DISCUSSION PAPER

Does the Migration Amendment (Immigration Detention Reform) Bill 2009 go far enough towards creating a just and humane system for asylum seekers in Australia?

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1. Introduction

In 2008 an important step forward was taken in relation to the Australian immigration process as Immigration Minister Chris Evans announced the new values that would be introduced into the Government's policies.[1] Important reforms have already taken place with the abolition of the debt owed by unlawful non-citizens for their detention[2] and the promise that children would no longer be detained in detention centres.[3] The Migration Amendment (Immigration Detention Reform) Bill 2009 ("Reform Bill") is currently before the Senate. In this Paper I shall examine some of the proposed amendments to the Migration Act 1951 and illustrate that these reforms are not sufficient on their own to bring to Australia a new era of a more humane immigration process for asylum seekers.

I will focus on the treatment of newly arrived asylum seekers, that is individuals who have sought international protection and whose claims for refugee status have not yet been determined. Due to time constraints it will not be possible to consider all of the reforms currently proposed by the Government but I hope to illustrate that the current reforms do not go far enough by highlighting some of the failings of the Reform Bill.

It will be submitted that while the Rudd Government is moving in the right direction more legislation must be enacted to ensure that Australia treats asylum seekers with dignity, respect and fairness and to ensure that Australia complies with its human rights obligations under the international treaties to which it is a party. The number of asylum seekers is rising globally, in part due to conflict and problems across the globe and asylum seekers looking for a new life in Australia must be treated humanely whilst their cases are being dealt with. The cases should be dealt with in a consistent and open manner and as quickly as possible to allow people to go on with their lives, whether in Australia or abroad.

2. Mandatory detention: an arbitrary and unjust policy

2.1 The pressing need to bring an end to mandatory detention

Since the amendments to the Migration Act 1958 in 1992 it has been mandatory for any unlawful non-citizen who enters Australian territory to be detained until they are granted a valid visa or are removed from Australia.[4]

Despite repeated calls from many international human rights organisations Australia refuses to move away from its policy of mandatory detention for asylum seekers. The UN Human Rights Committee has ruled[5] that Australia's mandatory immigration

[1] Senator Chris Evans, Minister for Immigration, July 2008, New Directions in Detention – Restoring Integrity to Australia's Immigration System

[2] Migration Amendment (Abolishing Detention Debt) Bill 2009

[3] Senator Chris Evans, Minister for Immigration, July 2008, New Directions in Detention – Restoring Integrity to Australia's Immigration System

[4] S.189(1) Migration Act 1958: If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person

[5] *A v Australia* CCPR/C/59/D/560/1993 UN Human Rights Committee 30 April 1997 available at http://www.unhcr.org/refworld/docid/3ae6b71a0.html

detention policy can sometimes breach Article 9(1) of the International Covenant on Civil and Political Rights, which prohibits arbitrary detention and provides that a detained person must be able to take proceedings before a court. Statements of this sort should not be ignored by the Australian Government and in order to take steps towards a fair and just immigration process there must be an end to this arbitrary and unjust policy.

The new values announced by the Immigration Minister last year set out a risk-based approach to immigration and the processing of asylum claims and the Reform Bill affirms in principle that detention in a detention centre should be a last resort and for the shortest practicable amount of time.[6] These new values ought to be welcomed as they move Australia towards a new, more humanitarian immigration process but it is regrettable that mandatory detention remains a foundation of immigration policy and indeed is repeated as the primary value showing that Australia will still not be taking a real risk-based approach to asylum seekers. The Rudd Government's commitment to mandatory detention as a means of protecting national security and the nation's sovereignty to make immigration decisions means that many desperate asylum seekers are punished for asserting their legitimate right to claim asylum in Australia contrary to the international treaties to which Australia is a party.[7]

Australia is one of few developed countries to retain a process of mandatory detention therefore it is hard to justify maintaining the policy for the reasons listed above. In the UK for example, there is a presumption for release of immigration detainees, not detention.[8] When an asylum seeker claims asylum in the UK they may be detained under a number of immigration powers but this will need to be justified to the courts.[9] In Portugal there is no detention of asylum seekers who present themselves for asylum within 48 hours of arriving in the territory, detention can only be for the purposes of deportation and any person who has illegally entered the territory who is detained by the police must go before a judge within 48 hours.[10] The focus in these countries and many others is, at least in theory, on a presumption for release of asylum seekers and detention is not regarded as a mandatory first option.

