and looks forward to the Government's prompt action in response to the recommendations made. The Inquiry strongly highlighted the need to fundamentally reform the organisational culture within DIMIA and its overall management of immigration detention

The Palmer Inquiry made a number of recommendations which dealt with such issues as the;

- Mental health and treatment of detainees;
- Procedures and practices of DIMIA, including appropriate training;
- The service contract with Global Solutions Limited (GSL);
- Management of and service provision inside detention centres; and the
- Treatment of female detainees.

While the findings and recommendations of the Inquiry are significant, the fundamental flaw of the Palmer Inquiry is that the framework revolves around examining the processes within the mandatory detention regime rather than the need to critically examine the policy itself. The Palmer Inquiry does not address the issue of indefinite detention and does not presume against the detention of asylum seekers.

The Inquiry refers to the need to respect the 'human rights and dignity' of detainees. Amnesty International Australia is concerned however that the detention environment

[7] http://www.aph.gov.au/hansard/reps/dailys/dr200605.pdf 20 June 2006. p.25

inherently removes the freedoms, choices and basic rights of individuals. Therefore, the Palmer Inquiry's request to respect detainee dignity may simply not be possible under current detention arrangements.

The Palmer Inquiry's focus was the abhorrent treatment of Australian resident Cornelia Rau. Reference was made to the negligence of DIMIA and other government departments in wrongfully detaining Ms Rau, holding her in a prison with convicted criminals, failing to provide her with adequate medical treatment and furthering her mental suffering. Ms Rau's treatment and experiences in Baxter highlight Amnesty International Australia's reasons for continued condemnation of Australia's mandatory detention policy and the situation within the existing detention facilities. The Palmer Inquiry has made a recommendation in line with that of our *Impact of Indefinite Detention*[8] report; that is the establishment of external accountability and the professional review of health standards in order to monitor conditions within detention centres. The Palmer Inquiry reiterated the point that the level of mental health care provided to detainees is grossly inadequate and the present arrangements between service providers are cumbersome. The Palmer Inquiry noted that "The detainee population requires a much higher level of mental health than the Australian community." This is in line with the evidence included in our *Impact of Indefinite Detention* report outlining that the detention environment can in fact be a cause of mental illness.

The Palmer Inquiry raised the concern highlighted by Amnesty International Australia on numerous occasions regarding the isolation of Baxter. The problems associated with this issue are in attracting professional staff, detainees having access to necessary services, as well as legal and community visitors gaining access to detainees. The Palmer Inquiry found that this situation is compounded by an environment where communication is one-way and there is no attempt to ensure the detainee understands their situation.

Whilst the Palmer Inquiry and Amnesty International Australia acknowledge the recently announced changes to immigration policy – the Palmer Inquiry explicitly states that such changes are of little impact without a cultural change within DIMIA.

Adequacy of health care and services

Amnesty International Australia draws attention to the multitude of evidence linking detention and mental health issues, as outlined in the sections below. It is further noted that the treatment of these issues is presently inadequate and leads to the question of whether such issues can be resolved at all within the detention environment. In its examination of one of these facilities the Palmer Inquiry stated; "the activities that occur in Baxter are similar to those in any Australian correctional institution; the untrained observer could not tell the difference."[9] Given the people kept in these facilities are under no charge, have no review of their continued detention and are often seeking asylum such conditions are unnecessary and unacceptable. Given the recent findings in relation to the negative impact of Baxter's remoteness, these findings can be equally applied to the remote facilities and people currently on Nauru and previously on Christmas Island. Access to legal assistance, community contact, torture and trauma services and specialised medical care are exceptionally problematic or not possible in these remote settings.

[8] *The impact of indefinite detention, the case to change Australia's mandatory detention regime.* June 2005. AI Index ASA 12/001/2005.
[9] Palmer Inquiry 4.3.1, June 2005

S v DIMIA

A judgement handed down by the Federal Court on 5 May 2005 found that the Commonwealth had breached its duty to take reasonable care of two detainees (referred to as S and M) held in mandatory detention at Baxter. The applicants sought treatment under the *Mental Health Act 1993* (South Australia) and were transferred to an external mental health facility prior to the conclusion of the case.[10]

Independent psychiatric assessments provided to the Court on behalf of applicants S and M made the conclusive finding that Baxter was not an appropriate place of treatment for detainees suffering mental illness of this magnitude.

