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Monash University  
Melbourne**

**Submission to the Commonwealth Joint Standing  
Committee on Migration**

***Inquiry into Immigration Detention in Australia***

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## **Preface**

This Submission was prepared and ready to be transmitted to the Committee on 29 July 2008 when the Minister for Immigration announced changes to the system of mandatory detention in Australia. The substance of that announcement has taken into account many of the issues which we address in our Submission. However as we have residual concerns about aspects of the proposed changes, we have decided to attach our original Submission as an Appendix and to address our remaining concerns in a Response to the Minister for Immigration's announced changes to the system of mandatory detention in Australia. That Response can be read as a stand alone piece.

August 4<sup>th</sup> 2008

## **Response to the Minister for Immigration's announced changes to the system of mandatory detention in Australia**

We greeted the Minister for Immigration's speech of the 29<sup>th</sup> July 2008 at the Australian National University<sup>1</sup> with great expectations. The government is to be congratulated on its decision to introduce reform into the system of **onshore** mandatory detention, which will ensure that Australia complies with its obligations under international law to detainees subject to immigration detention, to ensure that detention is not used in a manifestly disproportionate and unnecessary way.

However, we have serious concern over the singling out of 'spontaneous' asylum seekers for different treatment, including the continued use of the remote Christmas Island as a detention facility. We are concerned at the persistent linking of such asylum seekers with national 'security' and the notion of 'border security'. It is well-known that the 'deterrent' value of our 'border control' measures in detaining asylum seekers has not been established. In our opinion the continued use of Christmas Island as a detention facility is an unnecessary and regressive step which serves to discriminate against asylum seekers and to reinforce the characterisation of this vulnerable group of people which was a plank of the previous National-Liberal government. The proposed changes will further entrench the discrimination that currently operates between onshore and offshore asylum seekers.

This group of persons is thus excepted from the list of values which is to drive reform onshore. This is the reverse of the situation that should apply: **under international law asylum seekers are an exception to immigration control and have rights which will be denied by the proposal to process them on Christmas Island under a separate processing regime from that which applies on mainland Australia.**

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<sup>1</sup> See <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> accessed 30 July 2008.

To substantiate this viewpoint, we explain the nature and rights of asylum seekers, and how and why Australia will continue to be in breach of international law obligations in relation to those asylum seekers who are interdicted in excised territory and detained and processed on Christmas Island.

### **The status of asylum seekers under international law**

An asylum seeker is a person seeking asylum from persecution who has yet to be recognised as a 'refugee' as defined in Article 1A(2) of the Refugee Convention.<sup>2</sup> It should be noted that the United Nations High Commissioner for Refugees ('UNHCR') takes the view that a person who satisfies that definition is a 'refugee' without the need for a state determination to that effect.<sup>3</sup> As is well known, an asylum seeker has the right to flee persecution under the *Universal Declaration of Human Rights*,<sup>4</sup> Article 14. It is also widely known and recognised that due to the restrictive practices of Western nations, including Australia, many asylum seekers have to resort to the services of 'people smugglers' in order to exercise their right to seek asylum. Those who seek to come to Australia 'spontaneously' generally originate from countries where there is no lawful 'queue' in operation, including the opportunity to be resettled in Australia under the Humanitarian Program.

It should be noted that the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (the 'Migrant Protocol')<sup>5</sup> Article 19 expressly preserves the rights of asylum seekers under the Refugee Convention and prohibits

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<sup>2</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention').

<sup>3</sup> This is known as the 'declaratory' theory – see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, 1979, re-edited 1992) ('UNHCR Handbook') para 28.

<sup>4</sup> *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3<sup>rd</sup> sess, UN Doc A/810 (1948).

<sup>5</sup> *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime*, GA Res 55/25, Annex III, UN GAOR, 55<sup>th</sup> sess, supp No. 49 at 65, UN Doc A/45/49.

discrimination against them on the basis of their status as refugees. The purpose of the Migrant Protocol as stated in Article 2 is to:

[P]revent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while protecting the rights of smuggled migrants

This does not permit the deterrence and detention of asylum seekers / 'smuggled migrants'. Such measures are prohibited under other provisions of international law.

### **Detention of asylum seekers**

**It has been persuasively argued that the use of detention as a deterrent is a penalty and in contravention of Article 31 of the Refugee Convention.<sup>6</sup>**

UNHCR ExCom Conclusion No. 44<sup>7</sup> recognized four exceptions where the detention of asylum-seekers may be justified. These are:

- (i) to verify identity;
- (ii) to determine the basis of a refugee claim, although this cannot be used to justify detention for the whole determination procedure or for an unlimited period of time;
- (iii) when an individual has destroyed or presented false documents in order to mislead immigration authorities, although it cannot justify detention where individuals are unable to obtain documentation; and

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<sup>6</sup> Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies (Geneva: November 8 & 9, 2001), <[www.westnet.com.au/jackhsmi/roundtable-summaries.pdf](http://www.westnet.com.au/jackhsmi/roundtable-summaries.pdf)> on 2 July 2008. See Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' in E Feller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 185-252; Susan Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: the "Safe Third Country" Concept' in Jane McAdam (ed), *Moving On: Forced Migration and Human Rights* (Oxford: Hart Publishing, 2008), chapter 5.

<sup>7</sup> UNHCR ExCom Conclusion 44 (XXXVII) "Detention of Refugees and Asylum-Seekers," United Nations High Commissioner for Refugees, 37th Session, 1986, paragraph (b).

- (iv) to protect national security and public order, based on evidence that the individual has criminal precedents or affiliations which are likely to pose a risk to public order or national security such that would justify detention.

These four exceptions have been enshrined within Guideline 3 of the *UNHCR Guidelines for the Detention of Asylum Seekers*, which further says that detention should not be used for any other purpose other than those listed above. The Guideline states that using immigration detention as a form of deterrence (either to deter future asylum seekers or to dissuade those who have commenced their claims from pursuing them) or as a punitive measure for illegal entry into a country, 'is contrary to the norms of refugee law'.<sup>8</sup> These norms include the right of all refugees<sup>9</sup> under the Refugee Convention to free access to the courts of law of the country in which they find themselves, and freedom from discrimination as to 'race, religion or country of origin' (Article 3).<sup>10</sup>

The European Union has adopted a *Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*.<sup>11</sup> Article 18 of this Directive states that: 'member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.' Detention pending a determination is only permitted:

- following a specific decision by law that detention is objectively necessary for an efficient examination;
- where there is a strong, personal likelihood of absconding; or
- where the restriction is necessary for a quick decision to be made, in which case detention must not exceed two weeks.

Article 18 also states that where a person is held in detention, Member States shall ensure that there is a possibility of 'speedy judicial review.'

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<sup>8</sup> *UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 1999.

<sup>9</sup> Under the 'declaratory theory' of refugee law, a person is a refugee once they fulfill the requirements of Article 1A(2) of the Refugee Convention (the refugee definition).

<sup>10</sup> See also Art. 8 – exemption from exceptional measures on the ground of nationality.

<sup>11</sup> EU Council Directive 2005/83/EC of 1-2 December 2005.

The UN Working Group on Arbitrary Detention (UNWGAD) has outlined a number of changes necessary to prevent detention from being arbitrary in nature. These include:

- ensuring that any asylum-seekers who are placed in detention are brought promptly before a judicial or other authority;
- that asylum-seekers must be able to apply for a remedy to a judicial authority, who will then decide on the lawfulness of the detention, and may order release.<sup>12</sup>

Security is an overused criterion to justify the detention of asylum seekers and 'boat people'. For example, the Director General of the Australia Security and Intelligence Organisation (ASIO) revealed that, out of the 5986 security checks that ASIO had performed on boat people between 2000 – 2002, not a single one of them presented as a security risk.<sup>13</sup> In 2002, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade also heard that there was no evidence of a statistical linkage between asylum seekers and criminality (other than immigration violations).<sup>14</sup>

The same approach to detention onshore should apply to all 'unauthorised arrivals', that is, they should be released into the community once health and security checks have been completed. The Refugee Convention, Article 3 prohibits discrimination of refugees on the basis of 'race, religion or country of origin.' Detention of spontaneous asylum seekers / putative refugees on the basis of mode of arrival is tantamount to discrimination on the basis of 'country of origin.'

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<sup>12</sup> Report of the Working Group on Arbitrary Detention, Deliberation No. 5, *Situation regarding immigrants and asylum seekers*, E/CN.4/2000/4, 28 December 1999, pages 29–30.

