A Just Australia

Submission by Australians for Just Refugee Programs Inc. (*A Just Australia*) to the

Senate Legal and Constitutional References Committee Inquiry into the Administration and Operation of the Migration Act 1958

Australians for Just Refugee Programs under its campaign for *A Just Australia* welcomes the opportunity to present this submission to the Senate Legal and Constitutional References Committee Inquiry into the administration and operation of the Migration Act 1958.

A Just Australia would be pleased to attend Senate hearings on this inquiry to provide additional information to this submission. Case studies in this submission have been de-identified. Names can be supplied upon request.

A Just Australia believes that Australia's policies toward refugees and asylum seekers should at all times reflect respect, decency and traditional Australian generosity to those in need, while advancing Australia's international standing and national interests. *A Just Australia* aims to achieve just and compassionate treatment of refugees, consistent with the human rights standards that Australia has developed and endorsed.

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1. Background

The issue of responses to onshore asylum seekers is twofold: the processing of claims for refugee status (their legal rights) and the conditions under which asylum seekers live during that processing (provision of welfare). Although these two issues are quite distinct in nature, they directly impact on each other. While the current conditions of detention may on initial inspection appear to be humane, with housing, food and some recreation provided for, the duration and uncertainty of the visa processing system means that any form of detention, no matter how "five-star" the accommodation, will soon be seen by the resident to be punitive.

Policy responses to onshore asylum seekers or "boat people" have been made in an ad hoc fashion in crisis mode for the past 15 years. There has been little community or expert consultation. Indeed, policy has been maintained in the face of overwhelming expert evidence that it has dramatically failed in a number of areas. It is hard to think of another Government policy that has been maintained for so long against all expert advice.

Although *A Just Australia* welcomes this opportunity to submit evidence to the Senate Inquiry into the administration and operation of the Migration Act, we must point out that evidence has been presented for a number of years that the Department of Immigration has failed in its duty of care to asylum seekers and the Australian public.

There is overwhelming evidence showing that the processing of visas and deportations within the Department of Immigration is so flawed as to be entirely untrustworthy. A major overhaul of the system is required.

How many more such inquiries, reports and studies must Australian people sit through before something is done to halt these policies, which are against the Australian principles of justice and human rights?

The time for talk is over. It is now time for action. The alternatives to detention are there. They are tested by expert welfare agencies. Not only do they cost far less financially, they have far higher success rates in the voluntary return of failed asylum seekers.

Its time for a just and humane refugee policy that Australians can be proud of again.

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3. Summary of Recommendations

3.1 Permanent Protection or Voluntary Return

3.1.1 Provide secure legal status that affords all refugees, no matter how they arrived, all the rights to which they are entitled under the Refugee Convention and international human rights law.

3.1.2 Support the Voluntary Repatriation Model, described by the Refugee Council of Australia in April 2003. This model involves support for return with safety and dignity, after provision of information and exploratory visits with guaranteed return.

3.1.3 Dismantle the hierarchy of refugee protection visas in which temporary protection is used punitively or as a deterrent, to deny services and entitlements to some refugees.

3.1.4 Use temporary protection for refugees only as an instrument of prima facie recognition in mass influx situations. In accordance with international practice, all temporary protection for refugees must be limited in duration and be consistent with the rights afforded under the Refugee Convention and international human rights law.

3.1.5 Provide all necessary assistance to enable refugees to integrate into new societies if they are unable to return to their country of origin. The Government must take all appropriate measures to assist all refugees, especially refugee children, to be reunited with their families.

3.1.6 Recognise a special responsibility toward refugees in the Pacific states and in Indonesia and offer places to family members of refugees in Australia for reunification.

3.2 Humane solutions for long term detainees

3.2.1 Support the work of the Commonwealth Ombudsman to review cases of long-term detainees, with release recommendations being accepted.

3.2.2 Allow the Ombudsman to offer third country resettlement, with support from Departmental officials and non-government organisations to set up third-country options on a case-by-case basis.

3.2.3 Do not force asylum seekers who have been in long-term detention to return home and refrain from actively promoting the return of asylum seekers unless and until there are fundamental, durable and effective changes of circumstances in countries of origin.

3.2.4 Immediately bring those on Nauru to Australia and include them in the Ombudsman's long-term detention review.

3.3 Processing of Claims for asylum

3.3.1 Overhaul of the initial assessment procedures - better training for case officers, more up to date country information and faster processing times.

3.3.2 Overhaul of the Refugee Review Tribunal – no single member panels, evidentiary practices and procedures to reflect standards in similar tribunals, tribunal members to have legal training, standardising of decision-writing, independence from the Department of Immigration, greater focus on quality of decision-making instead of quantity of decisions.

