An extract from

A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers

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CPD CENTRE FOR POLICY DEVELOPMENT

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Arja's career with the Department of Immigration and Citizenship spanned more than 30 years. Most recently, she was First Assistant Secretary of the Refugee, Humanitarian and International Division from 2007 – 2010, where her responsibilities included high level policy and reform of all aspects of Australia's refugee and humanitarian program. This encompassed asylum and protection issues in Australia, Australia's offshore humanitarian resettlement programs and engagement with international organisations, UN agencies, NGOs and governments on matters relating to protection and humanitarian assistance to displaced people. From 1987 – 1993 she worked in Senior Adviser positions to immigration ministers in the Hawke and Keating Governments, including to Mick Young and Gerry Hand.

Kate Gauthier

Kate is an Associate Lecturer with the Migration Law Program at the Australian National University. Until recently, she was the National Director of refugee policy lobby group A Just Australia. She is the chair of the community group ChilOut – Children Out of Immigration Detention. Formerly, Kate was the immigration and refugee policy adviser to Senator Andrew Bartlett and the community liaison officer for Senator Aden Ridgeway. She was a co-founder of the Refugee Assistance Project, a board member of Pol Min (Political Ministry Network) and has regularly visited remote detention centres for 10 years. Kate has sat on a number of Ministerial and Departmental advisory panels and consultation committees.

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About this Extract

This is an extract from CPD's upcoming research report ***A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers***. The full report will be available to download in its entirety from Monday 22nd August 2011 at: http://cpd.org.au/2011/08/a-new-approach/ To stay up-to-date with commentary from the *A New Approach* authors in the lead up to the report's release, email: refugee.policy@cpd.org.au.

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Policy Responses to Onshore Asylum Seekers

> *Strong border security and humane and risk-based detention policies are not incompatible. They are both hallmarks of a mature, confident and independent nation.*[50]
>
> Former Immigration Minister Chris Evans

The key objectives of Australian policy have become distorted by public debate on asylum boat numbers. Both major parties have developed policy tunnel-vision, concentrating on 'deterring' boat arrivals from making the journey to Australia through punitive methods, without questioning the effectiveness or costs, or looking at alternative approaches.

Punitive deterrent policies have included: the introduction of mandatory detention for all asylum seekers arriving by boat, Temporary Protection Visas (TPVs), excision of external territories such as Christmas Island, and placing financial barriers on asylum seekers (such as no work rights) pending their protection outcome.[51]

Detention as a deterrent: sloppy policy evaluation

Australia is the only nation with a policy of mandatory detention, yet we see far fewer asylum arrivals than other countries and host far fewer of the world's refugees. In 2010, Australia ranked 46th in the world for the number of refugees per capita.[52]

Both major federal parties claim that the detention of asylum seekers is a necessary component of border protection and that detention itself can deter future asylum seekers and the people smugglers who facilitate their journey. Some argue that policies such as TPVs and excision with offshore processing stopped the boats.

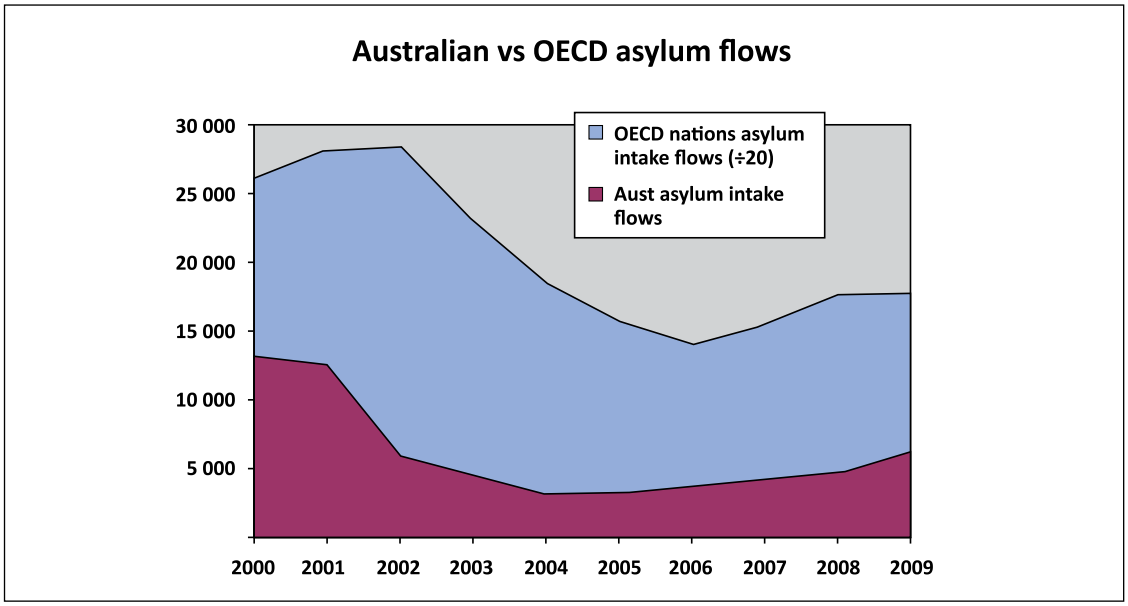
To claim that any raft of policies 'stopped the boats' or that a 'softening' caused an increase in boat arrivals is sloppy policy evaluation at best and a deliberate misrepresentation of statistics at worst. Both the International Detention Coalition and UNHCR have found no empirical evidence to suggest that detention deters.[53]