<sup>13</sup> Chris Sidoti, National Spokesperson for the Human Rights Council of Australia, 'Without Prejudice: discrimination and refugees' (Speech delivered at the NSW State Conference, Sydney, 14 November 2002).

<sup>14</sup> Ophelia Field, *Alternatives to detention of asylum seekers and refugees*, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, 62.

## Processing issues

Our second major concern relates to the processing of asylum seekers on Christmas Island. Whilst the Refugee Convention is silent on the issue of procedures for refugee status determination, there are several guiding principles to be followed in implementing the Convention in national law. First, there is the principle that such implementation should be in 'good faith' and in accordance with the context and object and purpose of the Refugee Convention.<sup>15</sup> It is generally accepted that the Convention is a human rights instrument aimed at the protection, not deterrence, of asylum seekers. The Preamble of the Refugee Convention makes it clear that its object and purpose is to assure to refugees 'the widest possible exercise of ... fundamental rights and freedoms'.<sup>16</sup> The second guiding principle is the fundamental norm of natural justice or the right to a fair and unbiased hearing.

As stated above, Article 16 of the Refugee Convention requires that **all** refugees be accorded 'free access to the courts of law on the **territory**' of the Contracting State. As Christmas Island is excised territory for the purpose of the Migration Act, it is arguably inappropriate to provide a process beyond the preliminary 'screening' stage on Christmas Island. Further, the proposed process discriminates about this class of asylum seekers in comparison to those who arrive legally (with a visa) on mainland Australian territory, and who are processed in accordance with the provisions of the Migration Act. This latter group comprises the majority of asylum seekers in Australia.

As is well known, as a signatory to the Refugee Convention, Australia has an obligation not to 'refoule' asylum seekers (Article 33). Concerns about processing of asylum seekers can be addressed as amounting to constructive *refoulement*.

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<sup>15</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980) ('Vienna Convention').

<sup>16</sup> Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2007), p 8.

We are concerned that the same or similar problems that arose under the Pacific Plan when asylum seekers were processed by the Department of Immigration under internal regulations,<sup>17</sup> will arise in relation to Christmas Island.

We are similarly concerned about the competency and independence of the proposed internal review mechanism.

We are concerned about the proposal to give the role of external scrutiny to the Immigration Ombudsman. **The role of an Ombudsman is to make recommendations on administrative matters, not to adjudicate upon the status of an individual.** This is a matter which is only appropriate for a specialised judicial or quasi-judicial body. Whilst it may be considered appropriate for the Ombudsman to have a role in relation to administration of the detention regime under the Migration Act, it is not appropriate for the Ombudsman to adjudicate upon the status of an individual.

We are concerned about the potential for removal from 'Australia' under section 198 of the Migration Act, without regard for the principle of *non-refoulement*.<sup>18</sup>

We are deeply concerned about the practical ability of asylum seekers on Christmas Island to access legal advice and interpreters.

### ***Access to legal advice***

The combined effect of sections 256 and 193(1) of the *Migration Act* is that an 'unlawful non-citizen' who arrives by boat does not need to be informed of their right to seek legal advice.<sup>19</sup> This is contrary to Principle 13 of the *Body*

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<sup>17</sup> See Susan Kneebone, 'The Pacific Plan: the Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* (No 3 and 4) 696-721.

<sup>18</sup> See Associate Professor Susan Kneebone (Castan Centre for Human Rights Law), Submission 71 into the Inquiry into the administration and operation of the *Migration Act* 1958 (2005).

<sup>19</sup> Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998)196.

*of Principles for the Protection of All Persons under any form of Detention or Imprisonment*, which states that:

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.<sup>20</sup>

Similarly, Guideline 5 of the *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* states that:

If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
- (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance ...

This provision is consistent with the Refugee Convention, Article 16 (free access to courts of law on the territory).

### ***Interpreters***

The issue of interpreters, particularly on-site interpreters, is also vital in ensuring that detainees of immigration detention have sufficient access to advice about their situation and access to a fair hearing.

### **Conclusion**

In conclusion we are concerned that detention is to continue on Christmas Island for certain asylum seekers. We are concerned about the processing issues and, for all the reasons set out in the Submission in the Appendix, about the prospect of 'arbitrary detention' on Christmas Island (which is described as a 'maximum security environment'). We are concerned about the artificial nature of 'community' detention on Christmas Island.

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<sup>20</sup> *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*, GA Res 43/173, 43 UN GAOR Supp (No. 49) at 297, UN Doc A/43/49 (1988) Principle 13.

In principle, asylum seekers should be protected by the same principles which are to apply onshore. That is, subject to health and security checks, they should be released into the community mainland Australia. Release on Christmas Island will not satisfy the requirements of international law.

## Appendix – Original Submission

### 1 Introduction

The Castan Centre for Human Rights Law welcomes the opportunity to make a submission to the Committee on the *Inquiry into Immigration Detention in Australia*. The Castan Centre's mission includes the promotion and protection of human rights. It is in that context that we make this submission, which seeks to state our concerns with the current legal regime which sanctions arbitrary and indefinite detention of different categories of detainees, and other abuses of human rights. We would like to congratulate the Committee on its decision to re-open this issue, and to seek public comment.

Despite recent changes implemented in response to previous inquiries by amendments made to the *Migration Act 1958 (Cth)* in the *Migration Act (Amendments) Act 2005 (Cth)* and through the formulation of new *Immigration Detention Standards* and a *Detention Health Framework*, there are lasting concerns about the practice of immigration detention in Australia.<sup>21</sup>

As this issue has been the subject of a number of previous inquiries, to which we have made submissions,<sup>22</sup> we will confine our submission to fresh comments on law and policy, including information about practices in other jurisdictions. We will address the terms of reference (TOR) under the respective headings accordingly.

At the outset we would like to re-iterate our concern with the overarching policy of mandatory detention, and with the statutory formulation of the powers which support such detention (namely, sections 189, 196 and 198 of the *Migration Act*). This policy applies without discrimination to various classes of persons, including asylum seekers, children, visa-overstayers, and persons subject to deportation for cancellation of visas under section 501 of

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<sup>21</sup> See Human Rights & Equal Opportunity Commission, *Reports to the Minister under the HREOCA (2008)* Human Rights & Equal Opportunity Commission <<http://www.hreoc.gov.au/legal/HREOCA%5Freports/>> at 3 July 2008.

<sup>22</sup> Associate Professor Susan Kneebone (Castan Centre for Human Rights Law), Submission 71 into the Inquiry into the administration and operation of the *Migration Act 1958 (2005)*; Susan Kneebone and Gabi Crafti on behalf of the Castan Centre for the HREOC enquiry into Children in Detention (April 2002).

the *Migration Act*. Moreover, the statistics do not distinguish between categories of detainees in relation to whom different rationales for detention apply.<sup>23</sup> In particular, special considerations apply to some categories of detainees, such as asylum seekers and children. The use of general legislation in this context is concerning.<sup>24</sup>

Under international law a number of different standards apply to the detention of categories of persons, including the *Standard Minimum Rules for the Treatment of Prisoners*,<sup>25</sup> *United Nations Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment*,<sup>26</sup> *Convention on the Rights of the Child* (CRC),<sup>27</sup> *Convention relating to the Status of Refugees* (Refugee Convention),<sup>28</sup> *Universal Declaration of Human Rights*,<sup>29</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>30</sup> and the *International Covenant on Civil and Political Rights* (ICCPR).<sup>31</sup>

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<sup>23</sup> See [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20080711.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20080711.pdf) at 27 July 2008.

<sup>24</sup> See Kneebone, Submission 71 (2005) above n 2 .

<sup>25</sup> *Standard Minimum Rules for the Treatment of Prisoners*, adopted 30 August 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF/611, annex I, E.S.C. res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, UN Doc E/3048 (1957), amended E.S.C. res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc E.5988 (1977).

<sup>26</sup> *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*, GA Res 43/173, 43 UN GAOR Supp. (No. 49) at 297, UN Doc A/43/49, 1988.

<sup>27</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, A/RES/44/25 (entered into force 2 September 1990).

<sup>28</sup> UN Convention, and Protocol, Relating to the Status of Refugees, 1951 Convention and 1967 Protocol, 189 UNT.S. 150, entered into force April 22, 1954, Article 31(1).

<sup>29</sup> *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3<sup>rd</sup> Sess., UN Doc A/810 (1948).

<sup>30</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, S. Treaty Doc No. 100-200 (1988), 1465 UNT.S. 85 (CAT).

<sup>31</sup> *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976 (ICCPR).