3.3.3 Judicial review of Refugee Review Tribunal decisions – repeal of all restrictions on the judicial review of decisions made by officers of the

Commonwealth under the Migration Act to meet, at minimum, the same jurisdiction to review decisions by officers of the Commonwealth under other Acts.

3.3.4 Release the Penfold Report.

3.5 Processing of bridging visas for detained asylum seekers

3.5.1 Migration Series Instructions to comply with law - When MSIs are rejected by courts as being outside the law, DIMIA must comply with those judgments.

3.5.2 Duty of care to be upheld. The primary consideration in visa processing should be the duty of care the Commonwealth has towards those in detention, with humane options used wherever possible.

3.6 Migration Detention

3.6.1 Community release - Immediately start to work with welfare agencies, human rights NGOs and organisations with experience in community-release/parole programs to set up programs that will allow for community based processing of asylum seekers.

3.6.2 A full judicial inquiry into conditions in immigration detention centres

3.6.3 A full judicial review of all past allegations of mistreatment - to ensure they were fully and impartially investigated.

3.6.4 Detention conditions oversight body - where there is any detention or accommodation facility used for either asylum seekers or compliance cases, the standards of those facilities should be monitored by an oversight body independent of the Department, with the power to impose suitable penalties for breaches.

3.6.5 Halt the practice of the unregulated use of isolation and segregation

3.7 Deportations

3.7.1 Full judicial inquiry into all aspects of deportations.

3.8 Service Provision

3.8.1 Palmer recommendations be implemented – As a matter of urgency, the recommendations for conditions at Baxter as outlined in the Palmer Report should be implemented. As outlined in previous sections of this submission, a full Judicial Inquiry should be held into conditions of detention, with the power to order changes to regulations surrounding those conditions.

3.9 Outsourcing detention management

3.9.1 Revoke contracts to outsource detention management .

3.9.2 DIMIA to relinquish its role of caring for asylum seekers to qualified practitioners in the welfare sector who have viable and affordable alternatives to detention which could solve the serious problems of the current system.

3.10 Related matters – excision of migration zone

3.10.1 Repeal all excisions so that the Migration Act applies to all Australian territory.

4. Submission on Terms of Reference

4.1 Submission on Terms of Reference – term a

> *the administration and operation of the Migration Act 1958, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia;*

4.1.1 Processing of Claims for Asylum

A Just Australia holds grave concerns about the process for determining asylum claims. An analysis of the publicly available data on the processing of claims suggests systemic failures to properly identify refugees at the initial case assessment stage by a DIMIA officer, with a heavy reliance on the Refugee Review Tribunal appeals mechanism to correct this failure. This problem appears to have become significantly worse over time.

One in eight rejections at the DIMIA case officer stage is later found to be incorrect by the RRT (2003-04).

According to the annual report of the Refugee Review Tribunal (RRT), the percentage of cases in which the original determination was set aside rose from 5.7% in 2002-03 to 12.7% in 2003-04[1]. That is, one in eight asylum seekers appealing a primary determination was later determined to be a refugee by the Tribunal. Such a high number of incorrect primary decisions is of grave concern.

Decisions of the Department in the RRT

Of particular concern, 89.8%[1] of primary decisions regarding cases from Afghanistan were overturned on appeal to the RRT (up from the already high 32.2% in 2002-03). This is a staggering figure and must surely indicate a fundamental break down in the assessment of asylum seekers from Afghanistan.

It is also notable that the RRT set aside rate for primary decisions on cases from reports Iran, Turkey, Egypt and Pakistan was over 50%, much higher than overturn rates for other countries.

It is disturbing that the initial system of case assessment could produce such high error rates. It is also of concern that each of these countries, Afghanistan, Iran, Turkey, Egypt and Pakistan, are predominantly Muslim countries. This suggests that the Department's country advice in these cases was lacking at the time the cases were initially determined, and raises serious questions about the ability of the Department to properly assess the claims of those from the Muslim world.

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[1] Refugee Review Tribunal (2004), *Annual Report 2003-04*, RRT: Canberra.

It is of great concern that the present system is unable to adequately make primary determinations to grant protection to those who are in need. Many asylum seekers recently released have been in detention for between 3-5 years. After RRT and then judicial review, they have finally proved their claims and have been granted refugee status. Each of these cases should have been caught at the initial assessment stage.

The need to appeal to the RRT is a normal, not aberrant, experience for refugees applying for asylum in Australia. Given this, it is difficult to understand the Government's claim that the appeals system is being misused. Clearly the current system presumes that an appeal is a necessary and normal part of any successful claim for asylum.