In Australia it seems that this will not be the case following the current reforms as mandatory detention remains effective. The concept has however been ameliorated and is restricted somewhat as will be explored below. It is encouraging to see that the policy of mandatory detention is being changed and that guidelines are being set but it remains unclear why detention is necessary in some of these cases and the reforms are not sufficiently wide-ranging to bring about a real change in the system. As the Australian Human Rights Commission highlights, detention of each unlawful non-citizen should be individually considered on its merits with deliberation of all

[6] Senator Chris Evans, Minister for Immigration, July 2008, New Directions in Detention – Restoring Integrity to Australia's Immigration System; Proposed subsection 4AAA(2) Migration Amendment (Immigration Detention Reform) Bill 2009

[7] Article 31(3) of the Refugee Convention states that refugees should not be subject to any form of punishment due to their illegal entry.

[8] Guidance Notes on Bail for Adjudicators, UK Home Office

[9] Immigration Act 1971

[10] Act 23/2007 Article 146

the relevant circumstances.[11] Instead the Australian system, under the new Reform Bill, will mandate detention for all people who fall into a certain category.[12] Furthermore, the Reform Bill will retain an overriding discretion for an officer to detain an unlawful non-citizen in any situation.[13] While it will no longer be mandatory to detain all unlawful non-citizens the categories of mandatory detention remain wide as discussed below and where there is no mandatory detention officers still have the discretion to detain so it is likely that the position will vary very little from the current situation.

2.2 The mandatory detention of unlawful non-citizens who present an unacceptable risk to the Australian community

Among those people who must be detained by an officer are unlawful non-citizens who present unacceptable risks to the Australian community.[14] At first glance it seems acceptable to detain asylum seekers who present an unacceptable risk to the community. However, it has yet to be established what this unacceptable risk may be. It is stated that an officer must only form the view that a person is an unacceptable risk to the Australian community if that person has been refused a visa or has had a visa cancelled on grounds relating to national security as determined by the Australian Security Intelligence Organisation Act 1979; if the person held an enforcement visa and remains in Australia when the visa ceases to be in effect; or where the circumstances prescribed by the regulations apply in relation to the person.[15]

While some of these grounds are clearly acceptable reasons to detain an individual there are two immediate concerns which must be raised. First, the regulations have not been made publicly available and it is probable that they will be introduced without further consultation so it is not possible to say how wide-ranging they will be. Evidently the width of the policy of mandatory detention will be established largely by the content of these regulations. The Department of Immigration and Citizenship has argued that these regulations are necessary to give the government flexibility to address emerging or changing immigration related risks such as immigrants absconding or failing to depart. The regulations are to focus on those with no entitlement to stay in Australia or who have failed to comply with visa conditions and not on newly arrived asylum seekers. However, the regulations will also cover other risks such as those connected with organised identity and document fraud.[16] The regulations, therefore, have the potential to be very wide-ranging and could lead to the mandatory detention of an important number of people. Of greater concern, however, is the fact that officers will not have any discretion to consider the facts of each individual case but there will be a blanket policy of detention wherever any of the circumstances apply. Proposed subsection 189(1) states that officers *must* detain the person. This may amount to arbitrary detention as cases will

[11] Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affair- 31st July 2009
[12] Proposed subsection 189(1) Migration Amendment (Immigration Detention Reform) Bill 2009
[13] Proposed subsection 189(1C) Migration Amendment (Immigration Detention Reform) Bill 2009
[14] Proposed subsection 189(1)(1)(b)(i) Migration Amendment (Immigration Detention Reform) Bill 2009
[15] Proposed subsection 189(1)(1A) Migration Amendment (Immigration Detention Reform) Bill 2009
[16] Department of Immigration and Citizenship's Submission to the Senate Standing Committee on Legal and Constitutional Affairs 31st July 2009

not be considered on their individual merits and Australia may yet again be in breach of its international obligations towards asylum seekers.