In the conclusion of the case, and in commenting on external medical opinions provided throughout the case the Court noted that "the conditions at Baxter were themselves a contributing cause of the mental illness of S and M".[11] This finding is in line with the position of Dr Sev Ozdowski, Human Rights Commissioner who notes that detention itself is a primary cause of metal illness and that as such, sufferers cannot be treated whilst in detention.

In the case of S v DIMIA, Justice Finn stated; "There were no psychiatric services provided at Baxter for the period between November 2004 and February 2005. This was a particularly crucial time because there was an obvious need to provide psychiatric care after the December 2004 rooftop protest and hunger strike. Failure to ensure psychiatric care was available over this time contributed to the deterioration of the detainees' health."[12]

At the time of this hunger strike the Minister stated; 'Calls for an independent review of medical facilities do not do justice to the highly professional medical and health staff we have on site and community doctors who treat detainees as needed.' [13]

Mental Health

Amnesty International Australia notes the Minister's statement of 25 May 2005 that extra medical staff would be provided within detention centres.[14] The Royal Australian and New Zealand College of Psychiatrists (the College) responded to this by stating that the changes were; "really grossly inadequate in terms of the needs of this population (detainees)". The College maintained its stance by highlighting "...we have stated previously, and we remain convinced, that this environment (immigration detention) is not suitable for the treatment of the mentally ill, that there should be immediate release of those with mental illness and mental disorder into appropriate psychiatric facilities. Detention centres don't operate as hospitals and in no way can be said to be therapeutic."[15] Based on such findings Amnesty International Australia maintains that extra staff is an unacceptable solution to a problem perpetuated by the environment (detention) itself.

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[10] *S v Secretary, Department of Immigration & Multicultural and Indigenous Affairs* [2005] FCA 549 at para 2.
[11] Ibid at para 267.
[12] http://www.lsc.sa.gov.au/lsc_involvement_in_palmer_inqu.asp
[13] Senator Amanda Vanstone. Media release 148/2004 released 17 December 2004 http://www.minister.immi.gov.au/media_releases/media04/v04148.htm
[14] Ministerial Statement to Senate Estimate Committee – VPS065/2005, released 25 May 2005.
[15] www.abc.net.au Transcript of interview conducted on 25 May 2005, Reported by Elanor Hall, interviewee Professor Louise Newman.

A comprehensive inquiry undertaken by HREOC in 1998 found that mental distress in varying degrees is a common manifestation in detained asylum seekers.[16] Between January 2001 and April 2002 there were 21 reported cases of children (aged between 10 and 18 years) attempting suicide in the 5 detention centres in operation during this time.[17]

As recently as 1 July 2005 there have been reports of unregistered medical staff being employed as health-care providers at detention facilities.[18] Other media reports include nursing staff subjected to abuse for meeting detainee health needs prior to the DIMIA's agenda.[19] In February 2004 the Royal Australian College of General Practitioners (RACGP) called for independent and accredited health facilities for all of Australia's immigration detention facilities. The RACGP states that staff employed by Global Solutions Limited (GSL) should be subject to the same review procedures as medical staff across Australia.

Temporary Protection visa

Amnesty International Australia and many other advocacy groups have consistently raoised concerns that Temporary Protection Visas (TPV's) are inconsistent with Australia's international human rights obligations. While the temporary nature of the TPV is not in itself a breach of the 1951 Refugee Convention (the Convention), certain conditions attached to the current TPV regime are arguably contrary to Australia's international obligations towards refugees.

Amnesty International's key concerns regarding the TPV program are

- **The 7 Day Rule*:*** Legislative changes as of September 27, 2001 prescribe that a person may never be eligible for permanent status if they transited a 'safe country' en route to Australia for more than 7 days and could have sought and obtained effective protection from that country or the office of the United Nations High Commissioner for Refugees (UNHCR) in that country. This rule, which may result in refugees living on temporary protection forever, is contrary to the spirit and intent of the 1951 Convention related to the Status of Refugees (Refugee Convention).
- **Re-proving Refugee Status**: It is contrary to the intention of Article IA of the Refugee Convention, for a refugee who has been through a full determination process, to be forced to re-prove that they are still a refugee requiring protection after 30 months. Refugee status is declaratory in nature and is only terminated in limited circumstances set out in the Refugee Convention.
- **Termination of Refugee Status*:*** Once refugee status has been granted, states may only terminate status through revocation, cancellation or cessation. Use of the cessation clause should be done with the utmost caution. States must demonstrate that there has been a *fundamental, stable and durable* change of circumstances, before the cessation clauses under the Refugee Convention can be invoked. The Refugee Convention only permits for refugee status to be taken away in very clear and limited circumstances, Australia's review of refugee status after the expiry of the TPV reflects an administrative procedure. As such, this