The Refugee Review Tribunal

Furthermore, the number of RRT decisions appealed to the courts has been increasing, and the quality of decision-making at the RRT is also deeply worrying. Despite repeated attempts by the Federal Government to prevent appeal to the courts from the RRT, the number of applications for judicial review of RRT decisions has risen consistently since the Tribunal commenced operations, climbing from 52 in the 1993-1994 financial year to 914 in 2000-2001, and 2,824 in 2003-2004.[2]

This climb does not simply reflect an increase in asylum seeker numbers. Rather, applications for judicial review as a *percentage* of Tribunal decisions have risen: applications were lodged for judicial review of 3% of RRT decisions in the 1993-1994 financial year, in 2000-2001, judicial review was sought for 16.18% of Tribunal decisions, and in 2003-2004, applications for judicial review were made in respect of 36% of all RRT decisions.[3]

This increase has generated a corresponding increase in migration matters as a proportion of the Federal Court's workload: of a total 6,016 matters filed in the Federal Court in the 2003-2004 financial year, 2,591 were migration matters (these would include some appeals from the general migration stream).[4] Of the total number of cases appealed to the Full Federal Court, in 1998-1999, 22.6% involved review of a decision made under the *Migration Act*; in 2003-2004, this figure had climbed to 74.6%.[5]

This exponential increase cannot simply be explained away by asserting that those appealing decisions are acting in bad faith. The increase in appeals has corresponded with multiple attempts by the government to prevent any such appeals by progressively tightening the provisions of the *Migration Act*. Repeated amendment of the Act, combined with intense government pressure on Tribunal members to privilege efficiency over fairness has created a situation where the legislation is so complex, and the Tribunal system under so much strain, that users of the system widely believe it to be incapable of making consistent decisions.

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[2] RRT Annual Report 2000-2001, p. 17; RRT Annual Report 2003-2004, p. 24.
[3] RRT Annual Report 2000-2001, p. 17; RRT Annual Report 2003-2004, p. 3.
[4] Federal Court of Australia, Annual Report 2003-2004, Appendix 5
[5] Federal Court of Australia, Annual Report 2003-2004, p. 17.

The inconsistency of decisions made at the RRT leads to unfair decisions. Evidentiary practices and procedures at the RRT have been observed to be "operating at such a routinely low standard that they contribute to decisions that are manifestly unfair and potentially wrong in law."[6] The conduct of hearings is entirely discretionary, meaning:

- there *may* be pre-hearing contact between the Member and the applicant, but there usually is not;
- the applicant *may* be able to bring a friend along for emotional support (an issue that is particularly relevant for traumatised people with a negative experience of the authorities in their country of origin);
- the Member *may* lead the applicant through their story chronologically or may instead focus only on one or two issues arising from their DIMIA file; and
- the Member *may* (selectively) use whichever country information they believe is relevant in assessing whether or not an applicant's story is credible – information which the applicant does not have access to, and which is of varying quality.

As a result, judges on the receiving end of appeals to the courts have repeatedly commented on the poor quality of review at the RRT. Justices Einfeld and North of the Federal Court made a pithy summation in *Selliah v MIMA*:

> [H]earings before the Tribunal are virtually unique in Australian legal procedures and in the common law system generally. ... The Tribunal is both judge and interrogator, is at liberty to conduct the interview in any way it wishes, without order, predictability, or consistency of subject matter, and may use any outside material it wishes without giving the person being interrogated the opportunity of reading and understanding the material before being questioned about it ... These methods contravene every basic safeguard established by our inherented system of law for 400 years.[7]

Furthermore, as the RRT has the same Minister as DIMIA (whose decisions it reviews), it is extraordinarily vulnerable to political pressures in decision-making. This is particularly so given the political prominence of asylum issues, and the extremely vocal championing of the Department's decisions by both Philip Ruddock and Amanda Vanstone.

Additionally, the government's focus on the cost of the determination system, rather than on its effectiveness has fostered poor decision-making. The focus on performance indicators, a set number of cases members are expected to finalise per year, as a way of measuring the performance of Tribunal members, also contributes to this. "Efficiency" becomes an end in itself rather than an aid to effective and fair decision-making. The RRT's credibility would be greatly enhanced, and its decisions greatly improved, if it had more independence and a greater focus on the quality, rather than just the quantity, of decisions made by members.

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[6] Catherine Dauvergne and Jenni Millbank, Federal Law Review 31 (2003): 299.

[7] *Selliah v MIMA* [1999] FCA 615, [3]-[4].

The time taken to process asylum claims is excessive and has been well documented elsewhere. One response from the Government to these delays has been to claim that delays are the result of asylum seekers misusing the system of appeals. As a result, the Government has acted to systematically reduce asylum seekers' access to appeal processes, so that decisions by an Officer of the Commonwealth on asylum seeking matters no longer have the same judicial scrutiny as decisions on other matters. Thus, certain social groups in Australia no longer have the same protection of the law to uphold their rights.