## 2 The Terms of Reference

### The criteria that should be applied in determining how long a person should be held in immigration detention

As we have previously stated the effect of sections 189 and 196 of the *Migration Act*, read together, creates a mandatory, non-reviewable system of detention which arguably breaches the right of **all detainees** to freedom from arbitrary detention.<sup>32</sup> The *Migration Act* contains no guidance as to what justifies continuing detention.<sup>33</sup> There is no mechanism to decide whether the detention is reasonable or proportionate, and no requirement that an individual's particular circumstances be taken into account. There is clearly a difference between the circumstances of a person awaiting deportation for breach of visa conditions, and those of an asylum seeker.

It is only on rare occasions, due to reasons such as serious health concerns or age, that the Department of Immigration and Citizenship (DIAC) grants an asylum-seeker a visa (a 'bridging visa') to enable them to be released from detention. This creates a situation where there is a lack of transparency due to the lack of clear criteria.

The ICCPR, Article 9 requires:<sup>34</sup>

- i) The deprivation of liberty must be in accordance with procedures as are established by law;
- ii) The law itself and the enforcement of that law must not be arbitrary.

Australia's immigration detention policy satisfies the first requirement, as procedures for immigration detention are established by sections 189 and 196 of the *Migration Act*. The issue is with the second requirement, that the enforcement of the law under sections 189 and 196 is not 'arbitrary' in nature.

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<sup>32</sup> Kneebone, Submission 71 (2005), 8.

<sup>33</sup> *Ibid.*

<sup>34</sup> Article 9 states: 'No one shall be subject to arbitrary arrest, detention or exile.' Also relevant is Article 3 which states: 'Everyone has the right to life, liberty and security of the person'.

In several cases, the Human Rights Committee (HRC) has found that Australia's mandatory migration policies do indeed amount to arbitrary detention, in breach of Article 9 of the ICCPR. In the well known case of *A v Australia*,<sup>35</sup> the Committee said that:

[T]he notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice.<sup>36</sup>

Importantly, the HRC decided in this case that mandatory detention is not arbitrary *per se* – it is often justified while **initial identity checks and immigration screening** takes place – but that continued detention would be arbitrary if it was not necessary or justified in the circumstances and not proportional to the aims pursued.<sup>37</sup> They said that detention should not continue beyond the period for which the government can provide appropriate justification.

Usual factors relevant to justifying detention are whether the detainee poses a **threat to national security; the likelihood that they will abscond; and their lack of cooperation**. In the absence of any such factors, any prolonged detention will be considered arbitrary, even if the entry was illegal.<sup>38</sup> As such, once the relevant health and safety checks have been conducted, it becomes the government's responsibility to provide any further reason for holding a particular individual in detention.

As stated in a previous submission, the Canadian *Immigration and Refugee Protection Act 2002* (IRPA) clarifies that persons can be arrested and detained for three principal reasons: **identity, flight risk or danger to the public**.

In the case of asylum seekers, special considerations (as discussed below) apply. Their individual circumstances must be taken into account, but as a rule, they are held in detention under section 196 until they are either granted

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<sup>35</sup> Communication No 560/1993 CCPR/C/59/D/560/1993, 30 April 1997 (1997).

<sup>36</sup> *A v Australia* (1997), Communication No 560/1993 CCPR/C/59/D/560/1993, 30 April 1997, para 9.2.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

a visa or deported. They are held there even though it has been repeatedly decided by the HRC that, while initial detention is justified, the Australian Government has failed to justify *continued* detention where security and health checks have already cleared a detainee as a security threat. In regards to justifying mandatory detention in regards to fear of absconding by the detainee, the HRC held (in the cases of *C v Australia*,<sup>39</sup> *Baban v Australia*<sup>40</sup> and *Bakthiyari v Australia*<sup>41</sup>) that immigration detention was arbitrary because the government failed to show that there were not '**less invasive means**' available to make sure detainees do not abscond, such as the use of reporting obligations or sureties.<sup>42</sup>

In summary, in general **detention is not justified once health and security checks have led to a positive decision, unless there is a risk that a person will abscond.** In the case of persons who are awaiting deportation for breach of visa conditions, different considerations apply, in contrast for example, to an asylum seeker who is pursuing legitimate avenues of review.

***Continued and indefinite detention without review is 'arbitrary'***

ICCPR Article 9(4) provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The normal practice in other Western jurisdictions is to provide for an automatic review of detention after a certain period. Australia is one of few countries that does not provide for such review. The Committee in the 2006 *Inquiry into the Operation of the Migration Act 1958* reached the conclusion that:

...the consequences of mandatory detention demonstrate that immigration detention, in its present form, is unable to meet the twin of

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<sup>39</sup> (2002) Communication No. 900/1999, 13 November.

<sup>40</sup> (2001) Communication No. 1014/2001, 18 September.

<sup>41</sup> (2002) Communication No. 1069/2002, 29 October.

<sup>42</sup> Savitri Taylor, 'Immigration Detention Reforms: A Small Gain for Human Rights' (2006) 13 *Agenda* 49, 50.

objectives of preserving the integrity of the migration program while ensuring the humane treatment of non-nationals in detention.<sup>43</sup>

The Committee made various recommendations for change as a result of its findings – most notably, that the *Migration Act* be amended so that mandatory detention is only used for the purposes of verifying identity, and to perform health and security checks, and that such detention be limited to a period of ninety days.<sup>44</sup>

In *Al-Kateb v Godwin*,<sup>45</sup> the High Court said that it is theoretically possible to keep stateless people (those who are not waiting a determination, and yet have no prospect of removal or deportation in the reasonable foreseeable future) in immigration detention for the rest of their life, even though they have committed no crime. This finding is contrary to ICCPR Article 9(4).

### ***Conditions of detention – prohibition of Cruel, Degrading, Inhumane Treatment***

Australia's mandatory detention policy is arguably in breach of other fundamental human rights enshrined in international law – namely, detention may be seen as a violation of Articles 7 and 10 of the International Covenant of Civil and Political Rights, which state respectively that:

Article 7: No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment.<sup>46</sup>

Article 10: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The prohibition on torture, cruel, inhumane or degrading treatment under Article 7 is a rule of 'jus cogens' in international law and an absolute human right from which there can be no derogation.

One basis for Australia's possible breach of these two Articles is due to certain treatment of people within immigration detention facilities. The Law

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<sup>43</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the administration and operation of the Migration Act 1958 Report (2005 – 2006)*, 6.140.

<sup>44</sup> *Ibid* 6.145.

<sup>45</sup> (2004) 219 CLR 562.

<sup>46</sup> A similar provision is stated in the *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*, GA Res 43/173, 43 UN GAOR Supp. (No. 49) at 297, UN Doc A/43/49, 1988.

Council cites concerns raised by various reports from the Human Rights and Equal Opportunity Commission (HREOC) and by decisions from the Commonwealth Ombudsman, which have reported inappropriate use of force in subduing detainees, and the use of isolation detention.<sup>47</sup> In regards to isolation detention, it has been found that many detention centres that operate within Australia separate detainees who are seen as a threat to themselves and others. They are segregated from the main detention population and locked in their rooms for up to 20 hours a day. There are some cases where people have been subjected to this sort of isolation detention for up to 8 months at a time – this in itself may amount to inhuman or degrading treatment contrary to international law.<sup>48</sup>

***The problem with the current policy– uncertainty of duration leads to mental harm***

Another key reason why Australia’s immigration detention policy may be seen to be in breach of both Articles 7 and 10 of the ICCPR, as well as other international law principles, is due to the significant incidences of mental harm that such detention inflicts upon detainees. The causing of severe mental suffering is arguably ‘cruel and unusual treatment’ or torture under the ICCPR, and also under the *Convention Against Torture and Cruel, Inhumane and Degrading Treatment*. Indeed, in *C v. Australia*, the HRC found Australia in breach of Article 7 for the failure to release a detainee after it had become aware of his psychiatric condition (which developed as a result of detention).<sup>49</sup>

Arguably a primary cause of such mental harm is due to not only the length of time spent in detention, but also the uncertainty about how much longer the detention will last.<sup>50</sup> Statistics provided by DIAC on 27 July 2007 show that of 231 immigration detainees at the Villawood Detention Centre, 77 people had been in detention for over a year. HREOC, after inspecting mainland

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<sup>47</sup> Law Council of Australia, *Mandatory Detention of Asylum Seekers* (2002) <[www.lawcouncil.asn.au/get/submissions/2106650995.pdf](http://www.lawcouncil.asn.au/get/submissions/2106650995.pdf)> on 3 July 2008.

<sup>48</sup> Mary Crock and Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and irregular Migration in Australia* (Federation Press, 2006) 198.

