Refugee Advocacy Service of South Australia Inc

A Community Legal Service for Refugees and Asylum Seekers

27 July 2005

Senator Patricia Crossin
Chairperson
Senate Legal & Constitutional References Committee
S161, Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin,

Re: **Inquiry into the Administration and Operation of the Migration Act 1958**

We make the following submission on behalf of the Refugee Advocacy Service of South Australia Inc ("RASSA").

Introduction

RASSA, an association incorporated in South Australia, was established by lawyers in this State as a result of the desperate needs of asylum seekers, held firstly at Woomera and then at the Baxter Detention Centre at Port Augusta, to access independent legal advice and representation.

In the summer of 2001 there were approximately 1,200 people being held in detention at Woomera in the outback of South Australia. Of these, about 250 were children. Woomera is about a 6 to 7 hour drive from Adelaide. This was essentially a makeshift camp put together in haste by the Federal Government to detain asylum seekers who had been arriving by boat from various countries overseas, primarily from Afghanistan, Iraq and Iran.

Conditions at Woomera Detention Centre were squalid. There was initially no air-conditioning, despite the extreme heat and extreme cold at night. The Centre was overcrowded. The medical services were often inadequate. We were told that the food was on many occasions simply indigestible. Detainees were called by a number. The whole place was totally dehumanising. There were many examples of attempted suicide and self-mutilation. The mental health of many, if not most, detainees had been fragile at the time of their arrival. It rapidly deteriorated as a result of the appalling conditions imposed on asylum seekers by the Australian Government.

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Barriers to Lawyers

Despite the provisions of section 256 of the Migration Act, which requires DIMIA to afford a detainee all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention, the Australian Government had provided very little access to lawyers for advice, and indeed put up many barriers to detainees accessing legal services.

One can assume that a key reason for the Federal Government detaining asylum seekers in isolated places such as, initially, Curtin, Port Hedland and Woomera, and now Baxter has been to restrict their access to adequate legal advice and services. The experience of lawyers in South Australia and of RASSA in particular, is that DIMIA on many occasions deliberately frustrates the attempts of lawyers to access the detention centres.

The Woomera Detention Centre was established at the end of 1999. In about November 2000 Jeremy Moore, a lawyer from South Australia obtained authority from two detainees to act for them. He wrote to DIMIA at Woomera seeking access to his clients but his request was ignored. He then issued proceedings in the Federal Court. The Government initially opposed the application for access but then reluctantly consented to it. As a result, the first access visit by lawyers to detainees at Woomera was on 1 December 2000. From then on, lawyers from South Australia attempted to gain access to asylum seekers throughout 2001. A house was rented at Woomera to provide accommodation and a makeshift office. Lawyers donated their time and resources free of charge. Eventually RASSA was established in early 2002 to coordinate the efforts of lawyers in South Australia.

RASSA relies almost entirely on the pro bono services of lawyers in South Australia and from other States. It receives no Government funding. Most of its funding comes from private donations, with some grants being received from bodies such as the Law Foundation of South Australia.

Lawyers from RASSA continue to have difficulties accessing clients in detention centres due to the obstructive behaviour of DIMIA officials. RASSA is required to write letters to DIMIA seeking access for a visit on each separate occasion, several days in advance. At times permission has been granted and then cancelled abruptly when lawyers were just about to set off for t heir journeys to Woomera or Baxter. On occasions detainees were suddenly sent away to other detention centres without any notice or reasons being given to their lawyer.

Upon visiting a detention centre lawyers are generally only allowed to see those persons who they have requested to see in advance. If a detainee hears about their visit whilst lawyers are actually there, that person is usually refused access to the lawyers despite his or her request.

In addition lawyers are not allowed entry into the actual compounds where detainees reside. This means that RASSA is not able to access those detainees who may be ill, for instance, or to review conditions in notorious areas, such as the Management Units or Red Compound 1.