However, the Government's claim of the misuse of appeal systems is difficult to substantiate. Having commissioned a report into alleged misuse – The Penfold Report – the Government then refused to release the reports findings. Thus, there is no publicly available evidence about the misuse of the appeals system by asylum seekers.

A Just Australia believes that the inconsistency and high error rates of primary decisions at the departmental level is what is causing the high rates of appeals. If the initial processing cannot be trusted, asylum seekers are more likely to appeal.

Ministerial intervention

Finally, the frequency with which the Minister is required to intervene to overturn decisions of the RRT is also of concern. The Department's figures reveal that of the 2049 visas granted as part of the on shore humanitarian program, 1259 (over 60%) were the result of decisions by the Minister (DIMIA 2005). This power is supposedly designed to catch anomalous cases – those experiencing gross discrimination amounting to a human rights abuse, but who, for some reason, do not qualify as a refugee under the convention. Obviously, 60% of total onshore humanitarian program extends well beyond anomalous cases and might suggest that at the stage of the RRT, as outlined above, genuine asylum claims are not being recognised.

Even if Ministerial intervention is confined to cases of human rights abuse that fall outside the convention, the interaction between the RRT and the Minister remains of concern. RRT members are not required to make any assessment of the need or desirability for Ministerial intervention. Some members of the Tribunal do, on occasion, make specific reference to the possibility of Ministerial intervention. The process by which some Tribunal members make such recommendations is clearly unsystematic. Thus, it is vital that the Minister not infer that the absence of such a recommendation count against an applicant.

Summary of Concerns

- The failure of the Government to release the *Penfold Report*.
- The high rate of decisions set aside from Afghanistan, Iran, Turkey, Egypt and Pakistan, all of which are majority Muslim countries.
- The failure of the initial case assessment process to identify many of those later determined to be refugees.
- The inconsistency of RRT decisions, particularly as those inconsistencies arise from discretionary and arbitrary practices in hearing applications before the Tribunal, and result in further appeals.

- The RRT's lack of independence, and its susceptibility to Departmental and Ministerial pressure.
- The possible over-reliance of the present system of Ministerial intervention, suggesting that genuine refugees are not being properly identified, even by the RRT.
- The unsystematic nature of advice from the RRT to the Minister, which could prejudice the some applications.

Recommendations

- Overhaul of the initial assessment procedures - better training for case officers, more up to date country information and faster processing times.
- Overhaul of the Refugee Review Tribunal – no single member panels, evidentiary practices and procedures to reflect standards in similar tribunals, tribunal members to have legal training, standardising of decision-writing, independence from the Department of Immigration, greater focus on quality of decision-making instead of quantity of decisions.
- Judicial review of Refugee Review Tribunal decisions – repeal of all restrictions on the judicial review of decisions made by officers of the Commonwealth under the Migration Act to meet, at minimum, the same jurisdiction to review decisions by officers of the Commonwealth under other Acts.
- Release the Penfold Report.

4.1.2 Processing of Bridging Visas for detained Asylum Seekers

The Migration Act and Regulations provide for a bridging visa which can be granted to people in detention if a specialist appointed by immigration certifies that they have a health condition which cannot be properly cared for in a detention environment[8]. Up until August 2003, the Migration Series Instructions (MSI)[9] directed that DIMIA *must* appoint a medical specialist to assess the health need when a person applied for the visa and that they *may* appoint a specialist if someone doesn't apply but appears to have such a health condition.

On a few occasions, asylum seekers in detention made applications for bridging visas based on very severe health conditions - which independent specialists had assessed as being caused or exacerbated by detention and had assessed as being unable to be properly cared for in detention. However, despite the clear responsibilities in the MSIs, the Department refused to appoint specialists to assess the conditions for the certification that was required to be eligible for the bridging visa.

Instead, the department sometimes asked the opinion of the treating GP in detention whether the person could be 'treated' in detention[10]. Importantly, this is different from whether the person could be 'properly cared for in detention'; the former being

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[8] Act ss 37, 73 and 72 Regulations 051, 2.20 (9), 1305.

[9] Unsure of number of MSI they have since been changed and we only have pasted copy of section; they were current in August 2003.

[10] Opinion of the treating GP found in the medical file of HH who had applied for a bridging visa: whether he could be 'treated' in detention.

merely a question as to whether treatment could be administered while the latter required consideration of whether 'adequate care' could be provided.