2.3 Mandatory detention of all unlawful non-citizens for the purpose of identity, security and health checks

Another part of the mandatory detention policy which cannot be ignored is the mandatory detention of all unlawful non-citizens for identity, security and health checks. It is understood that proposed subsection 189(1)(b)(ii-v) is intended to bring into force Value 2a)[17] that all unauthorised non-citizens will be detained to manage identity, security and health risks. It is acceptable to detain people for a short amount of time to obtain basic information about them but the Government has thus far failed to implement an appropriate procedure for doing so.

2.3.1 The need for clear time limits for preliminary checks

The Reform Bill does not currently provide for any time limit on detention for the purposes of the preliminary checks. There must be an obligation to deal with these checks quickly to minimise the length of time people are held in detention. Proposed subsection 189(1B) includes a new requirement that an officer must make reasonable efforts to ascertain the identity of persons detained; identify whether the person is of character concern; ascertain their health and security risks; and resolve their immigration status but there is no clear time limit facilitating independent review and no mechanism for a person detained for an unacceptable amount of time to seek relief. The subsection, while promising in principle, is too weak to deal effectively with the issue. Another anomaly in this section is that persons detained because they are thought to be an unacceptable risk to the Australian community are excluded from the requirement to make reasonable efforts to perform the preliminary checks. There does not seem to be any reason to exclude this category of persons merely because they are deemed to be an unacceptable risk to the Australian community. Indeed, reasonable efforts should be made to establish whether they are an unacceptable risk by ascertaining their identity, doing security checks and checking if they are of character concern. More generally, nothing in the Reform Bill requires detention for the shortest practicable time, despite this being affirmed as a principle,[18] and it remains to be seen if any change in the way cases are dealt with will occur. Furthermore, the Reform Bill does not require release once the checks are completed so even if the tests are dealt with quickly this does not mean that people will necessarily be released from detention.[19]

In Sweden,[20] preliminary checks are usually completed within two weeks and this is something that should be aimed for by Australian immigration officials and should be backed by legislation stating a maximum time for detention to complete security and identity checks. The Government must insist on processes to be put in place to

[17] Senator Chris Evans, Minister for Immigration, July 2008, New Directions in Detention – Restoring Integrity to Australia's Immigration System
[18] Proposed subsection 4AAA(2)b) Migration Amendment (Immigration Detention Reform) Bill 2009
[19] Bills Digest 11th September 2009 available at www.aph.gov.au/library
[20] All information about the Swedish asylum process taken from Alternatives to Detention, The Swedish Model of Detention, Grant Mitchell 2000; www.regeringen.se/sb/d/3083; and www.migrationsverket.se/english

allow these tests to be dealt with in a timely manner and detainees should be kept informed of their rights and kept up-to-date with the stage the tests have reached. Legislation must be introduced to require the release of detainees after the tests are completed satisfactorily and to introduce an appropriate mechanism for review. Without this new legislation there is no impetus for cases to be dealt with efficiently and it is unlikely that there will be any change to the current processes.

2.3.2 The place of detention during preliminary checks

It is also submitted that during these checks detention centres are not the most appropriate place to detain asylum seekers. 'A Just Australia' recommends a community-based alternative to detention whereby all asylum seekers arriving without a visa would be housed in a closed Reception Centre for an initial assessment period while preliminary checks are made.[21] This simple yet efficient alternative could act as a compromise as it would allow the checks to be dealt with quickly; it would make it simple to ascertain who was not being dealt with; and it would avoid asylum seekers being housed in detention centres which in the eyes of many are viewed as prisons and where they would potentially be housed with criminals awaiting deportation. These Reception Centres could play an important role in giving asylum seekers access to legal advice and assistance in filing their claims while giving the government an opportunity to carry out preliminary checks.