Another crucial barrier to lawyers is that, despite the provisions of section 256 of the Migration Act, we have been informed by detainees that DIMIA does not advise asylum seekers of their right to obtain legal advice. This effectively means that detainees only learn that legal assistance is available to them by word of mouth through other detainees

or community people who visit the detention centre to provide support to asylum seekers. The result of this is that detainees who are not aware of their right to obtain legal advice because of cultural or language barriers, lack of education or mental illness, are left to fend for themselves unless they learn that they are required to *ask* for legal assistance before DIMIA will allow it.

RASSA is unable to be pro-active in advertising their legal services to detainees in Baxter, because DIMIA refuses to provide details to us of the people who are detained. We can therefore only assist asylum seekers, when we become aware, through community people or other detainees, that they are in need of help. We rely solely on the information provided by other asylum seekers and observant visitors to Baxter to identify detainees in need of our legal services. Those detainees who are isolated from the rest of the inmates, either because of racial, religious or health reasons or because they are held in isolation (in the "Management Unit" or Red 1 Compound, for example), may never come to the attention of lawyers.

Once we are aware of a detainee's existence, we can telephone them and invite them to sign an authority, but we are unable to visit them or provide legal assistance until they sign an authority for us to act for them. If they are unable to sign an authority, due for instance to their mental illness, then such detainees may never get assistance. We regard this as yet another unreasonable barrier which is placed between the asylum seekers and their access to legal rights.

It is submitted that lawyers should be allowed full and unrestricted access to asylum seekers in detention centres. It is further suggested that section 256 of the *Migration Act* should be amended by deleting the phrase *"at the request of the person in immigration detention"* from this provision.

The Refugee Determination Process

Australia is a signatory to the 1951 UN Convention and the 1967 Protocol Relating to the Status of Refugees. Accordingly Australia is required to treat refugees and those claiming asylum in a humane manner and to expeditiously process their applications. Essentially a refugee is a person who does not wish to return to their country of origin owing to a well-founded fear of persecution on racial, religious or political grounds. Australia has an obligation under the Refugee Convention to consider all claims for refugee status. If a person establishes their refugee status, then Australia has a legal obligation to protect them.

However, it appears that the practice in Australia has been, that if those people who arrive here have not uttered the "magic words", ie specifically stating that they are seeking protection or status as refugees, then they have been left in limbo by DIMIA officials until someone, (usually another refugee), advises them to make the appropriate claim. On occasions it has only been when lawyers have actually provided such advice to some detainees, that people had been made aware of this requirement, despite having been held in detention for some considerable period of time.

Once a person does claim refugee status, then their application for a Protection Visa is dealt with by a DIMIA officer who interviews the applicant and decides whether he or she satisfies the criteria under the UN Convention. Lawyers are not permitted to represent applicants at these interviews. Moreover, it appears that DIMIA officials do not inform detainees of any right to obtain legal advice at any time. Again, this indicates the intent of the Federal Government to prevent asylum seekers from obtaining independent

legal assistance to expedite the processing of their visa applications.
It is submitted that lawyers should be permitted to represent applicants throughout the interview process in relation to their visa applications.

The Refugee Review Tribunal

The Refugee Review Tribunal must permit the applicant to appear and present evidence. One member of the Tribunal presides at each hearing, acting as both judge and interrogator. Again, lawyers may not appear on behalf of the applicant. A migration agent, or lawyer who is also a migration agent may appear but can only make submissions if invited to do so by the Tribunal member.

The applicant often speaks little English and has no understanding of the legal system in Australia. Sometimes that person is mentally unwell as a result of their detention experience. The lack of legal support at these crucial Tribunal hearings increases the vulnerability of persons who are already in a weakened state.

Members of the Tribunal are appointed by the Minister, usually for a period of five years. Some are lay people and some are lawyers. There have been reports that those Tribunal members whose decisions please the Government have a greater chance of being re-appointed (refer to the report of the Edmund Rice Centre "Deported to Danger" (2004) at page 14).

In the experience of RASSA there have been some very poor decisions made by the RRT. Examples of such decision making include the following:

- Very leading, directed or selective questioning by the RRT member which appears not designed to elicit the applicant's story but rather to find a reason for rejecting their claim.

- RRT members not addressing their mind to the key question as to whether this person is a refugee but spending an inordinate amount of time in trying "to catch them out".