<sup>49</sup> *C v Australia* (2002), Communication No. 900/1999, 13 November.

<sup>50</sup> *Human Rights and Equal Opportunity Commission, Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007* (2007) 12.

detention facilities in 2007, met with many detainees who expressed ‘extreme frustration and depression at the length of time they had been detained.’ They concluded that the length of detention, combined with the uncertainty of when it will end, will invariably lead to mental health problems.<sup>51</sup>

Similarly, the Senate and Legal Constitutional Affairs Committee in the *Inquiry into the Administration and Operation of the Migration Act 1958*<sup>52</sup> received significant amounts of evidence regarding the psychological and mental harm that prolonged and indeterminate detention causes. In particular, the submission by Royal Australia and New Zealand College of Psychiatrists (RANZCP) found that rates of mental illness, such as post-traumatic stress disorder, depression, and anxiety, are very high among those in immigration detention, and that detention may not only be the cause of such mental illnesses, but also exacerbates them.<sup>53</sup>

In addition to the breach of Article 7 of the ICCPR, Australia’s immigration detention policy also breaches Article 12.1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which states that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>54</sup>

In the 2006 Inquiry, the Committee received a vast body of evidence which showed that the health care that detainees receive within immigration detention facilities are inadequate, and that the staff are ill-trained to deal with the health issues of the detainees.<sup>55</sup> Not only does this breach Article 12 of the ICESCR; it also exacerbates the cruel and inhumane treatment experienced by people in detention facilities, and is further proof that a change to the current criteria regarding the length of immigration detention is completely necessary to counteract such problems.

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<sup>51</sup> Ibid.

<sup>52</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Administration and Operation of the Migration Act 1958* (2005 – 2006).

<sup>53</sup> The Royal Australian and New Zealand College Of Psychiatrists, *Submission 108 to the Senate Legal and Constitutional References Committee’s Inquiry into the Administration and Operation of the Migration Act 1958*, 2.

<sup>54</sup> 993 UNT.S. 3, entered into force Jan 3, 1976.

<sup>55</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Administration and Operation of the Migration Act 1958 Report* (2005 – 2006) 6.60 – 6.92.

## ***Detention of asylum seekers***

An asylum seeker is a person seeking asylum from persecution who has yet to be recognised as a 'refugee' as defined in Article 1A(2) of the Refugee Convention.<sup>56</sup> It has been persuasively argued that the use of detention as a deterrent is a penalty and in contravention of Article 31 of the Refugee Convention.<sup>57</sup>

UNHCR ExCom Conclusion No. 44<sup>58</sup> recognized four exceptions where the detention of asylum-seekers may be justified. These are:

- (v) to verify identity
- (vi) to determine the basis of a refugee claim, although this cannot be used to justify detention for the whole determination procedure or for an unlimited period of time
- (vii) when an individual has destroyed or presented false documents in order to mislead immigration authorities, although it cannot justify detention where individuals are unable to obtain documentation; and
- (viii) to protect national security and public order, based on evidence that the individual has criminal precedents or affiliations which are likely to pose a risk to public order or national security such that would justify detention.

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<sup>56</sup> *Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 ('Refugee Convention'). But note that the United Nations High Commissioner for Refugees ('UNHCR') takes the view that a person who satisfies that definition is a 'refugee' without the need for a determination to that effect. This is known as the 'declaratory' theory – see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, 1979, re-edited 1992) ('UNHCR Handbook'), para. 28.

<sup>57</sup> Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies (Geneva: November 8 & 9, 2001), <[www.westnet.com.au/jackhsmi/roundtable-summaries.pdf](http://www.westnet.com.au/jackhsmi/roundtable-summaries.pdf)> on 2 July 2008. See Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' in E Feller et al eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 185-252; Susan Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: the "Safe Third Country" Concept' in Jane McAdam (ed.), *Moving On: Forced Migration and Human Rights* (Oxford: Hart Publishing, 2008), chapter 5.

<sup>58</sup> UNHCR ExCom Conclusion 44 (XXXVII) "Detention of Refugees and Asylum-Seekers," United Nations High Commissioner for Refugees, 37th Session, 1986, paragraph (b).

These four exceptions have been enshrined within Guideline 3 of the *UNHCR Guidelines for the Detention of Asylum Seekers*, which further says that detention should not be used for any other purpose other than those listed above. The Guideline states that using immigration detention as a form of deterrence (either to deter future asylum seekers or to dissuade those who have commenced their claims from pursuing them) or as a punitive measure for illegal entry into a country, 'is contrary to the norms of refugee law'.<sup>59</sup> These norms include the right of all refugees<sup>60</sup> under the Refugee Convention to free access to the courts of law of the country in which they find themselves, and freedom from discrimination as to 'race, religion or country of origin' (Article 3).<sup>61</sup>

The European Union has adopted a *Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*.<sup>62</sup> Article 18 of this Directive states that: 'member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.' Detention pending a determination is only permitted:

- following a specific decision by law that detention is objectively necessary for an efficient examination;
- where there is a strong, personal likelihood of absconding; or
- where the restriction is necessary for a quick decision to be made, in which case detention must not exceed two weeks.

Article 18 also states that where a person is held in detention, Member States shall ensure that there is a possibility of 'speedy judicial review.'

The UN Working Group on Arbitrary Detention (UNWGAD) has outlined a number of changes necessary to prevent detention from being arbitrary in nature. These include:

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<sup>59</sup> UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999.

<sup>60</sup> Under the 'declaratory theory' of refugee law, a person is a refugee once they fulfil the requirements of Article 1A(2) of the Refugee Convention (the refugee definition).

<sup>61</sup> See also Art. 8 – exemption from exceptional measures on the ground of nationality.

<sup>62</sup> EU Council Directive 2005/83/EC of 1-2 December 2005.

- ensuring that any asylum-seekers who are placed in detention are brought promptly before a judicial or other authority;
- that asylum-seekers must be able to apply for a remedy to a judicial authority, who will then decide on the lawfulness of the detention, and may order release.<sup>63</sup>

### **Summary**

- The current legislation (*Migration Act*) fails to specify the criteria upon which a person's continued detention is justified once security (identity) and health checks had been cleared.
- It also fails to provide criteria that distinguish particularly vulnerable categories of detainees, including asylum seekers \ refugees, families and children, mentally ill persons.
- It is generally agreed that detention is otherwise justified where there is a risk that a person may abscond.
- In general a person should only be held in continuing detention after a maximum period, under judicial supervision.

### **The criteria that should be applied in determining when a person should be released from immigration detention following health and security checks**

The criteria to be applied, as stated above, is that all those who have completed health and security checks should be released from immigration

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<sup>63</sup> Report of the Working Group on Arbitrary Detention, Deliberation No. 5, *Situation regarding immigrants and asylum seekers*, E/CN.4/2000/4, 28 December 1999, pages 29–30.

detention, where they have been found to pose no risk to health and security, and once their identity has been verified.

Security is an overused criterion in relation to asylum seekers and 'boat people'. For example, the Director General of the Australia Security and Intelligence Organisation (ASIO) revealed that, out of the 5986 security checks that ASIO had performed on boat people between 2000 – 2002, not a single one of them presented as a security risk.<sup>64</sup> In 2002, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade also heard that there was no evidence of a statistical linkage between asylum seekers and criminality (other than immigration violations).<sup>65</sup>

### ***Risk of Absconding as an Additional Criterion***

One of the main justifications for immigration detention has been that it is necessary to prevent persons from absconding. In *C v Australia*, the Australian Government argued that it is 'reasonably suspected that if people were not detained, but rather released in the interim into the community, there would be a strong incentive for them not to adhere to the conditions of release and to disappear into the community.'<sup>66</sup> The statistics have consistently shown that the highest number of 'illegal immigrants' in the community is the visa overstayer category. Such persons are more likely to abscond. However asylum seekers are primarily concerned with reaching a safe haven and are anxious to regularise their status. They are less likely to abscond. There is little evidence to suggest that asylum seekers abscond if they are released into the community, either in Australia or overseas.<sup>67</sup>

The Human Rights Committee has accepted that prevention of absconding is a legitimate use for detention.<sup>68</sup> As such, it is suggested that, in conjunction with any health and security checks to be performed, that the criteria for

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<sup>64</sup> Chris Sidoti, National Spokesperson for the Human Rights Council of Australia, 'Without Prejudice: discrimination and refugees' (Speech delivered at the NSW State Conference, Sydney, 14 November 2002).

<sup>65</sup> Ophelia Field, *Alternatives to detention of asylum seekers and refugees*, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, 62.