2.3.3. Detention during health checks

In addition to providing these Reception Centres to deal with the preliminary checks it is essential the Government deals separately with the issue of health checks. As the UNHCR recommends, any isolation on the basis of health risks posed by an individual asylum seeker should be in a hospital or other medical facility and those detained for security reasons must be differentiated from those who are segregated on the basis of health risks.[22] There does not seem to be a pressing need to detain asylum seekers while health checks are carried out. There is no justifiable reason to distinguish them from lawful non-citizens such as tourists who enter the country without being detained for health checks. Furthermore, asylum seekers who arrive in Australia by plane with appropriate documentation are not detained for health checks but must complete a health check within the designated amount of time. Asylum seekers should not be arbitrarily detained merely because of their mode of arrival in Australia or because they do not have the correct documentation as they are asserting their right to claim asylum. The Department of Immigration has admitted that there is little risk to the community in terms of health and that boat arrivals are no less healthy than other visitors to Australia.[23]

I submit that further legislation is needed to introduce strict time limits for security and identity checks to be carried out while asylum seekers are placed in a Reception Centre and to ensure that detainees are released following these tests. Processes

[21] 'A just Australia' Submission to the Senate Standing Committee on Legal and Constitutional Affairs 31st July 2009
[22] UNHCR Submission to the Senate Standing Committee on Legal and Constitutional Affairs 31st July 2009
[23] Joint Standing Committee on Migration 2008

should also be introduced to deal with health checks for asylum seekers once they are released into the community.

3. Detention during the asylum process

3.1 Detention in a detention centre as a last resort

In the Reform Bill Parliament affirms as a principle that the purpose of detaining non-citizens is to "manage the risks to the Australian Community of the non-citizen entering or remaining in Australia and to resolve the non-citizen's immigration status."[24] The preliminary checks outlined above serve to manage the risks to the community and I believe that once these checks have been dealt with then asylum seekers should no longer be detained. To detain an individual to resolve his immigration status is detaining someone for administrative convenience only and is not appropriate or just. Once the preliminary checks have been dealt with asylum seekers should be given a visa appropriate to their situation and released whilst their asylum claims are being dealt with.

However, I can appreciate that in some cases the Government will find it necessary to detain someone following the preliminary checks. If an individual is to be detained then community-based detention should be the norm and detention centres should remain a last resort. Indeed Immigration Minister Chris Evans stated as one of the new values for immigration that detention in a detention centre during the asylum process would be the last resort and would be for the shortest practicable time.[25] This is commendable and it is encouraging that the Parliament affirms these principles in the Reform Bill[26]. Unfortunately, under the Reform Bill indefinite detention remains possible and there is no independent review of the appropriateness or reasonableness of detention by the courts. The result of this is that immigration detainees are left with fewer protections and rights than incarcerated criminals. Criminals will pass before the courts before being incarcerated and will have a sentence of a determined length. As asylum seekers are asserting a legitimate right to claim asylum and have not committed a crime[27] it does not seem understandable that they do not at least have the same rights and protections as those involved in criminal processes. Systems must be put into place to review the detention of immigration detainees if Australia is to continue its policy of mandatory detention.

A primary concern is the risk of indefinite detention. Unless there is automatic independent review of detention and time limits placed on detention then a repeat of the unfortunate cases of Cornelia Rau and Vivian Alvarez could well be a reality.[28] A system that allows indefinite detention of people cannot be justified in a country which promotes itself as fair and just. There are numerous arguments outlining the impact detention may have on people's lives and there are already workable

[24] Proposed subsection 4AAA(1) Migration Amendment (Immigration Detention Reform) Bill 2009
[25] Senator Chris Evans, Minister for Immigration, July 2008, New Directions in Detention – Restoring Integrity to Australia's Immigration System
[26] Proposed subsection 4AAA(2) Migration Amendment (Immigration Detention Reform) Bill 2009
[27] The Refugee Convention Article 3(3) states that refugees should not be subject to any punishment due to their illegal entry
[28] Detention of Cornelia Rau: The legal issues. Research Brief available at www.aph.gov.au/library

alternatives to detention in a detention centre yet there is no forceful argument promoting the use of detention. I would submit that clear time limits for detention are brought in and that any continued detention ought to be justified by the Immigration Department. This combined with a strong system of independent review as outlined below is the only mechanism to ensure that people are not arbitrarily detained.