Further, the opinion was sought from a GP in cases where several specialists, namely psychiatrists, had stated that the person's condition was caused by detention and the person could not be properly cared for in detention. In other cases where treating specialists, HREOC and FAYS repeatedly called for the release of people on bridging visa's the department never considered the option of appointing a specialist to assess the need for the bridging visa. Two case studies are attached which detail the conditions of and recommendations made about one individual and one family, and the way that DIMIA dealt with them.

It was not until the Federal Court[11] held that DIMIA must appoint a specialist whenever there was material that suggested a person had a special need, that DIMIA was finally forced to comply with the obvious requirement of the law.

The way that DIMIA dealt with this bridging visa illustrates a number of problems which are not merely isolated or specific instances of bad practice, but are entrenched in DIMIA's attitude and approach to the administering of the Migration Act and are based on the fundamental problem of DIMIA's adversarial attitude to asylum seekers. This adversarial attitude is demonstrated in three ways:

- Firstly DIMIA's contempt and disregard for the advice of medical specialists, illustrated by the department's failure to follow the recommendations of specialists and to consider the recommendations in relation to appointing a specialist to assess a person's very obvious need for a bridging visa.

- Secondly DIMIA's approach of doing everything possible to ensure that asylum seekers do not get appropriate care, by ignoring their own MSI detailing that they *must* appoint a medical specialist, and by fighting the court application where a person sought an order that a specialist be appointed.

- Thirdly, regardless of whether the law required the department to appoint a specialist, this is a clear example of where the department had a humane option which would prevent harm and provide care for a person in detention and the department not only chose the option which caused harm and prevented care but actively fought to make sure that care was not provided.

This example of the department's attitude and approach has implications for the processing of visa applications generally. The department did not act as an impartial administrative body which administers the law, specifically in this instance by processing visas. Rather, the department approached its tasks with a fundamentally adversarial stance to the wellbeing and rights of the people applying for the visas. The department displayed disregard and contempt for the advice of medical professionals and for the courts interpretation's of the law. Therefore in relation to all visa processing, how likely is it that the decisions the deportment makes are based on a fair assessment of the application against the relevant criteria?

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[11] *VQAS* v *Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 832 (6 August 2003)

For more information, please see the attached case studies in Appendix B.

Recommendations

- **Migration Series Instructions to comply with law** - When MSIs are rejected by courts as being outside the law, DIMIA must comply with those judgments.
- **Duty of care to be upheld**- The primary consideration in visa processing should be the duty of care the Commonwealth has towards those in detention, with humane options used wherever possible.

4.1.3 Migration Detention

The current system of migration detention for asylum seekers is a policy with welfare outcome failures that are well-documented. It is unnecessary to resubmit the evidence, but in brief: prolonged mandatory detention for asylum seekers has been shown to cause mental illness in adults and children; it has been condemned by numerous human rights, welfare and medical bodies; it breaks numerous United Nations Conventions; it is unnecessary in the current climate and it is exorbitantly expensive.

The mandatory detention policy has been defended by both major political parties as being a fundamental tool in deterring future onshore asylum seekers. *A Just Australia* has attached a legal brief (Appendix A) on the unconstitutionality of mandatory detention being used for this purpose.

A Just Australia does not believe that the current system of mandatory detention for asylum seekers is a suitable or humane policy. While there does remain some need for immigration facilities, either for the health and security screening process or for compliance cases, the current facilities are inappropriate for any population. There has been little to no consultation regarding the welfare outcomes on detained people before designing the centres, with disastrous results.

There are many other options for the accommodation of asylum seekers while being processed. *A Better Way*[12] policy proposal is one such option. No refugee lobby group is proposing the reduction of the security protections Australia needs in the current political climate. Options being proposed are as simple as this: in the current system, asylum seekers have their protection claims assessed. Once found to be eligible for a protection visa, health and security checks are conducted. During this process, which can take up to 6 or 7 years if judicial review is required, we detain people at an average cost of $210 per week.[13] But what if those checks were conducted at the beginning of the process instead of the end? Once someone was identified as being no threat to our national security, they could be released on a program with graded levels of security. Officers would have the power to recommend a bridging visa with work rights and some financial assistance, or community-based accommodation with

[12] www.betterway.info

[13] Costs based on DIMIA figures. $210 is the average of Villawood and Baxter costs where most asylum seekers are held.

reporting requirements, semi-secure hostel facilities with day-release, right through to continued detention where someone did pose a threat to the Australian community.

These options, being used widely overseas, are far cheaper, have better rates of voluntary return for failed asylum seekers and are infinitely more humane. They do not have to reduce the levels of health and security screening that asylum seekers go through.