[16] Human Rights and Equal Opportunity Commission. *Those who've come across the seas: The report of the Commission's enquiry into the detention of unauthorised arrivals.* 1998
[17] Human Rights and Equal Opportunity Commission , *A last resort? National inquiry into Children in Immigration Detention,* pg 148.
[18] http://www.abc.net.au/news/newsitems/200507/s1404501.htm. July 1, 2005
[19] Australian Nursing Journal February 2004, Volume 11, no 7

review procedure can be seen as contrary to Australia's obligations under the Refugee Convention.

- **The Onus of Proof:** UNHCR has consistently stated that the onus should be on the host state authorities to show that situations in a country of origin have not changed, not on the refugee.
- **Non-Refoulement**: Australia is at risk of breaching the principle of *non-refoulement* in returning refugees whose TPVs expire. Where there are substantial grounds for believing that the person would be in danger of being subjected to a violation of their human rights, it is incumbent on the Australian government not to return them. Where there has not been fundamental, stable and durable change and the burden of proof has been placed on an individual to show continued persecution there is a serious risk that someone will be returned to country where their safety will be at risk. Amnesty International does not believe sufficient safeguards exist under the current TPV system to ensure that Australia is currently meeting its *non-refoulement* obligations.
- **Penalty of Not Receiving Permanent Protection:** A state may not penalise a refugee by virtue of their mode of arrival or their lack of proper documentation. Refusal to grant permanent protection for a limited class of refugees effectively amounts to a penalty.
- **Limits on Judicial Review*:*** Concerns exist over legislative limits to judicial review of decisions suggest that the only review may be in the hands of the Minister for Immigration's discretion.
- **Denial of Civil, Social and Economic Rights Afforded to Refugees*:*** Australia's denial of access to certain basic rights and entitlements for TPV holders is also inconsistent with Australia's obligations of the Refugee Convention.
- **Family reunion and travel documents: in circumstances where family reunion rights are permanently denied:** By permanently denying family reunion rights Amnesty International believes that Australia is in breach of Article 15(3) of the Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights (ICCPR). Australia can also be seen to be in breach of Article 9 and Article 10 of the Convention of the Rights of the Child (CRC). Further, Article 28 of the Refugee Convention creates an obligation to issue travel documents for the purpose of travel outside the territory, yet there is no automatic right of re-entry should a TPV holder leave Australia.

Of recent significance to the application of the TPV legislation for both the DIMIA and the RRT, however, is the recent Federal Court decision by Justices Murray Wilcox, Rodney Madgwick and Bruce Lander.[20] The ruling moved the onus to the Australian Government to prove asylum seekers would be safe if forced to return. The decision by Justices Murray Wilcox, Rodney Madgwick and Bruce Lander means TPV holders will no longer be forced to prove their refugee status when their three-year visa expires and they could instead be issued with a permanent visa.

Given that as of the time of writing the submission the Australian Government has yet to determine whether or not to challenge this decision to it is too early to assess just how significant this Federal Court decision may be for those seeking permanent protection.

[20] QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 136

Amnesty International Australia welcomes the October 31 2005 deadline for the determination of pending Permanent Protection Visa applications. However Amnesty International Australia maintains that permanent protection and full rights should be afforded to all persons deemed to be refugees.

Refugee Status Determination

While Amnesty International Australia's concerns with Australia's current Refugee Status Determination system have previously been outlined in our submission to the Senate *Sanctuary under Review* inquiry, as well as the Select Committee on Ministerial Discretion in Migration Matters, a number of recent developments do need to be highlighted. In particular, changes to the legislation for the processing of visa applications both at the primary and review stages, the further extension of Ministerial discretion, and recent reports and inquiries highlighting concerns with the way Australia removes failed asylum seekers.