<sup>66</sup> *C v Australia* (2002), Communication No. 900/1999, 13 November, para. 49.

<sup>67</sup> Crock et al, 182.

<sup>68</sup> Field, above, 25.

release from immigration detention should also depend on a detainee's flight risk. **Such a decision should be made under judicial supervision.**

### **Options to expand the transparency and visibility of immigration detention centres**

As many of the operational aspects of IDCs have been canvassed by previous enquiries, we confine our comments to the rights of detainees in relation to access to legal advice. We also provide a comment upon the adequacy of interpretation services.

The HRC has repeatedly expressed concern about the fact that there is no obligation under Australian law for government officials in Australia to inform detainees of their right to seek legal advice. In the past Australia has actually prevented non-governmental organisations from contacting detainees to inform them of this right. The combined effect of sections 256 and 193(1) of the *Migration Act* is that an 'unlawful non-citizen' who arrives by boat (in most cases this refers to asylum seekers) does not need to be informed of their right to seek legal advice.<sup>69</sup> This is contrary to Principle 13 of the *Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment*, which states that:

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.<sup>70</sup>

Similarly, Guideline 5 of the *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* states that:

If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:

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<sup>69</sup> Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) 196.

<sup>70</sup> *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*, GA Res 43/173, 43 UN GAOR Supp. (No. 49) at 297, UN Doc A/43/49, 1988, Principle 13.

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
- (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance ...

This provision is consistent with the Refugee Convention, Article 16 (free access to courts of law on the territory).

### ***Interpreters***

The issue of interpreters, particularly on-site interpreters, is also vital in ensuring that detainees of immigration detention have sufficient access to advice about their situation. As of 2007, the only centre that employed on-site interpreters was the Northern Immigration Detention Centre. The rest exclusively employed the Telephone Interpreting Service (TIS).<sup>71</sup> While TIS may be an adequate interpreting device when dealing with basic communication, there are times where it fails to assist detainees sufficiently. In fact, the absence or unavailability of interpreters has contributed to disputes involving detainees.<sup>72</sup> Further, it has been held that a reliance on the TIS restricts communication between immigration detention staff and detainees on a daily basis, thus, failing to build much-needed rapport and understanding between both sides.<sup>73</sup> Where possible, it would be in the best interests of both staff and detainees to ensure that on-site interpreters are provided, and that reliance on TIS should be limited to only when absolutely necessary.

Concerns regarding the provision of legal assistance and aid, along with concerns involving the adequacy of interpreter services offered at IDCs are unfortunately exacerbated by the remoteness of many of the IDCs.<sup>74</sup> The remoteness of the IDCs ensure that many of the problems of access to legal advice and interpreting services will remain unresolved.

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<sup>71</sup> Human Rights and Equal Opportunity Commission (2007), 40.

<sup>72</sup> Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998), 47.

<sup>73</sup> Human Rights and Equal Opportunity Commission (2007), 41.

<sup>74</sup> Senate Committee (2006) 185.

## **The preferred infrastructure options for contemporary immigration detention**

As stated above, IDCs accommodate a range of 'unlawful non-citizens' that include, in addition to asylum seekers and children, people who have overstayed their visa, people in breach of their visa conditions, people who were refused entry at Australia's international airports, illegal fisher-folk, and persons subject to deportation following cancellation of a visa on the basis of 'bad character'. One of the issues, as is well known, is the lack of segregation of detainees from these categories. Another is the use of remote facilities. Although some of the latter have been closed, some facilities still exist far from major centres where support services are best. At present, there are five immigration detention centres around Australia that are either in operation or maintained as contingencies:

- Christmas Island Detention Centre;
- Maribyrnong Immigration Detention Centre;
- Northern Immigration Detention Centre;
- Perth Immigration Detention Centre, and;
- Villawood Immigration Detention Centre.<sup>75</sup>

***The subject of offshore processing and detention centres has also caused controversy, with the offshore location of the Christmas Island centre creating significant problems for detainees attempting to access vital services such as adequate legal assistance, interpreters, and medical professionals.***

The current use of IDCs is fraught with well chronicled problems. In one report, over seventeen different breaches of the ICCPR and/or CRC were documented.<sup>76</sup> As a matter of priority, it has consistently been recommended

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<sup>75</sup> National Communications Branch, *Location of Operational Facilities* (2008) Department of Immigration and Citizenship <<http://www.immi.gov.au/managing-australias-borders/detention/facilities/locations/index.htm>> at 3 July 2008.

<sup>76</sup> Human Rights and Equal Opportunity Commission, *Villawood Immigration Detention Centre Redevelopment* (2006) para 11.

that the government demolish Stage 1 at the Villawood Immigration Detention Centre and replace it with a new facility as the current infrastructure is not appropriate for asylum seekers.<sup>77</sup> Further, prompt renovations have been recommended at Perth Immigration Detention Centre due to the facility lacking crucial services and infrastructure needs.<sup>78</sup>

More broadly, the very fact of immigration detention is one of the main causes of mental health problems amongst the asylum seeker population that can only be cured or alleviated upon the discontinuation of immigration detention in its present form. Indeed, the report by the Australian Broadcasting Corporation recently noted that a team of psychiatrists had identified a new mental health condition among detainees of IDCs. The psychiatrists suggested that it was more to do with the protracted and indefinite process of seeking asylum and immigration detention, rather than from the detainees' experiences in fleeing their countries.<sup>79</sup>

The detention policy needs to take into account the needs of its different detainee population. In particular consideration should be given to excluding those who are not at risk of absconding from the 'closed' IDC policy. This includes asylum seekers and children.

### ***Detention of children***

The *National Inquiry into Children in Immigration Detention* found that the operation of sections 189 and 196 of the *Migration Act*, the *Migration Regulations* regarding Bridging Visa E 051 and the application of those laws by the Minister and the Department place the Commonwealth in breach of fundamental CRC and ICCPR principles.<sup>80</sup> These principles include that children should only be detained as a measure of last resort (CRC, Article 37(b)), that children should only be detained for the shortest appropriate

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<sup>77</sup> Human Rights and Equal Opportunity Commission (2007) para 25.

<sup>78</sup> *Ibid* para. 26.

<sup>79</sup> Stephen de Tarczynski, 'AUSTRALIA: Concerns for Refugees Despite Better Treatment', *Inter Press Service*, 10 June 2008.

<sup>80</sup> Human Rights and Equal Opportunity Commission (*Children* 2004) 214.

period of time (CRC, Article 37(b)) and that children should not be arbitrarily detained (CRC, Article 37(b); ICCPR, Article 9(1)).

Moreover, many children in immigration detention arrive in Australia with considerable pre-existing trauma that is often exacerbated by the oppressive environments of IDCs. HREOC found that the longer children were in detention the more likely it was that they would suffer serious mental harm.<sup>81</sup> Due to a host of factors that include conditions of detention, it has been found that children in immigration detention are not in a position to enjoy the highest attainable standard of health, as required by the CRC.<sup>82</sup> Many mental health experts with experience dealing with children in IDCs state that the only effective way to address the mental health problems caused or aggravated by detention is to remove them completely from that environment.<sup>83</sup> This more than anything attests to the fact that IDCs are not the preferred infrastructure option for immigration detention of families in any circumstances.

The government has attempted to respond to these concerns by the *Migration Amendment (Detention Arrangement) Acts 2005 (Cth)*. Subsections 4AA(1) and (2) of the Act state that the detention of children in IDCs is ‘a measure of last resort’. However, despite this legislative assurance, children are still being detained at IDCs before other alternatives are provided, in accordance with the mandatory detention policy of the Government. ***Further, while Government attempts to provide ‘residence determinations’ for children and families, this is still only an alternative form of detention, rather than an alternative to detention. As a result, these provisions for alternative detention still fall short of international human rights obligations,<sup>84</sup> and even more alarmingly, continue to adversely impact on the mental health of children.***

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<sup>81</sup> Ibid. 430.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Human Rights and Equal Opportunity Commission (*Villawood* 2006) para. 14.

**Options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing (IRH), Immigration Transit Accommodation (ITA) and community detention**

***IDCs***

As many of the issues in relation to health services, recreation and education in IDCs have been canvassed in recent reports, and as a number of improvements have been introduced, we will not deal with this TOR in detail, except to comment on the outsourcing of IDC management and service provision.

***Outsourcing of IDC management and service provision***

The provision of detention services at Australia's IDCs has been outsourced since November 1997. Presently, Global Solutions Limited (GSL) are contracted to operate all Australian IDCs. In consultation with HREOC and the Commonwealth Ombudsman Office, the Commonwealth developed the *Immigration Detention Standards* (IDS). These Standards are intended to ensure that people in immigration detention are treated with respect and dignity, and also to guarantee the compliance of Australian immigration services with relevant domestic and international law.