3.2 The low risk of detainees absconding

It is often stated that asylum seekers ought to be detained to avoid them 'disappearing' into the country and becoming untraceable by the Government. This is a fallacy. The majority of asylum seekers want their claim to be considered and hope to be allowed to live and work in the country they have chosen to claim asylum in. Reports from a range of countries favoured by asylum seekers including Canada, New Zealand, the USA, Germany, Denmark, Finland, Norway, Sweden and the United Kingdom have found that the procedural compliance level of asylum seekers in community-based programs is very high. The different reports suggest a compliance level of 95% or higher.[29] Closer to home, a study by the Hotham Mission in Melbourne between 2001 to 2003 reported a 100% compliance rate of the asylum seekers released into the community.[30] When considering that community based alternatives to detention are cost-effective and more humane than detention in a detention centre then this very small risk of asylum seekers absconding is one which should be borne by Australia.

3.3 A potentially great impact on detainees' health

Another important risk, which should not be ignored in making the decision to detain asylum seeker in a detention centre, is the impact that this may have on both their medical and physical health. A recent report in the UK by the charity 'Bail for Immigration Detainees' contains testimonials from a number of immigration detainees in UK detention centres. The report states that the two most common phrases heard from detainees in relation to the health care they receive are: "they stopped giving me my medication" and "we are given paracetamol for everything." The medical conditions among the detainees interviewed included strokes, HIV, tuberculosis, gallstones, stomach ulcers, sciatica, arthritis, diabetes, hypertension, asthma, psychiatric problems, depression and suicidal ideation.[31] Many of these conditions can be linked to the distress and anxiety caused by indefinite detention.

The Commonwealth Ombudsman's Report highlights that the same problems are present in Australian detention centres. It was reported that a major issue during the inspection of the detention centres was an increase in mental health issues and concerns that some mentally ill detainees may not be capable of conducting their own affairs and make rational decisions in relation to their immigration claims. The Ombudsman was told that the mental health staff could do little to help the

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

[30] Hotham Mission Asylum Seeker Project, 'Welfare Issues and Immigration Outcomes for Asylum Seekers on Bridging Visa E, Research and Evaluation,' November 2003.

[31] All the information in this paragraph was obtained from BID's publication 'Out of Sight, out of mind: Experiences of Immigration Detention in the UK' July 2009

detainees as the source of their distress and anxiety was being detained for an undefined amount of time.[32]

The impact of detention on people's mental and physical health can also have a worrying effect on their lives once they are released from detention. They may have problems working and integrating into society. Doctors have noted a concern that detention may leave long-term psychological scars which may form a barrier to adaptation and integration when asylum seekers are released into the community after being detained.[33]

The majority of these risks can be avoided by detaining asylum seekers for the shortest amount of time possible and using alternatives to detention wherever possible.

3.4 The Alternatives to Detention

Having considered the low risk of asylum seekers absconding and the impact detention can have on the health of detainees it is necessary to look at the alternatives to detention which must be favoured by the government over detention in a detention centre. If the policy of mandatory detention is to continue then a community based detention program needs to be used as an alternative to detention in a detention centre. There are many schemes already in place such as the Immigration Residential Housing or the Immigration Transit Accommodation.[34] The Reform Bill also takes an important step forward in widening the definition of detention to include temporary access community permits.[35] A full discussion of the alternatives to detention is beyond the remit of this Paper but much research into the question has already been done and effective alternatives are already being used in Australia and abroad so it is clear that other options to detention in a detention centre are available and use should be made of them as a priority.