The IDC found detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals, since asylum seekers and irregular migrants are either:

- Not aware of the detention policy or its impact in the country of destination
- May see it as an inevitable part of the journey, and
- Do not convey the deterrence message back to those in their country of origin

As the Graph 4 shows, Australia's asylum numbers have largely followed global trends in recent years. On this graph, the OECD figures have been reduced by 20 times to allow for a comparison of OECD numbers with Australian trends on the same axis. The large number of asylum seekers in OECD countries dwarfs Australia's minimal intake. When shown this way, some small variation exists in the trend, indicating that domestic policy focused on boat arrivals has, at best, had a marginal impact on arrival numbers.

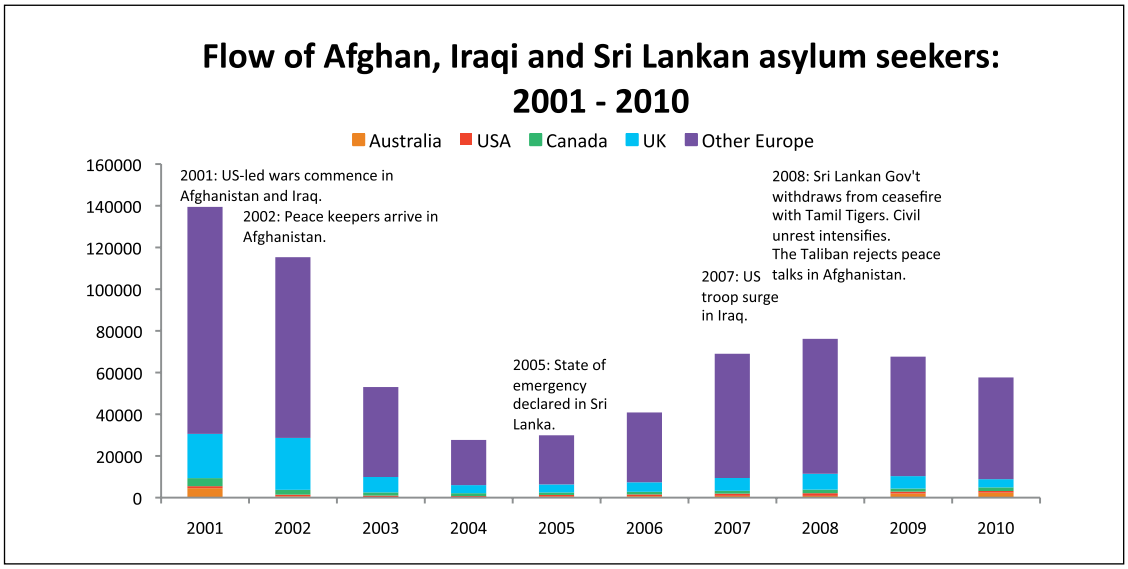
Graph 4: Australian versus OECD asylum flows



Source: OECD, Foreign and foreign-born populations in the OECD countries: stocks and flows - Inflows of asylum seekers

Graph 5 below shows total asylum seeker inflows from the major source countries of Afghanistan, Iraq and Sri Lanka. The trends are similar for each major destination country – suggesting that war, civil unrest and persecution in source countries are major influencers on people movements around the globe, and far more influential than the deterrent policies of any one destination country.

Graph 5: Flow of Afghan, Iraqi and Sri Lankan asylum seekers: 2001 – 2010



Sources: UNHCR Asylum Levels and Trends in Industrialized Countries (2005-2010), UNHCR Statistical Online Database
(Asylum seekers originating from, 2001-2004), UNHCR Statistical Yearbook (2004).