A Just Australia welcomed the recent Palmer report into the detention of Australian resident Cornelia Rau and the deportation of Australian citizen Vivian Solon. We welcome the inquiry into the other approximately 200 other cases of alleged unlawful detention, but believe that the inquiry should have judicial powers. The scope of the inquiry should also be widened. It is disappointing to see that conditions of detention and breaches of people's rights is only considered worth investigating if a person has a valid visa to be in Australia. The message being that if you are an asylum seeker, it is not worth investigating to see if your rights have been violated. Clearly in cases of detention and deportation there have been numerous such violations both for asylum seekers later deported, as well as people later found to be refugees and released into the Australians community on visas.

A Just Australia has noted with some concern, the use of a compound within Baxter Detention centre as a "behaviour modification" regime, known as the Red1 compound. This regime is a prime example of the unregulated nature of conditions within the overall migration detention regime. It is hard to find any lawful basis for allowing detention officers employed by a private company the power to arbitrarily impose the punishments of separation and isolation on people who have never been charged nor found guilty of any offence. The use of isolation and separation, its legal and welfare ramifications, needs to be investigated by an independent judicial body.

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

Recommendations

- **Community release** - Immediately start to work with welfare agencies, human rights NGOs and organisations with experience in community-release/parole programs to set up programs that will allow for community based processing of asylum seekers.
- **A full judicial inquiry into conditions in immigration detention centres**
- **A full judicial review of all past allegations of mistreatment** - to ensure they were fully and impartially investigated.
- **Detention conditions oversight body** - where there is any detention or accommodation facility used for either asylum seekers or compliance cases,

the standards of those facilities should be monitored by an oversight body independent of the Department, with the power to impose suitable penalties for breaches.

- **Halt the practice of the unregulated use of isolation and segregation**

4.1.4 Deportations

A Just Australia has welcomed the recent inquiries into deportations. However, as stated elsewhere in this submission, the scope of the inquiries urgently needs to be broadened. The Edmund Rice Centre's report *Deported to Danger* has raised serious allegations of asylum seekers being deported on false paperwork and to situations of danger. This is in breach of the most important principal of the Refugees Convention, that of *non-refoulment.*

There have been many reports of chemical restraints and excessive force being used during deportations. These deportations often take place at night or on weekends when lawyers are less available to legally halt proceedings. Tactics like this are unworthy of a government agency and these allegations must be fully investigated. Again, *A Just Australia* is disappointed in the lack of focus on investigating rights breaches for asylum seekers and refugees as opposed to Australian citizens and residents. Australian laws should apply to all those within its jurisdiction, regardless of the individual's social or visa status.

The case of A[redacted] Si[redacted] should serve as a prime example of an unlawful deportation of an asylum seeker. Mr Si[redacted] entered Australia's migration zone and requested protection. Mr Si[redacted] claims he was told that he would be taken to another location to have his visa processed. He was then removed from Australia's migration zone and transported to Manus Island in Papua New Guinea, where he was later told he was not being processed for a protection visa because he had not made a valid request. The reason: he did not ask for the protection visa application form by its correct number. Quite clearly this is a case of an officer arbitrarily applying a law differently, as no other asylum seekers within Australia's migration zone have been required to ask for protection by quoting the correct departmental form number.

Recommendations

- Full judicial inquiry into all aspects of deportations.

4.1.5 Deportations – Unauthorised removal of a child from custodial parent.

In July 2003, officers of the Department secretly arranged for the removal from Australia of a 7 year old girl who was in detention with her father. She was taken to her mother in Iran. The father and daughter had been in detention since their arrival in Australia at the beginning of 2001. The Department did not tell the father they were taking his daughter and made every effort to conceal the fact from him, telling him that she was out shopping.

The father and the daughter had an application in the High Court for special leave in relation to their protection visa applications. The mother had sought and obtained an order from an Iranian court that she be granted custody of the child until the child was 7 years old. The child had turned 7, 3 weeks before her removal. Thus any Iranian court order had expired by the time DIMIA organized the deportation.

Although there are serious questions as to whether s198 (6) of the act allowed for the lawful removal of the child while she had an application for review of a protection visa decision ongoing[14], where the department has clearly acted well outside of the powers conferred by the act is in the making of the decision to take custody away from one parent and grant it to another.

The child's protection visa application was a joint application with her father, who was not deported.[15]. Therefore, since they removed the child but not the father, they were not removing an unlawful non-citizen at the end of their case, they were specifically sending a child to the other parent.

Further, the decision to give custody to the mother was made before arrangements for the child's removal were made. In a conversation with [redacted] (the officer, or one of the officers, who made the decision to send the child to her mother) the day after the child was removed, an advocate[16] was told that the father was no longer the child's legal guardian and therefore the father had no right to any information about the child - the information being sought was the location of the child.