However, a recent ANAO Audit Report<sup>85</sup> into the structure and effectiveness of the current contract between the Commonwealth and GSL raised serious concerns as to whether it adequately addresses the best practice for public sector outsourcing.<sup>86</sup> The ANAO found that the contract did not establish clear expectations for the level and quality of services to be delivered and that DIAC's ability to monitor the performance of GSL and its respective subcontractors was compromised by the lack of clarity in standards and

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<sup>85</sup> Joint Standing Committee on Migration, Audit Report No. 1 2005-2006, *Review of Audit Report No. 12005-2006: Management of Detention Centre Contracts – Part B* (2005).

<sup>86</sup> *Ibid* 3.

associated performance measures.<sup>87</sup> Further, the Palmer Report found that the current detention services contract was flawed and that it did not allow for delivery of the immigration detention policy results that are expected by the Government. The report also stated that the monitoring arrangements for compliance with IDS lacked any focused mechanism for external accountability and professional review.<sup>88</sup>

In light of these findings, DIAC has undertaken a number of initiatives to remedy many of its deficiencies. This has been done namely through the establishment of the Palmer Implementation Plan and the Detention Contract Management Group. However, persistent problems continue. Specifically, the failure of Government to codify the IDS in legislation fails to provide the transparency and accountability required in the provision of government services.<sup>89</sup> Failure to codify the IDS means that the minimum standards are an insufficient guide on what current and future service providers must do to ensure conditions in immigration detention comply with domestic and international law. Moreover, it means the mechanisms for scrutinising whether or not the service provider complies with them are inadequate since the responsibility of ensuring compliance is placed upon the service provider themselves.<sup>90</sup> This suggests that the current process is inherently flawed.

It is unsatisfactory for the government to contract out its obligations in this way without ensuring adequate accountability mechanisms. Moreover the government makes itself vulnerable by its failure to ensure adequate accountability mechanisms.

### ***Services across Immigration Residential Housing (IRH)***

IRH aims to provide family-style housing where detainees possess greater freedom, particularly with regards to their domestic circumstances. There are

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<sup>87</sup> Ibid.

<sup>88</sup> Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005) 153.

<sup>89</sup> Human Rights and Equal Opportunity Commission, *Inquiry into the administration and operation of the Migration Act 1958* (2005), 234.

<sup>90</sup> Human Rights and Equal Opportunity Commission, *Australia's compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (2008) para 21.

currently two IRH centres in operation located in Sydney and Perth. Both feature separate houses and facilities that have been described as 'comfortable'.<sup>91</sup> Conditions within IRH centres are less harsh as they are in IDCs and some detainees have expressed their preference for this form of immigration detention. However, it is important to emphasise that it is still an alternative form of immigration detention. Detainees are restricted in their movements and must be accompanied by detention staff when visiting external sites.<sup>92</sup> An unfortunate consequence of this is that the typical mental health problems associated with restricted movement and uncertainty as to the future and that are widespread in IDCs also apply to detainees in IRH centres.<sup>93</sup>

It has been noted by HREOC that IRH centres do not seem to be used to their full capacity and that the activities available at the facilities are quite limited. As a result, it is recommended that use of IRH centres be expanded and maximised so that fewer people are subjected to IDCs.

However such form of **detention must also enable detainees to work and to mix with the community as appropriate.** As this form of detention applies mainly to asylum seekers, it is important to begin the process of integration into the community and to provide them with a meaningful existence.

### ***Services across Immigration Transit Accommodation (ITA)***

ITA centres serve to provide temporary accommodation to those who are short-term detainees or are a low security risk before they are transferred to other facilities or deported. HREOC assessed the Brisbane ITA centre as having adequate security, recreational and housing services, and that in general it is a satisfactory facility for transitional accommodation.<sup>94</sup>

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<sup>91</sup> Human Rights and Equal Opportunity Commission (2007) 13.

<sup>92</sup> Ibid 14.

<sup>93</sup> Human Rights and Equal Opportunity Commission (2006) para 4.1.1.

<sup>94</sup> Human Rights and Equal Opportunity Commission (2007) 15.

### ***Services across community detention***

As a result of subsection 197AB(1) of the *Migration Amendment (Detention Arrangement) Acts 2005 (Cth)*, the Minister has the power to make a 'residence determination' for individual detainees to be able to live in specified community locations. As at 2 November 2007, 206 detainees have been granted residence detention, otherwise referred to as community detention.<sup>95</sup>

Community detention allows detainees to live unsupervised in the community and with the community and welfare support of non-government organisations such as the Australian Red Cross (ARC). Detainees are prohibited from engaging in paid work. The ARC rents apartments or houses for detainees and provides them with a living allowance that is transferred automatically into a bank account for a detainee to access as needed. This is a prudent service that will ensure a degree of financial security. The living allowance is used by detainees to pay for living expenses such as food and electricity, although it is insufficient to purchase more substantial items such as televisions.<sup>96</sup> Detainees do not have access to Medicare, however, their medical expenses are subsidised by ARC.

As stated in HREOC's 2007 report, in general, detainees in community detention were happy with their conditions and valued the opportunity to engage in community life.<sup>97</sup> Consequentially, if detention continues to be the preferred measure for dealing with unlawful non-citizens, then community detention or residence determinations should be the primary form of detention. In order for this to occur, the *Migration Amendment (Detention Arrangement) Acts 2005 (Cth)* requires further amendment to expand the possibility for residency determinations beyond the discretion of the Minister.<sup>98</sup> Further, the eligibility criteria for residence determinations should be expanded to encompass adults who display a preference for that

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<sup>95</sup> Ibid 16.

<sup>96</sup> Ibid 17.

<sup>97</sup> Ibid.

<sup>98</sup> *Migration Amendment (Detention Arrangement) Acts 2005 (Cth)* s 197AB(1).

alternative form of detention. It is unclear why the circumstances for the exercise of the Minister's discretion need to be 'unique' or 'exceptional circumstances', as the current provisions state.<sup>99</sup>

In addition to expanding the use of community detention, ***it is preferable to offer appropriate detainees the opportunity to engage in paid work within the community and to undertake study for a qualification.***<sup>100</sup> The current arrangement that allows only superficial involvement in community life fails to adequately prepare detainees who are eventually granted permanent or extended visas for life outside detention. Moreover, the blanket prohibition on such measures seems to suggest to the detainees that they are on borrowed time and that undertaking such activities are pointless since they are unlikely to succeed in their attempts to avoid deportation. There is no reason why detainees who are considered to be mentally healthy, qualified and eager to be barred from undertaking work or study that would aid not only their stay in detention but also help them prepare for a potential future as Australian citizens.

### ***Services across alternative detention***

Finally, there is scope for alternative detention within Australia's immigration detention policy that includes people detained in private houses, hospitals and motels, and that require supervision by a 'designated person'. This is a preferred form of detention particularly when placing mentally unwell detainees in private homes, rather than the conditions they would otherwise endure in IDCs.<sup>101</sup> However, the significant burden placed upon the designated person in order to supervise and care for the detainee, along with the restriction of the detainee's liberty by being under constant watch demonstrates that this is not generally an ideal form of detention.

The current forms of detention that are featured in Australia fall short of both international law and the expectations of a reasonable person. Later in the

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<sup>99</sup> *Migration Amendment (Detention Arrangement) Acts 2005* (Cth) ss. 197AB and 195A.

<sup>100</sup> ICESCR, Article 6 recognises the right to work. ***As a party to this convention, Australia should extend this right to asylum seekers within Australia.***

<sup>101</sup> Human Rights and Equal Opportunity Commission (2006) para 4.1.2.

submission, other alternatives to immigration detention will be discussed and analysed with the intention of putting forward an alternative model that is more humane and respectful of a detainee's dignity and worth as an individual.

**Options for additional community-based alternatives to immigration detention by:**

**a) inquiring into international experience; and**

**b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;**

***Alternatives***

A comprehensive list of alternatives to detention in other countries, and how effective they are has been created and can be accessed at <http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf>

***Australia's current detention alternatives***

The main complaint about Australia's current alternatives, such as residential housing projects (RHPs) and community based detention, is that they are alternative forms of detention, rather than alternatives to detention.