- Applicants being placed under stressful questioning and required to respond on the spot without any opportunity to consider issues raised and provide further submissions.

- Applicants not being given a proper opportunity to simply tell their story.

- Problems with interpreters which are often apparent once tapes of the hearing are listened to and the transcript reviewed. These occur where interpreters do not have adequate fluency in the English language or in pronunciation. At times there may be ethnic conflicts between the interpreter and the applicant.

- The RRT member often places great emphasis on so-called "inconsistencies" in submissions. Sometimes assumptions as to credibility are made on the basis of inconsistencies without taking into account the fact that applicants may be under stress and may be being questioned about issues that took place several years ago where they may not have a good memory recall.

- RRT members often making assumptions or putting words in the mouth of an applicant, making erroneous conclusions and not necessarily asking for

clarification of conclusions.

- RRT members "brushing off" issues raised by the applicant, or saying they will come back to those issues and then not doing so;

- RRT members raising spurious reasons as to why an applicant should leave Australia and return to their former country. Examples include questions such as – if the applicant had bribed their way out of their home country, then why couldn't they bribe people to live there safely, or asking why they simply couldn't keep a low profile in their own country. Each of these questions of course implies that the RRT member accepts that the person cannot live freely and safely in their own country, and yet often the applicant is still rejected.

- Obvious failures of the RRT to acknowledge the genuine refugee claims of certain groups of people, eg Sabain Mandaeans, Arab Iranians and Christian converts, who more recently have been recognised as persecuted groups.

A further difficulty for RASSA in advising asylum seekers on potential appeals, is that we only have access to tapes of the Tribunal hearings. We need to obtain the services of volunteers to transcribe those tapes. In non-immigration matters, transcript access fees are usually waived in relation to legal aid matters.

It is a submission of RASSA that transcript fees should be waived and copies of transcripts of RRT hearings provided free of charge to those making applications or lodging appeals.

It is also our submission that the Refugee Review Tribunal should be completely overhauled. Persons appointed should be lawyers. They should either have tenure or in the alternative be restricted to one fixed term of appointment with no right of renewal. In other words there should be no perception that Tribunal members are relying on the Government's favours for continuing employment.

Lawyers should have full access to detainees and be able to appear for them at the Refugee Review Tribunal.

Appeals from the Refugee Review Tribunal

Until late 2001, the Migration Act contained a provision to the effect that a decision of the Tribunal could not be overturned by a Court, merely because it contained an error of law or because it was so unreasonable that no reasonable person could have made it. Since that time there have been further amendments to the Migration Act to make it even more difficult for applicants to access the Federal Court or High Court. For instance, the Migration Act now provides specifically that the Tribunal does not have to afford natural justice to applicants.

The Government has also attempted to severely restrict the jurisdiction of the High Court and the Federal Court to deal with any appeals from the Refugee Review Tribunal by means of the "privative clause". Fortunately the High Court in the decision of *S157* (*S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24), restricted the interpretation put forward by the Federal Government in relation to this clause, but instead effectively allowed a larger number of applicants to actually have their case heard by the High Court or Federal Court.

It is our submission that provisions of the Migration Act are inconsistent with Australia's

obligations under the Refugee Convention. The provisions of the Migration Act which significantly restrict access to the Courts from the Refugee Review Tribunal should be amended to provide for a just appeal process.

Detention

Conditions in Australia's Immigration detention centres are inhumane. Furthermore, it is our submission that conditions accorded to some detainees in detention centres have amounted to "torture" as defined by Article 1(1) of the Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment, to which Australia is a signatory. This observation is based on extensive interviews with detainees over several years, and the consistency in graphic detail of their reports. It is little wonder that the Australian Government voted against the Optional Protocol to the UN Convention against Torture in July 2002. The Optional Protocol provides that, amongst other matters, detention centres such as those established by the Government to imprison asylum seekers, will be subject to inspection by an independent body. The Federal Government is clearly fearful of what might be uncovered if it were to sign the Protocol and permit such inspection.