The required procedure under Australian law for arranging the return of a child to a guardian in a country which is not a signatory to the convention on the civil aspects of international child abduction (Iran is not a signatory) is to apply under the *Family Law Act 1975 (*cth)[17]. The procedure would require a proper determination of the best interests of the child taking into account the effect that separation from either parent would have on the child.[18]

Prior to the deportation the Department gave no notice or indication to the father that they were going to remove his child. The father was being held in separation in the Management Unit at Baxter Detention Centre for refusing to allow detention officers to strip search him in front of his young daughter. Details of the removal and the effect on the father and child, are set out in the attached affidavits as appendix C and

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[14] The power to remove is not unlimited WAJZ, *WAKA, WAGF, WAKB, WAKE and WADX* v *Minister for Immigration & Multicultural & Indigenous Affairs* (No 2) [2004] FCA 1332 (14 October 2004). And where a person has court proceedings in relation to a visa application there may not be a power to remove: *SRFB* v *Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1021 (19 September 2003).*

[15] Although Iran prefers that the person being returned has agreed there are several cases where Iranians have been removed or attempts (sometimes stopped by injunctions) have been made to remove them where they have not agreed to be returned.

[16] Who had written authority from the father to obtain any information from the department relating to the father or child, which the father had a right to have.

[17] s 67T and s 67Q

[18] s 67V

the Judgment as appendix D : *Secretary, Department of Immigration and Multicultural and Indigenous Affairs* v *Mastipour*[19]

It is can be assumed that the reason the Department arranged the removal so secretly, was that the officers involved were fully aware that had the father been given notice he would most certainly have exerted his rights to, at minimum, have the Family Court determine his lawful custody status towards his child.

Beyond the legal aspects of the removal of the child are the very obvious issues of inhumanity. Family and Youth Services of South Australia had frequent contact with the child in the last few months of her detention. Despite being aware of their power to make a recommendation that the child be released from detention without her father[20], they believed it was in the child's best interest to remain in detention *so as to be with her father.*

The issue of the best interest of the child is paramount in any lawful determinations of custody or indeed any decisions made relating to children. It takes no great knowledge of children to assume that taking a 7 year old away from her father who was in an isolation cell, without even allowing her to say goodbye and with no prospect of seeing him again within the near future would be at the very least extremely distressing.

When the father was finally told of the child's removal, it was put to him, in his isolation cell, like this[21]:

[redacted] *"I have sent M back to Iran"*
Father : *"I don't believe you"*
[redacted] *"You can call her if you like"*

As Lander J said[22] :

> "However, no evidence was adduced by the Secretary from the officers who were said to have been assaulted. Mr M's assertions in relation to the circumstances giving rise to his removal to the Management Unit were thereby largely uncontradicted. Neither [redacted] nor Mrs [redacted] contradicted Mr M's claims in relation to his detention in the Management Unit and his claims of deprivation. Even more importantly, neither denied that Mr M's daughter was removed from Australia in the circumstances deposed to by him and, in particular, as Mr Burnside QC put it 'under the cover of a lie'. Indeed, neither of them addressed those allegations at all."

This is not just an exceptional case of one or two individuals within the department acting badly, although [redacted] is particularly implicated by the lengths he went to in arranging the removal. It is another example of disregard the department has for

[19] [2004] FCAFC 93 (29 April 2004).
[20] On a bridging visa pursuant to regulation 2.20 (7) bridging visa's for children where child protection says it is in their best interests to be released even without parents.
[21] Affidavit of MM
[22] [2004] FCAFC 93 (29 April 2004) at para 72.

the law and legal process, by taking upon themselves powers denied them under the Family Law Act.

Recommendations

- Judicial inquiry - into the deportation of a seven year old girl where Immigration Department officers made the decision to grant custody without Australian court judgement on custody.

4.2 Submission on Terms of Reference – term b

> *the activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia;*

A Just Australia notes Palmer report which covers the deportation of Vivian Solon and the involvement of government agencies other than the Department of Immigration.

Recommendations

- Judicial Inquiry into deportations - *A Just Australia* is of the opinion that the Palmer Inquiry was not given enough time, scope or authority to adequately investigate this serious event. We support the calls for some form of judicial inquiry into all deportations and unlawful detention cases.

A Just Australia would like to bring to the attention of the Senate Inquiry however, that it is not just actions surrounding incorrect deportation such as Vivian Solon that should be investigated. Matters such as the deportation of the 7 year old Iranian girl should also be investigated, as well as the numerous allegations of deporting people on false paperwork and to dangerous situations.