Ministerial Discretion

Amnesty International most recently outlined its concerns regarding Ministerial discretion in its submission to the Senate Select Committee on Ministerial Discretion in Migration Matters' 2004 inquiry. In its submission Amnesty International made four specific recommendations:

1. Ministerial discretionary powers on humanitarian grounds should be retained, but not as the final or even sole avenue of review of Australia's international humanitarian obligations.[21]

2. Section 36(2) of the *Migration Act* 1958 *(Cth)* (the Act) should be amended to include assessment of risk on the basis of serious human rights violations covered by international treaties ratified by Australia (such as torture or extrajudicial executions) which should be included in assessment of refugee status in Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and Refugee Review Tribunal (RRT) determinations.

3. All decisions affecting forcible removal or extradition from Australia should involve a legal requirement in each individual case, to examine risks of serious human rights violations on return at the hands of the state or where the state is unable or unwilling to provide protection.

4. The Committee examines alternative forms of 'complementary protection' visas for those who may have compelling protection needs but are not recognised under the current refugee determination process.

In March 2004 Amnesty International Australia gave evidence to the Senate Select Committee on Ministerial Discretion in Migration Matters that Australia's international obligations were not being adequately considered in the decision of when to exercise ministerial discretion. At the time, these comments were reiterated by migration lawyer, Mr Bitel, who noted humanitarian grounds were rarely used as a basis for the

[21] Comprising of the *Convention Against Torture, Inhuman or Degrading Treatment or Punishment* (CAT); the *Convention on the Rights of the Child* (CROC); *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Reduction of Statelessness* (Statelessness Convention'.

Minister's use of discretion. Mr Bitel also commented on a lack of transparency and accountability regarding the use of ministerial discretion[22]. Findings, outlined below, that people are being deported to danger[23] and that the number of Memoranda of Understanding (MOUs) facilitating removal are increasing, cause Amnesty International Australia to again bring into question the use of Ministerial discretion. The recent amendments to the Act greatly increase the Minister's discretion and maintain the non-compellable aspects of the minister's role, such as consideration of Ombudsman's reports regarding continued detention. The amendments provide even more non-reviewable powers to the Minister such as the decision to revoke a RPBV and place a person in immigration detention.

Recent amendments to the Act have increased Ministerial discretion, the use of which remains non-reviewable and also adds to the non-compellable nature of ministerial actions. It is of concern that these amendments were made despite the recommendations and dialogue of the March 2004 Senate Committee report investigating Ministerial powers.[24] With a view to increasing transparency and consistency; Recommendation 21 of the Ministerial discretion report directed the establishment of an independent committee with the role of providing recommendations to the Minister in all cases where the exercise of discretion was being considered.[25]

Recommendation 8.1 from the Committee involved in *A Sanctuary Under Review* states;

> "the Minister should note the concerns expressed about the s417 Guidelines and consult widely with stakeholders on a regular basis to ensure that the content of the Guidelines remains contemporary and addresses the specific purposes of Australia's obligations under the CAT, CROC and the ICCPR."[26]

Given that the amendments to the Act result in an increase of Ministerial discretion, Amnesty International Australia again calls for regular consultation and the constant monitoring of whether Australia is meeting international obligations and 'remaining contemporary' with regards to the use of discretionary powers. In particular this refers to the need for decisions to be made on humanitarian grounds, especially in the legislative absence of complementary protection.

Amnesty International Australia notes that many of the March 2004 Senate Select Committee recommendations (specifically relating to Ministerial powers) have not been implemented or are not in efficient operation. Therefore without the creation of defined guidelines and measures for transparency and accountability, an increase of Ministerial discretion remains of concern.

Forcible Return

Amnesty International Australia maintains in its own submission made to the Senate Select Committee on Ministerial Discretion in Migration Matters in 2004[27] that there is a requirement for select returnees to be monitored, to ensure that the integrity of

[22] Select Committee on Ministerial Discretion in Migration Matters, *Report* March 2004 pp.87-89.
[23] Edmund Rice Report *Deported to Danger* September 2004.
[24] Select Committee on Ministerial Discretion in Migration Matters, *Report* March 2004
[25] Ibid, Recommendation 21; Section 9.7 p.164.
[26] Senate Legal and Constitutional References Committee, *A Sanctuary Under Review- An examination of Australia's Refugee and Humanitarian Determination Processes* June 2000. (CAT – Convention Against Torture, CROC – Convention on Rights of Child, ICCPR – International Covenant on Civil and Political Rights).
[27] http://www.amnesty.org.au/resources/submissions

decision making is properly tested (where, for example an assessment is made that a particular group will not face persecution in a particular country). As early as June 2000 such a process was already being discussed (Recommendation 1.1 of *A Sanctuary Under Review*). This same report drew upon the case of "Ms Z", a pregnant Chinese woman with one child who was deported and endured a forced abortion under China's 'One Child Policy'.