RASSA has received repeated complaints from asylum seekers that some guards at Woomera and Baxter have physically and mentally abused detainees. There appears to be little accountability for the actions of such guards. Again, the problem of lack of access to lawyers has compounded this. Detainees have felt particularly vulnerable in their situation. They have felt that if they complained, this could lead to further abuse or even deportation. We have had reports of detainees being physically beaten, of detention centre rules continually being changed for no reason, of people being selected arbitrarily and forcibly removed to the isolation cells without being given any reason or being told of how long they would have to stay in such cells.

One of the most debilitating aspects of the Baxter Detention Centre is that detainees cannot see outside. All they can see is the sky above the courtyard of their compound. The centre has been deliberately designed in this way. We have reports of refugees, who upon being released from the detention centre, are quite disoriented for some period of time as a result of such conditions.

The problems of lack of access to adequate health care have been documented in the Inquiry into the circumstances of the immigration detention of Cornelia Rau, CIDCR ("the Palmer Inquiry"). RASSA has been critical of such matters for a lengthy period of time now. It is well known that conditions of detention impact significantly on people who generally have arrived in Australia in a fragile mental state in any event. The lack of access to proper and independent mental health professionals has been of particular concern to RASSA. On one occasion, for instance, DIMIA refused to allow us to use a room at Baxter for the purpose of obtaining an independent psychiatric assessment, for the reason that the psychiatrist was not the "treating medical practitioner". We submit that detainees should have full and unrestricted access to independent mental health professionals and accorded proper medical treatment.

In our view the euphemistically called "management Units" which are in reality isolation cells, have in general been used to punish detainees. The Management Unit is about 3 metres square, contains a mattress and no other furniture. Fixed upon the wall is a closed circuit TV camera which observes and records the inmate's movements at all times. The

cell is always lit. There is no view of anything outside the room. There is a small frosted window up high which lets in some light. In the past detainees have been confined to their cell for more than 23 hours in each day.
It is submitted that the use of isolation cells in detention centres should be abolished.

The indiscriminate use of the "Management Units" at Woomera and later at Baxter has been a cause for RASSA and other lawyers to take legal proceedings against the Government. An example of one case occurred in July 2003. RASSA submitted a statement of claim on instructions from a client alleging that guards had entered his living area, beat him on his head, right knee and chest, ordered him to take off his clothes in front of his young daughter and handcuffed him. When he refused to do so he was placed in solitary confinement in the management unit.

Whilst our client was held in solitary confinement, his young daughter was, without his knowledge or authority, flown back to Iran by the Australian Government. A psychiatrist retained by DIMIA stated in a report that the Department had specifically ordered him not to tell the detainee that his daughter had been sent back to Iran, when he examined the detainee in the management unit shortly after that event. As a result of these proceedings, lawyers for the detainee successfully obtained orders from the Federal Court that he be removed from solitary confinement and sent to Maribyrnong Detention Centre. He had been held in isolation for approximately 2 months. Despite the appalling nature of the conditions afforded to this detainee, which was commented upon by the Federal Court, the Federal Government appealed this decision to the Full Court, but was not successful on appeal. ([2004] FCAFC 93).

In particular the Full Federal Court noted that there was no detailed regulatory regime in place in immigration detention centres. The Court considered that the failure to make such regulations necessarily resulted in uncertainty as to what powers and obligations applied in detention centres.

The High Court has commented upon conditions in detention as follows:

> "*Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a Detention Centre fail to comply with a duty of care, they may be liable in tort".* (Refer to judgment of Gleeson CJ at para. 21, in *Behrooz v Secretary, DIMIA* (2004) 208 ALR 271).

Communications with Clients

Lawyers are also faced with problems concerning lack of interpreters on visits to detention centres. In the past RASSA has had to rely on the good will of people in the community, some of whom were refugees themselves, who would attend on visits at no cost to interpret for RASSA. We have generally not been permitted to use other detainees as interpreters, even when that interpreter is a friend of the client and the client wishes that person to accompany them. There is now an increasing range of different nationalities and languages being held in detention centres in Australia, and particularly at Baxter.