The UNHCR says 'pragmatically no empirical evidence is available to give credence to the assumption that the threat of being detained deters irregular migration'.[54]

Using domestic policy to stop asylum flows is unrealistic. To completely stop asylum seeking, the Australian system would have to be worse than that being fled from - worse than extra-judicial killings, torture and persecution. And to attempt to influence the behaviour of other asylum seekers in third countries by punishing individual asylum seekers in Australia, who have committed no crime, is immoral and in some cases a breach of our constitution.[55]

Cost benefit analysis

There has been even less attention paid to the overall costs of the approach. The UNHCR[56] shows the savings in switching from mandatory to community detention. It found that in 2005/06, the potential savings per person per day in Australia ranged from $333 to $117, depending on assumptions about the particular form of mandatory (e.g. remote facility) or community detention.

Next year (2011/12) the government will spend close to $800 million in asylum seeker interception, detention and related costs.[57] This is about $90 000 for every asylum seeker who comes to Australia.

Australia needs to develop a flexible, modern and outcome-focused reception system. Policy towards asylum seekers once they have arrived in Australia should protect the Australian community from security or health threats, rapidly and fairly determine who is owed protection under Australia's international obligations, and those who are found not to be in need of Australia's protection should be quickly returned home in safety and dignity. The system should afford all people their human rights as well as access to the legal systems that deliver those rights. And most importantly, it should be outcome-focused and cost-effective.

The international experience: alternatives to detention

Many countries have been putting alternatives to detention into practice, including Hong Kong, Indonesia, United Kingdom, Belgium, New Zealand and Argentina. The results of these immigration practices include:

- Cost reduction. The alternatives cost less than detention
- High rates of compliance and appearance
- An increase in voluntary return and independent departure rates
- The reduction of wrongful detention and litigation
- The reduction of overcrowding and long-term detention
- Respect, protect and fulfillment of human rights
- Improved integration outcomes for approved cases
- Improved client health and welfare

Source: Immigration Detention Coalition: IDC handbook[58]

Policy changes by both the former Coalition and current ALP Governments recognised this and aimed, in some parts, to move towards that end. The most obvious examples are:

- **The Community Care Pilot (2005) –** introduced by the Howard government, this pilot succeeded because it used a holistic case-management approach while keeping people in the community instead of in detention centres. The idea was that if you treat people humanely this will have positive outcomes for their immigration case. They are better able to assist in their case (trauma has detrimental effects on memory) and are more compliant because they feel their case is being heard fully and fairly. According to workers at service delivery agencies, this pilot program led to far higher rates of uncontested and voluntary returns of failed visa applicants.[59] This pilot is now the ongoing Community Assistance Support (CAS) program and is working successfully for asylum seekers in the community. But unfortunately, the political climate surrounding detained asylum seekers has made the current government wary of releasing even the most vulnerable detention cases, for fear of being called 'soft' - resulting in far fewer detained cases being part of CAS than under the pilot scheme itself.
- **Extending the powers of the Commonwealth Ombudsman (2005) –** including reviewing detention cases greater than six months old and providing recommendations for possible remedies to continued detention.[60]
- **The New Directions in Detention Policy (2008) –** which outlined seven Key Immigration Detention Values, including that mandatory detention be retained as "an essential component of strong border control" but seeking "to emphasise a risk-based approach to detention and prompt resolution of cases rather than punishment".[61] The approach was to conduct health, identity and security checks immediately and if a person passed those checks their continued detention was "unwarranted." This was to include asylum seekers held in excised locations such as Christmas Island. However, as boat arrivals began to increase in 2008-09 the policy was not fully applied because; firstly, there is not enough community-based accommodation on the island, and; secondly, as the Opposition made much of the increase in boat numbers it was politically difficult to transfer asylum seekers from Christmas Island to community-release options on the mainland.

The way forward

Risk-based detention

All other forms of detention practices in Australia – quarantine, mental health detention, prisons and remand – are based upon publicly-available criteria for who shall be detained, for how long and under what conditions. Detainees have the ability to have their detention reviewed, both for the legality of the detention as well as the need for the detention itself. Creating the same regime for immigration detention would bring the system into line with acceptable standards as practised in other areas of policy.

The key change required to achieve this is to apply a risk-based approach to detention across the whole detention system, including for all boat arrivals in excised locations. The criteria for risk must be documented, and the detention must be reviewable with enforceable remedy for unlawful or unwarranted detention.