4.3 Submission on Terms of Reference – term c

> *the adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;*

4.3.1 Oversight body into service provision

A Just Australia notes that there have been numerous allegations of a lack of adequate healthcare and other services provided in detention facilities. Although the worst detention centres have closed (Curtin and Woomera) it should be noted that conditions in those centres – thought adequate by DIMIA – were appalling. Cramped accommodation, poor food, unhygienic toilets, lack of recreational services among other unacceptable conditions.

Since DIMIA found these conditions were acceptable at the time, it is hard to find it appropriate that the same department is the oversight body into current conditions and

services. Indeed, the Auditor General's report on the management of detention centre contracts has stated that the current contracts between DIMIA and GSL, and the ways that contract is overseen by DIMIA, does not provide for systems to maintain the Immigration Detention Standards.

4.3.2 Medical Care

S v Secretary, DIMIA[23] highlights what is standard practice - that not only does the Department not provide adequate healthcare and ignore medical recommendations, but actively seeks to prevent people being admitted to hospital. The two applicants in the case were by no means unusual. DIMIA generally waits until someone has become beyond extremely ill to admit them to hospital, and even then it is not guaranteed. There are cases of detainees being virtually catatonic, who have remained so in their beds for months on end at Baxter without being taken to hospital.[24]

In other cases the healthcare provided is appalling. In one alleged case of mistreatment, a man broke his leg and while an ex-ray was taken the next day, it took the medical staff three weeks to take him to hospital to have it treated. According to this man, every day for three weeks he begged to be taken to hospital, and it was only when he finally smashed a window that he was taken to hospital where a cast was put on.[25]

Recommendations

- Palmer recommendations be implemented – As a matter of urgency, the recommendations for conditions at Baxter as outlined in the Palmer Report should be implemented. As outlined in previous sections of this submission, a full Judicial Inquiry should be held into conditions of detention, with the power to order changes to regulations surrounding those conditions.

4.4 Submission on Terms of Reference – term d

> *the outsourcing of management and service provision at immigration detention centres*

The Auditor General's report into the management of detention centre contracts and the Palmer Inquiry report both outline the difficulties of outsourcing detention management to private companies. While the need for detention facilities for asylum seekers is debatable, if detention is used it is quite clear that putting the care of vulnerable people into the hands of private for-profit companies results in numerous breaches of duty of care.

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[23] *S* v *Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005). Attached to this submission

[24] SAA/A, in 2003.

[25] Name supplied upon request - Baxter IRPC in 2003.

The Auditor General found that the process of monitoring the contracts "was an ineffective mechanism for sanctioning persistent below-standard delivery.[26]" ANAO found that DIMIA did not have a process to assess whether the standards of service delivery were of the required quality.

The poor conditions of detention centres have been well documented. In more recent months the focus has been on the lack of adequate mental health services and the low quality of food. This submission will not repeat the evidence put forward in so many media and research reports. However the existing evidence shows that the standards set out in the Immigration Detention Standards is not being met.

4.4.1 Cost of outsourcing

The rationale for outsourcing services is usually economic rationalism – it is claimed to be cheaper to allow private companies to run services. It is generally held that because they are run for profit, they will be run more efficiently and therefore be more cost effective. While it is debatable whether it is morally defensible to allow a company to make profit from the detention of people not charged or found guilty of any offence, the evidence shows that in this case it is not economically defensible. Simply, the outsourcing of immigration detention facilities is incredibly expensive compared to the alternatives.

Costs per person per day:

Villawood	$111
Maribyrnong	$248
Perth	$589
Port Hedland	$286
Baxter	$310[27]

Programs for alternative programs that allow for the community-based processing of asylum seekers, such as The Better Way, cost approximately $60 per person per day.

Recommendations

- Revoke contracts to outsource detention management - DIMIA must relinquish the role of caring for asylum seekers to qualified practitioners in the welfare sector who have viable and affordable alternatives to detention which could solve the serious problems of the current system.

A Just Australia again calls on the Government to - as a matter of urgency - start working with welfare agencies to implement programs for the release of asylum seekers such as The Better Way. [28]

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[26] ANAO part A p16

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

[28] www.thebetterway.info

4.5 Submission on Terms of Reference – term e

any related matters.

4.5.1 Excision of Areas from Australia's Migration Zone

A Just Australia is firmly against the excision of areas from Australia's migration zone. The excision is method of avoiding our responsibilities to asylum seekers under the Refugees Convention, and as such it is an unworthy action of any Government that is a signatory to the Convention.

A Just Australia notes that while change to the Migration Act is necessary, due to the excision of large portions of Australia from the migration zone, any positive changes will not apply to future asylum seekers who will be intercepted and taken to offshore facilities such as Christmas Island where the Migration Act does not apply.

Recommendations

- Repeal all excisions so that the Migration Act applies to all Australian territory.