While RHPs are less oppressive than immigration detention centres, their structure indicates that they are still a method of detention. This is due to the excessive surveillance and restrictions within them, such as the use of cameras; security guards patrolling the site 24 hours a day; routine headcounts; body searches from children on their way and returning from school; and the requirement that detainees are not allowed to leave the grounds unless accompanied by a DIAC officer.<sup>102</sup>

Similarly, while the Minister for Immigration is empowered to declare places within the community an alternative place of detention (APD), including hotels, mental health facilities, and family homes, it has been observed that the government does not widely utilise APD arrangements for people to live in the community.<sup>103</sup> Furthermore, APD amounts to detention, given the asylum-

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<sup>102</sup> Commonwealth, *Parliamentary Debate*, House of Senate, 16 June 2004, 23896 (Senator Nettle of NSW, on Immigration Residential Housing Project).

<sup>103</sup> Amnesty International Australia, *The Impact of Indefinite Detention: The Case to Change Australia's Mandatory Detention Regime Preliminary Report*, 23 March 2005

seeker's restricted movement to a specific setting that has been designated as the detention environment. No support is given to people detained under APDs – they have inadequate access to both social workers and welfare arrangements.<sup>104</sup> While APDs are undoubtedly an improvement to detention centres, they still do not allow for freedom of movement, as the detainees are constantly monitored by guards and need to be accompanied by a designated person, approved by the DIAC, whenever they wish to leave the APD.

Where similar alternatives have been used in European countries, there have been reported problems very similar to those that arise from detention centres – that is, feelings of depression and a loss of independence from detainees. More viable, less restrictive alternatives are thus required.<sup>105</sup> In this regard, Australia should follow the lead of the methods adopted by various other countries.

Many countries allow for asylum seekers to be released into the community pending their applications, utilising detention facilities only to those who pose a security or health threat to the community, and those who show a high risk of absconding if they were to be released. The main alternatives to detention in most countries is in accordance with the examples given under Guideline 4 of the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, with the primary methods adopted being either through the use of bail/bond/surety, or by imposing reporting obligations on asylum seekers.

### ***Sweden's alternatives to detention***

Asylum seekers have their detention reviewed on a case-by-case basis, and many are granted supervised release from detention. Under supervised release, an asylum seeker may be required to report to the police throughout the week, or to surrender their passports or other documents to them. The

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<<http://www.amnesty.org/en/library/asset/ASA12/001/2005/en/dom-ASA120012005en.html>>  
at 30 June 2008.

<sup>104</sup> Ibid.

<sup>105</sup> Ophelia Field, *Practical alternatives to the administrative detention of asylum seekers and rejected asylum seekers* (1997) < <http://www.ecre.org/files/alterns.pdf> > at 5 July 2008.

starting point in Swedish Law is that authorities should take the least restrictive measures necessary in any given case.<sup>106</sup>

Alternatively, asylum seekers may also be released into an open centre. Residence within such a centre is not compulsory, and persons may choose to live within the community and make their own housing arrangements if they wish. Those with relatives or family residing in Sweden generally opt for this. Financial assistance is conditional upon participating in training courses within the open centres, rather than upon residence in a centre. However, comparative statistics on the compliance rates of these two groups of asylum seekers – those living in centres and those living independently – are not available.<sup>107</sup>

### **Canada**

Canada allows for the release on bail, bond or surety, and such a release is usually accompanied by supervision, usually by a family member of the released person, or by an organisation. The State-funded Toronto Bail Program tries to maximise the availability of bail by offering to supervise asylum seekers who have no family or other eligible people that can act as a guarantor or surety. So long as certain criteria are met, a person may be released upon request and supervised under the Program without a need to pay a bond. The main aim of the program is ‘to remove the element of financial discrimination from the bond system.’<sup>108</sup> The form such supervision takes is through regular reporting requirements and unannounced visits to the asylum seeker’s residence. The Bail Program has had an extremely high rate of success in regards to those who would otherwise be deemed as representing a high absconding risk, with a compliance rate of 91.6% in 2002-2003.<sup>109</sup>

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<sup>106</sup> Ibid 188.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid 86.

<sup>109</sup> Ibid 26.

## ***Europe / the United Kingdom***

In many European countries, including the UK, asylum seekers are asked to surrender their passports and other travel documents, and to report to the State authorities at regular intervals, e.g. twice a week. They are usually registered at a nearby reception centre even if they are living independently in the community, and are thus restricted to the areas near the assigned centre.<sup>110</sup>

While there is currently no information available to see how effective such reporting requirements are in increasing compliance with procedures, it is believed that compliance is very high, at least in the UK, due to the fact that receipt of State assistance is conditional upon compliance.<sup>111</sup>

In the United Kingdom, bail is also available to immigration detainees, but is only granted upon application by the detainee. There are also strict means and merits tests applied in applying for legal aid for the bail hearing, which makes bail difficult to access as an alternative to detention for many detainees. Two nongovernmental organisations -- Bail for Immigration Detainees ('BID') and Bail Circle -- help to ease this problem by providing legal representation to asylum seekers at their bail hearings. The average amount of money required for bail or surety is around £250, and detainees released on bail under this system, as in Canada, showed a similarly high level of cooperation, with only about 8 - 9% attempting to abscond.<sup>112</sup>

## ***The United States***

Immigration and Customs Enforcement (ICE) in the United States of America has utilized various alternative methods to detention due to the number of asylum seekers exceeding the limited amount of detention spaces available. There are a variety of alternatives used. Firstly, an 'alien' may be released on an Order of Recognizance if they are perceived as too poor to post a bond and also do not pose a threat to national security. However, if they fail to

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<sup>110</sup>Field (2008).

<sup>111</sup>Field (2006) 29.

<sup>112</sup>Ibid 26.

appear for any of their hearings they will be automatically put into detention when apprehended, and be deported shortly after.<sup>113</sup>

In a similar vein, the asylum seeker may also be required to pay a bond (at a minimum of US \$1500), which will be forfeited if they fail to appear at any of their hearings, or if they fail to meet any other demand made by ICE.<sup>114</sup> Such a required minimum amount is arguably excessive, and seems to go against the availability of bail as a true alternative to detention. Guideline 4(iii) of the *UNHCR Revised Guidelines* states that for bail to be seen as a viable alternative, 'the amount set must not be so high as to be prohibitive.'<sup>115</sup>

America's Lutheran Immigration and Refugee Service (LIRS) have proposed another alternative in response to this. While asylum seekers technically have the legal right to parole, many remain in detention because there is no one to sponsor them for release.<sup>116</sup> Previously, the US conducted a 3 year test program, funding Non Government Organizations to supervise the release of asylum seekers, with positive results (93% appeared at all necessary hearings).<sup>117</sup> Based on this and various other successful pilot programs run by NGOs, the LIRS proposes that the government work in conjunction with private, non-profit agencies to screen asylum seekers and determine who would be appropriate for release from detention. This screening would analyse the threat they pose to the community, their risk of absconding and any other relevant factors. If they are released, the non profit agency uses their links in the community to assist participants in getting access to necessary services (such as job placements and health checks), and inform them about their legal rights and obligations.

A final method which is now being implemented in the United States is the use of electronic monitoring devices. This has the effect of significantly reducing the chance of absconding. Under this new program, either an ankle

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<sup>113</sup> US Immigration and Customs Enforcement, Detention and removal operations: Alternatives to detention (2007) < <http://www.ice.gov/pi/news/factsheets/061704detFS2.htm> > at 10 July 2008.

<sup>114</sup> Ibid.

<sup>115</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating To The Detention Of Asylum Seekers (February 1999) Guideline 4(iii).

<sup>116</sup> International Detention Coalition, *Children in Immigration Position Paper* (2007) 26.

<sup>117</sup> Ibid.

bracelet is worn, or there is continual report by telephone to a case manager. Some organisations, such as the Women's Commission for Refugee Women and Children, and the Lawyers Committee for Human Rights, were hesitant about this method, suggesting that it be restricted to those with higher risks of absconding.<sup>118</sup>

There are various problems with the use of electronic monitoring equipment as an alternative to detention, and it is not endorsed. The first problem is that it is generally not cost efficient – such a method is about as expensive as detaining a person in detention facilities. Secondly, and more importantly, is the fact that such a method appears to fail to meet the test of necessity and proportionality in regards to restricting an asylum seekers right to freedom of movement.<sup>119</sup>

***Bridging visas: the current alternative to detention in Australia, and why they need to be changed***

The current bridging visa system in Australia is most similar to the alternative methods to detention employed by the countries mentioned above. Asylum seekers with bridging visas are allowed to be released from immigration detention, into the community, similar to a bail authority. Like the international measures discussed above, bridging visas may attach either reporting requirements, or the requirement to pay a bond. People eligible for such visas include asylum seekers who come to Australia as tourists or students and claim refugee status. The visas allow these individuals to wait out their processing times in the community. If they seek asylum within 45 days of arriving in Australia, these people are also permitted to work and are eligible for modest income support from the government.