Current mandatory detention policies require that all non-visa holders should be detained (NB: in practice, 76% of all asylum seekers who have arrived in Australia over the past 10 years, those who have come here by air, have not been detained because they are issued with visas on arrival). The fundamental problem is not with mandatory detention itself, but that the policy lacks a follow-up risk-analysis to determine who should *continue* to be detained. Recent research into detention suggests "the most significant policies for preventing unnecessary detention lie in the process of determining who should be detained and the reasons for their detention, rather than in traditional conceptions of 'alternative to detention' programs."[62]

The most humane and least expensive outcomes would flow from the simplest policy change: take the current risk-based policies and practices used for plane arrivals under the New Directions in Detention program, and properly apply them to boat arrivals.

A mainstream legal framework - time limited and reviewable detention

The current system of mandatory detention is not only arbitrary but also indefinite in nature. It is incarceration without trial and without a clearly defined timeline or time limit – thereby leading to boredom, frustration and anger by those who are being incarcerated. It can also become indefinite in the more literal sense – where a visa is not granted but a person cannot be removed from Australia, mandatory detention laws allow for the 'administrative' detention of that person for the rest of their life.[63] There is no other form of detention in Australia that is arbitrary, indefinite and non-reviewable.

Current mandatory detention law holds that detention can only be ended by the grant of a visa or by a person's removal from Australia. This is in conflict with current government policy, which holds that indefinite immigration detention is unacceptable and a breach of international human rights instruments.

Detention for initial identity, health and security checks is still a fundamental part of a risk-based approach. The type of detention for those initial checks should have varied security levels, depending upon the individual being detained. An initial 30 day detention limit is sufficient to carry out health, identity and security checks in most cases. Continued detention on judicial order should be available, with a three month maximum for detention where no adverse security findings or character assessments have been made during those checks, with any health issues to be covered by existing quarantine laws. The time limit to detain children should be 14 days, with every attempt made to expedite the release of children. Standards for the conditions in which any child can be detained must be developed in conjunction with child welfare agencies. The entire family unit would be released with the child. The release of any member of that family unit could be cancelled under judicial order if security issues can be shown.

Conditions of detention

Unlike state prison systems, there are no codified minimum conditions for immigration detention. While Immigration Detention Standards were once written into outsourcing contracts with companies such as Serco, these have since been removed, meaning that today there are no publicly-available standards for immigration facilities. This renders oversight of conditions impossible.

The different forms of detention facilities also lack usage guidelines. For example, the Immigration Transit Accommodation (ITA) facilities have been purpose-built for short-term accommodation, and are therefore appropriate for a short-term stay. Yet the ITAs are currently being used for medium- to long-term detention. It seems obvious that the level of facilities provided to a person being detained for three days versus 30 days versus 30 months should be vastly different.

Unfortunately, the complete lack of flexible accommodation facilities has tied the hands of the Department of Immigration, which has nowhere but high-security detention to place the majority of asylum seekers pending the outcomes of their initial security, health and identity checks.

Flexible detention and accommodation centres

While there is on-going need for high-security centres on the mainland, particularly for criminal deportees and immigration compliance cases, there is limited capacity for accommodating low-risk asylum seekers outside existing detention facilities.

Given the enormous costs of building the Christmas Island detention facilities and the ongoing need for accommodation on the Island for boat arrivals, the centres there could be used for the initial 30 day screening process, with some re-purposing of the high-security centre to be more appropriate for asylum seekers. After that initial screening process, the majority of asylum seekers would be released into the community for the duration of their protection visa application process.

After initial screening, some asylum seekers may require ongoing detention. This should occur in existing mainland centres in urban locations to allow for access by lawyers, family and supporters, as well as greater oversight and reduced costs.

The excision laws and use of Christmas Island

This would necessarily mean an end to the excision laws and transferring all asylum seekers off Christmas Island, as there is a lack of alternative accommodation on the island to allow for the release of people (who do not pose any risk) from the high-security detention facility. The remoteness of Christmas Island also makes it impossible to deliver torture and trauma counseling services that are readily available on the mainland. The location vastly increases the costs of accommodating detainees while reducing the quality of services provided. The latest available figures put Christmas Island at $2 895 per detainee per day compared with Villawood in Sydney at $190 per detainee per day.[64]

Beyond being excessively expensive, offshore detention and processing of asylum seekers is bad policy from a purely rationalist perspective, as it does not achieve its goals. There is no evidence to show that punitive practices have any significant impact on asylum flows. If it does manage to reduce the acceptance rate of protection claims from excised compared with mainland-processed asylum seekers, then the excision system is set up for *refoulement* – the return of genuine refugees back to situations of danger.