However, I would submit that detention of any form is not necessary and that lessons can be learned from the mechanisms used internationally such as open hostel accommodation and the use of bail and sureties. In Sweden for example, pending a decision on an asylum claim, asylum seekers can choose to live with family or friends or in the Migration Board Reception Centres. While half of asylum seekers choose to organise their own accommodation others opt for the self-catered flats provided by the Migration Board. Benefits are provided though if asylum seekers have to wait for more than four months for a decision on their asylum claim they are given the right to work.[36] In the UK the system has a slightly different focus with many detainees being granted bail coupled with requirements such as sureties, electronic tagging and reporting conditions which reduce the risk of detainees absconding.[37]

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[32] Commonwealth Ombudsman 2008 Immigration Detention Report
[33] Article by Zachary Steel and Derrick M Silove, The Medical Journal of Australia, 2001.
[34] Alternatives to detention in a detention centre are outlined in the report Community Based Alternatives to Detention by the Joint Standing Committee on Migration
[35] Proposed subsection 5(1)c) Migration Amendment (Immigration Detention Reform) Bill 2009
[36] All information about the Swedish asylum process taken from Alternatives to Detention, The Swedish Model of Detention, Grant Mitchell 2000; www.regeringen.se/sb/d/3083; and www.migrationsverket.se/english
[37] www.bia.homeoffice.gov.uk/asylum

It is submitted that there are many ways of dealing with asylum seekers in a more just and humane way than is used in Australia at present and I urge the Government to make further reforms and abolish mandatory detention and introduce these alternatives.

4. Review of detention

Another failing of the Reform Bill is that does nothing to implement a form of regular review of the reasonableness and appropriateness of detention. As emphasised above if there is arbitrary detention of asylum seekers then this will leave Australia in breach of its international obligations.[38] In order to ensure detention is not arbitrary detention must be a proportionate means of achieving a legitimate aim, having regard to whether there are alternative means which are less restrictive of rights.[39] The Australian Human Rights Committee has stated that in order to guarantee the prohibition on arbitrary detention "it is essential that the decision to detain, or to continue detention, is subject to prompt review by a court. The court must have the power to review the lawfulness of the decision and to order the person's release if the detention does not comply with the requirements"[40] of the international treaty. It is essential that legislation be put in place to ensure the separation of powers and allow the courts to independently review the decision to detain. The presumption should be on release and it should be for the immigration department to justify the need to keep people in detention.

In the UK every immigration detainee has the right to apply for bail before an immigration judge after seven days of detention. In theory, the presumption is for release not detention and it is the job of the Home Office to prove why the detainee should remain in detention. Reasons that are often cited include the risk of a detainee failing to comply with bail conditions. The Court has the opportunity to decide if detention should continue and if it is decided that bail ought to be granted then the detainee will be released, usually with reporting conditions. This review of detention decisions by the courts is an essential part of the process as the courts are independent from the government and the immigration service. There are a multitude of problems with the system: most detainees do not have access to legal advice and will represent themselves and in 2008 only 18% of immigration bail applications were successful.[41] However, despite the deficiencies in the British system there is at least a mechanism in place to allow review of detention decisions by the courts.

The current system of internal review by immigration officers of the appropriateness of detention is not sufficient and must be reviewed by an independent body. Since 2005 the Immigration Department must provide a report to the Commonwealth Ombudsman on all detainees detained for more than two years.[42] The Ombudsman

[38] Article 9(1) International Covenant on Civil and Political Rights; Articles 3 & 9 Universal Declaration of Human Rights; Article 3(3) Refugee Convention
[39] N Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary p. 236
[40] Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs – 31st July 2009
[41] www.biduk.org
[42] s.486N Migration Act 1958

will in turn give an assessment of the case to the Minister along with recommendations.[43] This is obviously a step in the right directions but is not sufficient as the Minister is not bound by any recommendations and waiting two years before reviewing a person's detention is unacceptable. In 2008 it was proposed that review should be conducted at six-monthly intervals. This, while an obvious improvement, is still not sufficient.