More recently RASSA has used the Translating and Interpreting Service, which is part of DIMIA. This is an expensive service. DIMIA has therefore been making money from not-for-profit organizations such as RASSA as a result of its not providing proper access

to those it detains. It is the submission of RASSA that interpreters should be provided free of charge to lawyers obtaining instructions from detainees. We submit that detainees should in fact be provided with interpreters whenever they request one, for example when trying to read written correspondence from lawyers and others, and that there should be a straightforward process for them to do this which is fully explained to them.

In addition, RASSA has had difficulty in communicating with clients, in that generally detainees have been restricted in their access to phones or fax machines. Often there has been a cumbersome bureaucratic process set in place for detainees wanting to send a fax. Detainees are apparently charged $4.00 for the first page and $1.00 for each page after that. Detainees are given an allowance of $8.00 per week only and may not have the money required for such services. This is particularly the case if they are seeking to send RASSA a lengthy RRT decision or Court decision. There also appear to be time restrictions as to when they can send such documents. On occasions detainees have in fact missed critical deadlines for filing appeals due to delays occasioned by DIMIA in faxing relevant appeal notices.

Lack of Accountability of DIMIA

It has been the experience of RASSA that DIMIA officers, and in particular those in management positions at the Detention centres, have tried to hide behind the veil that the company which has been contracted to run the Detention centres is responsible for all matters concerning detention under the Migration Act. DIMIA has used this excuse to try and escape its responsibilities under the Migration Act and not to be accountable for its role in relation to detention. There has been an ongoing lack of transparency in the decision-making processes of DIMIA.

Furthermore, contracts which have been largely drafted by the Commonwealth and entered into by the Commonwealth are quite inadequate in relation to clearly setting out standards required in detention and the appropriate demarcation of responsibilities between the parties. We refer to the comments and recommendations of the Palmer Inquiry in this respect (for example recommendations 28 and 29).

It has also been the experience of RASSA that requests for information and documents concerning asylum seekers, pursuant to the freedom of information legislation, have not been responded to due to an alleged lack of resources in DIMIA. However, RASSA has recently begun to give notice to DIMIA of legal action if FOI requests are not acted on within a reasonable timeframe. As a result our requests have been responded to far more quickly, which confirms our belief that DIMIA's claim to be under resourced, which was hard to believe in the first place, was merely an obstructionist tactic.

Furthermore, DIMIA officials have continually asserted that they would be in breach of "privacy legislation" if they were to provide RASSA with details of asylum seekers held in detention including names and composition of family groups. DIMIA have not however been able to support how any alleged privacy legislation prevents RASSA from accessing such details. At times the claim of DIMIA that they are simply respecting a detainee's "right to privacy" has meant that RASSA has not been given information when a client has been sent to hospital or to gaol, or even whether they have been released or deported. RASSA has on one occasion been told that someone is no longer at a particular detention centre, when in fact they still were.

On the other hand, RASSA has received accounts from asylum seekers of DIMIA freely giving personal information to officials from countries from which asylum seekers are

fleeing. We have been informed that on occasions DIMIA has allowed officials from those countries access to the detention centre and to detainees, regardless of the wishes of those asylum seekers. (Refer for instance to the report of the Edmund Rice Centre supra.)

Indefinite Detention

It is a fundamental right according to the rule of law that no person should be detained indefinitely without being charged and convicted according to the due process of the law. In the case of asylum seekers however, this fundamental rule of law has been over-ridden by the Federal Government. Unfortunately the High Court, in the decision of *Al Kateb* (*Al Kateb v Godwin* (2004) 208 ALR 124), upheld by a bare majority the right of the Federal Government to implement such a policy. This decision meant that those persons held in immigration detention and who were found to have no right to live in Australia and yet no prospects of removal to another country, could be held in detention indefinitely. This has placed Australia in a position which is completely at odds with most democratic countries which comply with the rule of law, including the United Kingdom.

It is the strong submission of RASSA that asylum seekers should not be held in indefinite detention. It is our view that any asylum seeker should only be held for a minimum period of time to enable appropriate security and health clearances to be completed. Detention should not be for any period longer than 4 weeks. If an asylum seeker is held in detention for any longer period, for security or health reasons, then such a decision should be subject to automatic independent judicial review on at least a 4 weekly basis.