The fundamental problem is that these bridging visas are generally not available for those non-citizens who arrive without a valid visa. They must meet some very strict requirements to be eligible, under a Class E Bridging

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<sup>118</sup> Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security* (2004) 43 – 45  
<[http://www.humanrightsfirst.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf) > at 11 July 2008.

<sup>119</sup> Field (2006) 92.

Visa – they must either be over 75 years of age, a child, victims of torture and trauma, or be married to an Australian citizen or permanent resident.<sup>120</sup> Even if they are eligible and fall into these select categories, they do not automatically get a visa – it is still up to the discretion of the relevant officer. Past practice has shown that most unauthorised arrivals are still detained, rather than released.<sup>121</sup>

Another crucial problem that currently makes the Bridging Visa E inadequate as a viable alternative to detention is the fact that it provides no entitlements for asylum seekers to work, nor does it provide them with entitlements to healthcare or welfare support from the government. Asylum seekers who are released from detention under a bridging visa generally have to rely on non-government organisations to support them, which themselves only have limited resources.<sup>122</sup>

In order to make bridging visas a true alternative to mandatory detention, the strict requirements need to be abolished. Instead, once asylum seekers have been detained to verify identity and perform any health and security checks, they should automatically be granted a bridging visa unless they are seen to pose a risk to the community in some way, or have a high risk of absconding. The bridging visas should also provide more rights than they currently do, such as granting asylum seekers the permission to work and the right to Medicare, and some form of welfare support, such as access to the Asylum Seeker Assistance Scheme. Such an alternative will address many of the current problems related to immigration detention today - it is a more humane method than the one currently being adopted by Australia, helping to avoid the psychological damage that prolonged periods of detention may cause. Furthermore, it also serves to significantly reduce financial cost.

One of the main concerns that the Australian government has had with any such scheme that would involve releasing asylum seekers into community if given a bridging visa, is the fear that asylum seekers will abscond if they are

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<sup>120</sup> Migration Regulations 1994 (Cth) Regulation 2.20.

<sup>121</sup> Crock et al, 162 – 163.

<sup>122</sup> Amnesty International Australia, above.

not kept in detention. However, research has shown that this is not the case. In particular, the Hotham Mission, a non-government organisation in Melbourne, conducted a study between February 2001 and February 2003, tracking 200 asylum seekers who had been released into the community on Class E Bridging Visas. 31% of those who were given the bridging visa were former detainees. Within that 2 year period, the Hotham Mission found that not one asylum seeker out of those 200 absconded, despite the fact that 55% had been awaiting a decision for four years or more, and despite the fact that 68% were found to be at risk of homelessness or were in fact homeless.<sup>123</sup> The reality is that for most asylum seekers, there is no alternative place to go.

**c) comparing the cost effectiveness of these alternatives with current options**

***Cost Analysis of Detention Versus Alternative Methods***

It has long been known that the costs of immigration detention are high – a 1998 report, *The Management of Boat People*, by the National Audit Office showed that detention is resource intensive.<sup>124</sup> Overall, the costs have increased over the years, beyond the level of inflation. From 1994 – 95, the average daily cost per detainee was \$69. It increased dramatically from 1995-96, to \$105; and as of 2004, the very *minimum* cost of detention per day was \$111, with the average amounting to around \$120 per day, and some detention centres exceeding \$200 per day. This excludes the cost of border surveillance, and importantly, of moving detainees between the detention centres, which incurs even more substantial costs. It was reported that the relocation of 46 detainees in 2001 from Woomera to Port Hedland cost approximately \$169,000. The Australian Democrats have estimated that mandatory detention costs the Australian taxpayer around \$42 million a year, and that \$230 million has been spent on the building of detention centres between 2001 – 2004.<sup>125</sup>

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<sup>123</sup> Field (2006) 29.

<sup>124</sup> Australian National Audit Office, "The Management of Boat People" (1998) <[http://www.anao.gov.au/uploads/documents/1997-98\\_Audit\\_Report\\_32.pdf](http://www.anao.gov.au/uploads/documents/1997-98_Audit_Report_32.pdf)> at 9 July 2008.

<sup>125</sup> Crock et al, 205.

On the other hand, it has been difficult in assessing the costs of alternatives to detention, mainly because many countries do not report such costs. Raw figures have shown that home detention costs about \$60 a day, while a community parole method, like bail, costs around \$5 – \$6 a day.<sup>126</sup> However, these fail to take into account any capital costs such as the provision of welfare support, access to Medicare, the necessity of a case worker or the costs related to reporting obligations, etc. Despite this, the research that has been done nevertheless show that almost any alternative measure proves to be cheaper than detention.<sup>127</sup> For example, in relation to the United States Lutheran Immigration and Refugee Service's alternative, it was calculated that the cost of using LIRS's alternative up to an asylum seeker's hearing is about US \$2626 (including the cost of detention prior to screening, and any necessary re-detention); comparatively, the cost of detention until a hearing is about US \$7259. This is a difference of more than \$4500 per person.<sup>128</sup> Similarly, Canada's Toronto Bail Program reported that its alternative costs about \$12-15 per day for staff running costs (not including costs of food and shelter etc.) as opposed to the C\$175 per day average cost of detention in a provincial jail in Canada.<sup>129</sup>

In Australia, the Justice for Asylum Seekers (JAS) submitted a detailed cost analysis of detention in comparison to other alternatives.<sup>130</sup> Inclusive of all capital costs such as the cost of a case worker to be assigned to each asylum seeker, and allowing for the need to detain asylum seekers at certain stages in the procedure (ie. upon initial arrival, and if they are shown to be a risk to the community or have a high flight risk), there was still found to be an 18% saving in cost.<sup>131</sup> Similarly, HREOC has admitted that while the ideal alternative model to detention – which emphasises Commonwealth support of asylum seekers, and monitoring them while they are in the community – will

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<sup>126</sup> Justice for Asylum Seekers (JAS) Network, Submission 163 into *The Inquiry into the administration and Operation of the Migration Act 1958* <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/migration/submissions/sub163att\\_a.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/submissions/sub163att_a.pdf)> at 11 July 2008.

<sup>127</sup> Field (2006) 48.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid 49.

<sup>130</sup> Justice for Asylum Seekers (JAS) Network.

<sup>131</sup> Ibid.

incur costs, it will not require any more expenditure than is already being used for immigration detention purposes.<sup>132</sup>

Again, it is reemphasised that where there has been a comparison between the costs of detention, against the cost of alternative methods in other countries, the alternative methods are almost always more cost effective.<sup>133</sup> It should also be noted that this discussion does not take into account the direct and indirect economic and other benefits of allowing asylum seekers to have access to the labour market (in accordance with the Refugee Convention).

### **Conclusions on community based alternatives to immigration detention**

The majority of Australia's current alternatives to immigration detention could be improved. Residential Housing Projects and Alternative Places of Detention, while removing some problems related to detention centres, are nevertheless not ideal alternatives for the very fact that they are still forms of detention. Similarly, Bridging Visa Es are too restrictive in their existing form and are too under-utilised to be regarded as a true alternative to detention. For Australia to create a satisfactory alternative to detention, in line with international methods, the bridging visa regime needs to be changed so that the requirements are not so restrictive, and so that more rights are granted in relation to them. International experience has shown that such an alternative is both effective, and cheaper, than the current practice of mandatory immigration detention.

Compulsory accommodation such as residential housing projects or other alternative places of detention is far from ideal. Where similar alternatives have been used in European countries, there have been reported problems very similar to those that arise from detention centres – that is, feelings of depression and a loss of independence from detainees. More viable, less

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<sup>132</sup> Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) 236.

<sup>133</sup> Field (2006) 48.

restrictive alternatives are thus required.<sup>134</sup> In this regard, Australia should follow the lead of the methods adopted by various other countries.

### **3 Conclusions**

The discussion of the issues relating to the TOR in this Submission illustrate that the approach to mandatory detention in Australia:

- Lacks a coherent overarching policy;
- Is unsupported by clear legislative guidelines;
- Has been implemented in such a way as to breach basic human rights;
- Requires an urgent and comprehensive overhaul to bring it in line with basic principles and international 'best practice'.

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<sup>134</sup> Ophelia Field, *Practical alternatives to the administrative detention of asylum seekers and rejected asylum seekers* (1997) < <http://www.ecre.org/files/alterns.pdf> > at 5 July 2008.

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