I would urge the Australian government to ensure that there is systematic review of all detainees, by the courts, at regular intervals so that the Department of Immigration must justify the reasons for detention.

5. The need for consistency in the treatment of asylum cases

One final block on Australia's ability to move towards a just and humane immigration process is the unacceptable excision legislation applicable to the most desperate of asylum seekers, those who risk their lives to escape persecution by boat and seek a new life in Australia. This legislation provides an insurmountable block on having fairness and consistency in the way the Government treats unlawful non-citizens, which the Immigration Minister promised the public in 2008.[44]

The effect of the legislation enacted in 2001 is to stop a person who first entered Australia at an excised offshore place from making a valid visa application. The bar can only be lifted at the discretion of the Minister who cannot be compelled to do so. The purpose of this discriminatory legislation was stated as intending to reduce the incentive for people to travel with people smugglers and make the hazardous journey across the seas to Australia. This clearly has not occurred as Australia has seen an increase in so-called 'boat arrivals' and stories of new boats being intercepted have covered the newspapers this month.[45] A total of 1,640 asylum seekers have arrived this year aboard 28 boats, exceeding the total number of boats for the past seven years.[46] The Opposition has argued that this increase is due to the softening of Australian immigration policy[47] but the increase is far more likely to be due to a global increase in people seeking asylum by boat associated with conflict in Afghanistan, Sri Lanka and Iraq as discussed below.[48]

The Department for Immigration has argued that the policy addresses the specific risks associated with this mode of arrival and the fact that boat arrivals have undergone no pre-arrival screening.[49] It is not clear what these increased risks are. There is not a single case of a terrorist arriving in Australia via a boat of asylum seekers. It is the organisations involved with people smuggling that are at fault here not the people fleeing for their lives. It was recently reported that 90% of boat

[43] s.486O Migration Act 1958
[44] Senator Chris Evans, Minister for Immigration, July 2008, New Directions in Detention – Restoring Integrity to Australia's Immigration System
[45] September 2009
[46] Reuters: Asylum influx a threat to PM Rudd 28th September 2009
[47] Deputy Leader of the Opposition Julie Bishop September 2009 http://www.julie-bishop.com/transcripts/183-abc-news-breakfast-with-joe-obrien.html
[48] UNHCR's Report - Asylum Seeker Levels and Trends in Industrialized Countries noted a 12% increase world wide in asylum applications over the past year
[49] Department of Immigration and Citizenship's Submission to the Senate's Standing Committee on Legal and Constitutional Affairs – 31st July 2009

arrivals go on to receive refugee status[50] so evidently they are found not to present a risk to Australia. Action needs to be taken to stop people smuggling and the Government made a strong commitment to do so by allotting a large amount of money from the 2009-10 federal budget "to fund a comprehensive whole-of-government strategy to combat people-smuggling and help address the problem of unauthorised boat arrivals."[51] While the federal government is working with the Indonesian Government to control the activities of people smugglers and to discourage people from coming to Australia by these means, those asylum seekers who do reach Australian territories should be treated with dignity and respect. These people should be given equal opportunities to apply for a visa regardless of how or where they arrive in Australia and the people of Australia agree. A recent poll commissioned by Amnesty International found that 69% of Australians believe that asylum seekers who arrive by boat should have access to the same legal protections as all other asylum seekers.[52] It is possible to treat asylum seekers fairly and humanely while maintaining strong border control measures to disrupt the work of people smugglers.

6. The minimal impact on Australia of a human-rights approach to asylum seekers

A recent misfortune for the development of humane immigration policies is that the oft-repeated myth that the 'softer' approach of the Rudd Government has led to an increase of asylum claims in Australia. It is true that there has been an increase in past years of the number of asylum claims received by Australia. In 2008 Australia received 4700 asylum claims, an increase of 19% since the previous year. This increase is just above the global average. However, these figures are still considerably lower than in 2000 where 13,100 claims were made and in 2001 when 12,400 claims were received. The figures show that asylum claims are lower under the present Government than during the Howard Government's second and third terms in power where the immigration focus was on maintaining strong border controls and many 'hard' policies were in place. The era in which there were a high number of asylum seekers was characterised by Temporary Protection Visas and the Pacific Solution. This illustrates that hard policies do not necessarily lead to a lower number of asylum claims.