The reality of 'community detention' for children

There is currently bipartisan support to remove children and their care-givers from the harsher forms of immigration detention. In practice however, children who arrive by boat have not been placed in community detention, but have instead been put into *Alternative Temporary Detention in the Community*. The reality of this form of detention is far from the name. Children are in no way in the community – they are in secure locked facilities and under guard when they go to school and to the few recreational activities they are allowed. Dr Louise Newman, a special adviser to the Government on detention issues has pointed out that in some cases these facilities are worse than the IDCs, as they lack purpose-built recreation, health and education amenities. While children are slowly being released into community detention[65], this process has no determined guidelines regarding how long

children should be detained, in what form of facility, or the criteria for release. The current program for the release of children is a one-off. There are no plans to document policies for the community release of any child-asylum seekers in the future. Prolonged detention of children remains the default detention practice.

The situation for unaccompanied minors (UAMs) is also dire. The Minister for Immigration is both their guardian, the final determiner of their visa and the person who is required by law to detain them. This final responsibility is in direct conflict with the role of a guardian to hold a child's best interests at heart. This is particularly critical during the visa determination process, as UAMs lack a trained independent guardian able to monitor their best interests during the interview process to enable the children to properly provide information regarding their need for protection under the Refugee Convention.

Recommendations

1. Phase out mandatory detention within two years, transitioning to a risk-based detention policy applicable to all asylum seekers regardless of their manner of arrival and including currently excised locations. This will end the prolonged use of Christmas Island and involve a repeal of the excision laws.
2. Refocus the legal framework for detention to match the mainstream legal framework for all other forms of detention in Australia.
3. Use detention specifically for mandatory health, identity and security checks, with a 30 day time limit for adults (with additional detention on judicial order) and a 14 day time limit for children.
4. Create new accommodation centres with greater flexibility for different security levels, in urban or regional hub locations, for ease of service delivery, better oversight and reduced cost.
5. Appoint an independent child guardian for Unaccompanied Minors in the immigration regime.
6. Release all children (and their carers) from mandatory detention before the end of 2011.

Notes

50. Evans, C. (2008) *New Directions in Detention - Restoring Integrity to Australia's Former Immigration System,* Speech to Australian National University, Canberra, Tuesday 29 July 2008, Available at: http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm

51. There has been extensive research into all these policies and a broad range of court decisions challenging the legality of some of these arrangements. Useful sources are reports prepared by Amnesty International, Human Rights Watch, A Just Australia and the Refugee Council of Australia.

52. UNHCR (2011), *Asylum Levels and Trends in Industrialized Countries 2010,* Available online: http://unhcr.org.au/unhcr/images/EMBARGOED%20-%20UNHCR%20-%202010%20Asylum%20Trends%20Report.pdf

53. See: International Detention Coalition op. cit. and UNHCR (2011) *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants,* Available at: http://www.unhcr.org/refworld/docid/4dc935fd2.html

54. *Ibid*, p.V. *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants,* Alice Edwards, UNHCR Legal and Protection Policy Research Series, April 2011.

55. A Just Australia, *The Legality of Detention as a Deterrent,* Available at: http://www.ajustaustralia.com/resource.php?act=attache&id=115http://www.ajustaustralia.com/resource.php?act=attache&id=115

56. UNCHR (2011) Research on Legal and Protection Policy Research Series, April 2011, p. 85. Available at: http://www.unhcr.org/4dc949c49.html

57. This excludes costs associated with the recent Malaysia agreement.

58. International Detention Coalition, *op. cit.*

59. Department of Immigration and Citizenship, *Community Care Pilot & Status Resolution Trial,* March 2009, Available at: http://idcoalition.org/wp-content/uploads/2009/06/ccpmarch-2009.doc

60. However, those recommendations are unenforceable and are often ignored, as is the case for the large number of boat arrival asylum seekers held in detention for prolonged periods. The next logical step to this reform is to ensure that oversight functions have enforceable remedies where prolonged detention is unwarranted.

61. Evans, C. (2008) Chris Bowen MP, Minister for Immigration and Citizenship, *'New Directions in Detention – Restoring Integrity to Australia's Immigration System* Speech to Australian National University, Canberra, Tuesday 29 July 2008,. Available at: http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm

62. International Detention Coalition, *op. cit.*, p.4.

63. Australia's longest serving immigration detainee was Peter Qasim, detained for more than seven years before being released in 2005.

64. Senate Estimates (2007), Legal and Constitutional Affairs Committee, Hansard 21 May 2007, p.121.

65. There are no current DIAC figures publicly-available, so it is hard to give an accurate representation of how many children are in these types of facilities and for how long.

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