A report published in 2004[28] by the Edmund Rice Centre found that there were instances where failed asylum seekers were deported to countries other than their home country. The report also presented case studies where documentation for the person's travel to their home country was deemed to be incorrect or inadequate which then resulted in arrests and further detention. Concerns regarding deportation procedures and the actions of DIMIA staff in this process have been brought into parliamentary question; for example Senator Nettle in December 2004[29]. Case studies of 40 individuals who were refused protection in Australia and subsequently returned to their home countries were used in the report. Of these people, 35 were "living in dangerous conditions" as soon as they arrived in their home countries [30]. The results of this report make the Australian Government's stance that "...Australia is not responsible for the future well being of that person (a rejected asylum seeker) in their homeland"[31] even more alarming.

A recently published book; *Following Them Home*, by David Corlett, tells of a Palestinian male who came from Syria who had been held in Australian detention facilities where he went on a hunger strike, was hospitalised, and had been force fed. DIMIA advised this man that he could live in Thailand. This offer was later revoked and later still, reinstated. After finally reaching Thailand, the Palestinian man has been required to travel to another country every two months in order to have his visa renewed.[32] Again, a situation that does not equate to durable protection and one that has been created by the Australian Government. The findings and field research involved in this book have exposed the plight of some Afghan returnees and the need for these people to again flee Afghanistan and be subjected to human rights violations.[33]

Both the Edmund Rice Report and David Corelett's research draw upon the case of an Iranian returnee who had converted to Christianity but been denied protection by the Australian Government. Upon his removal from Australia he realised that there was Christian reading material in his luggage. Despite appealing to DIMIA staff to remove this, he arrived in Iran with the materials. The man was held for three days in an airport jail after arriving in Iran and was required to give authorities the title of his parent's home as assurance that he would not leave Tehran.[34]

The most highly publicised example of the need for greater monitoring is the wrongful deportation Vivian Alvarez. The Palmer Inquiry detailed the abhorrent treatment and inadequate actions of DIMIA and other government departments in her case. This wrongful deportation shows obvious errors in procedure and action by staff at many levels.

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[28] 'Deported to Danger'; Edmund Rice Centre for Justice and Community Education, September 2004.
[29] December 2, 2004. http://www.kerrynettle.org.au/500_parliament_sub.php?deptItemID=184
[30] Ibid.
[31] Senate Hansard 8 February 2001 – Government Response to the Senate Legal & Constitutional References Committee's Report *A Sanctuary Under Review* 2000 in relation to Recommendation 11.1.
[32] http://www.theage.com.au/news/immigration/10day-penalty-for-throwing-milk 30 June 2005.
[33] p78-79 *Following Them Home* David Cortlett. Black Inc. Agenda 2005.
[34] Ibid at pp.120-121.

Conclusion

Amnesty International Australia refers the Committee to the recommendations made in the report; *The Impact of Indefinite Detention*, *the case to change Australia's mandatory detention regime*, which provides part of this submission, and calls for these to be implemented by the Australian Government.

Regarding recent changes to Australian immigration policy and law, the creation of added Ministerial discretion does not negate Amnesty International's concerns with policies of mandatory and indefinite detention. As noted in *The Impact of Indefinite Detention* , it is our view that detention should only be used in exceptional circumstances following a judicial determination that this is a necessary course of action.

Amnesty International Australia welcomes the October 31 deadline for the determination of pending Permanent Protection Visa applications. However Amnesty International Australia maintains that permanent protection and full rights should be afforded to all persons deemed to be refugees.

The creation of an Ombudsman's reporting system for 'long-term' detainees is welcomed however the 2 year period and non-compellable nature of the report makes the change inadequate.

Amnesty International Australia welcomes the recommendations of the Palmer Inquiry and those made in the three Senate Reports outlined in this submission (Senate Select Committee on Ministerial Discretion in Migration Matters' *Report*, March 2004, this Committee's report *A Sanctuary Under Review- An examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000 and the Select Committee for an inquiry into a certain maritime incident's report: *A Certain Maritime Incident* October 2002). Amnesty International supports the adoption of these recommendations and their implementation into legislation in line with those recommendations put forth by Amnesty International in our report *The Impact of Indefinite Detention*.