Asylum claims rise and fall due to persecution of different groups and conflicts across the globe. The current increase in claims in Australia can be explained by a general global increase in the number of asylum claims[53] due to problems, conflicts and political instability in Sri Lanka, Iran and Afghanistan (amongst others) and is not to do with the change in policy by the Government. While Australia noted an increase of 19% other countries reported a much greater increase with Italy receiving an increase in the number of asylum claims of 122% and Norway of 121%.[54]

[50] Pamela Curr of the Asylum Seeker Resource Centre in the Sydney Morning Herald 22 April 2009
[51] B Debus Minister for Home Affairs Media Release 12 May 2009
[52] Amnesty International at www.amnesty.org.au
[53] In 2007-2008 a global increase of 11% was reported
[54] Statistics are taken from UNHCR (The UN Refugee Agency) Report 'Asylum Levels and Trends in Industrialised countries 2008'

In any case, merely because there is an increase in the number of asylum claims lodged does not mean that Australia will accept more claims. Australia agrees with the UN Refugee Agency how many asylum seekers will be accepted each year. This system is flexible and unused places can be carried forward to the following year. The number of places available under the Humanitarian Program are adjusted on the basis of need. For example in May 2008 it was announced that there would be an increase to 6500 of the number of refugee places available to deal with the critical resettlement needs of Iraqis.[55] A more humane treatment of asylum seekers does not encourage a growth in the number of asylum seekers it merely guarantees that people are treated with humanity and dignity.

7. Conclusion

I acknowledge that important steps have been taken towards making the Australian treatment of unlawful non-citizens humane and efficient and the new values asserted by the Government show an encouraging attitude to the treatment of asylum seekers. I urge the Senate to adopt the Reform Bill and bring into force the amendments to the Migration Act 1958. The treatment of unlawful non-citizens in Australia is improving consistently and is an issue which is constantly in the public eye.

However, further reform through legislation is needed to concretise the principles announced last year by the Government. The sections of the Reform Bill I have highlighted are not strong and precise enough to bring about the change that is needed. To reiterate, the first step which needs to be taken is to bring an end to the policy of mandatory detention. Australia stands alone in maintaining this arbitrary policy and repeated calls have been made from a range of international organisations for the policy to be brought to an end. Australia needs to accept that it can maintain strong border controls without maintaining the policy of mandatory detention.

Instead of the mandatory detention policy, new processes need to be introduced to deal with the essential preliminary checks efficiently to allow asylum seekers to be released into the community as quickly as possible, while their claims are dealt with. These processes need to include strict time limits and procedures for review and challenge by asylum seekers who are not dealt with in the correct manner.

The risks associated with detention are clear. Long-term detention can have devastating effects on a person's mental and physical wellbeing. On the other hand, the risk of asylum seekers absconding is low and alternatives to detention in a detention centre have been shown to be very effective. The logical conclusion must be that detention in a detention centre should be avoided for asylum seekers where possible and although this is affirmed in principle in the Reform Bill stronger methods must be put in place to ensure that it becomes a reality. A system of review by the courts must be established to allow regular independent review of the immigration service's decision to detain and to avoid indefinite detention.

[55] Department of Immigration and Citizenship Fact Sheet 60 – Australia's Refugee and Humanitarian Program

Finally, the excision legislation must be repealed. The recent increase in boat arrivals highlights that the policy does not act as a deterrent. In this time of increasing asylum claims what is important is that asylum seekers are treated with respect and dignity and that their claims are dealt with quickly and fairly. This is the only way to bring to the Australian immigration system the fairness and consistency promised by the Immigration Minister.