Given the range of methods now available to correctional services authorities to allow for home detention and other methods of monitoring those convicted of offences whilst allowing them limited movement in the community, RASSA sees no reason why an appropriate regime could not be established for asylum seekers to be permitted to reside in the community during the processing of their visa applications, subject to appropriate monitoring and reporting requirements.

Removal of Detainees

RASSA is very critical of the actions of DIMIA in relation to removal of detainees from Australia. RASSA is generally not informed that clients will be removed. In certain cases RASSA has been able to take legal action only through being informed by community supporters about a pending removal, rather than being appropriately informed by DIMIA. It is our submission that RASSA should be given prior notice of pending removal of any of its clients.

The Federal Government does not monitor what happens to those asylum seekers who have been removed back to their country of origin. However, information received from the Edmund Rice Centre and others give rise to grave concern about the safety of many of those persons . (Refer to report of Edmund Rice Centre 2004 supra.)

One occasion that RASSA is aware of occurred where either DIMIA or the company responsible for the detention centre, packed an asylum seeker's Christian Baptismal Certificate in their luggage. That asylum seeker had converted to Christianity whilst being held in detention. Authorities in Iran would have easily been able to review that certificate upon the detainee going through customs. According to the law of Iran, that certificate would be proof that the detainee had changed their religion from Islam to

Christianity. Such an act (ie apostasy) can attract the death penalty in Iran.

A further issue of concern to RASSA has been the failure by the Government to refuse to send a detainee back to a country where they may be subject to torture or death. A person may for instance have had their claim for refugee status rejected, even though they would still face danger in being returned to their country of origin, on the basis that the danger does not occur for a Convention reason. In our view section 198 of the *Migration Act* should at least be amended so that a person cannot be removed to a situation of danger of death or torture to them, or where their removal would trigger death or torture of a family member.

SUMMARY OF RECOMMENDATIONS

1. Allow lawyers full and unrestricted access to asylum seekers in detention centres.
2. Amend section 256 of the *Migration Act* to delete the phrase *"at the request of the person in immigration detention"* from this provision.
3. Lawyers should be permitted to represent applicants throughout the interview process in relation to their visa applications.
4. Lawyers should have full access to detainees and be able to appear for them at the Refugee Review Tribunal.
5. Amend the terms of appointment of RRT members such that they have only one period of appointment for a specific number of years, without any reappointment.
6. Transcript fees should be waived and copies of transcripts of RRT hearings provided free of charge to applicants.
7. Detainees should have full and unrestricted access to independent mental health professionals and accorded proper medical treatment.
8. Amend the *Migration Act* to permit judicial review of immigration detention centre management practices.
9. Amend the provisions of the *Migration Act* which currently restrict the rights of appeal from RRT decisions to the Courts.
10. Allow detainees, their lawyers and medical practitioners full access to interpreting services, free of charge.
11. Allow full access to detainees and their lawyers to fax, photocopying and telephone facilities within a detention centre.
12. Review all contracts between the Commonwealth Government and those companies managing detention centres to allow much more stringent accountability and transparency in relation to conditions in detention.
13. Use of isolation cells in detention centres should be abolished.
14. Amend the *Migration Act* to provide that generally a detainee should not be held for longer than 4 weeks in detention. If a detainee is held for any longer period of time, then there should be automatic independent review of any such decision, every 4 weeks. Detainees should be permitted to reside in the community while their visa application is being processed, subject to appropriate reporting and monitoring requirements.
15. Amend section 196 of the *Migration Act* to prohibit indefinite detention and allow

all detainees access to the writ of Habeas Corpus.

16. Lawyers acting for detainees should be given at least five days prior notice that a client will be removed from Australia.

17. Amend section 198 of the *Migration Act* to provide that persons will not be removed to countries where they may be subject to risk of torture or death.

Yours faithfully

Graham Harbord
Member of the Management Committee
Refugee Advocacy Service of South Australia Inc.