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Submission to

**Senate Legal and Constitutional Affairs Legislation
Committee**

into the

**Migration Amendment (Detention Reform and Procedural
Fairness) Bill 2010**

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The Castan Centre for Human Rights Law is grateful for the opportunity to make a submission to this enquiry. The Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 is timely and consistent with Australia's human rights obligations. It should be supported.

The preventable harms which emanate from immigration detention are well-documented. In giving evidence to the Federal Court, psychiatrist Jon Jureidini described Australia's immigration detention environment as 'almost designed to produce mental illness.'¹ This view has been iterated by mental health professionals, including former Australian of the Year Patrick McGorry, who likened immigration detention centres to 'factories for producing mental illness and mental disorder.'² Evidence to this effect has been cited by the former Minister for Immigration, Chris Evans, in announcing the 'new directions in detention' policy and its 7 constituent values.³ Minister Evans recognised that 'desperate people are not deterred by the threat of harsh detention' and rejected the notion that 'dehumanising and punishing unauthorised arrivals with long-term detention is an effective or civilised response', A more humane approach was promised. Three years on, even the best of Ministerial intentions have failed to avert a return to punitive policies of the past.

There is little to distinguish the experience of immigration detention in 2011 from the worst excesses of the past. Five suicides in Australia's IDCs occurred between August 2010 and March 2011 and self-harm and suicide attempts occur regularly. The mental harm which emanates from holding people in indeterminate detention will leave the individuals involved and Australian society as a whole, with a significant and largely avoidable burden. With 6715 people in immigration detention as of 6 May 2011, the system has experienced increased waiting times, overcrowding and rioting. 1038 children remain in detention, only 251 of whom are residing in mainland 'community detention.'

¹ *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217 evidence of Dr Jon Jureidini with respect to Baxter Immigration Detention Centre at [180].

² Adam Cresswell, 'Call to abandon 'factories for mental illness'', *The Australian*, 26 January 2010 at <http://www.theaustralian.com.au/news/nation/call-to-abandon-factories-for-mental-illness/story-e6frg6nf-1225823428382>

³ Chris Evans MP, *New Directions in Detention - Restoring Integrity to Australia's Immigration System*, Australian National University, Canberra, 29 July 2008.

The government's detention values are not being implemented with respect to boat arrivals with the exception of value 3 which provides that children should, wherever possible, not be detained in an immigration detention centre. While only detention in an immigration detention centre is referred to in policy terms as immigration detention, the alternative forms of accommodation in which children are held are deemed to be immigration detention under the Migration Act. Most of these forms of accommodation also fall within the scope of immigration detention in accordance with United Nations High Commissioner for Refugees guidelines.⁴ While the Migration Amendment (Immigration Detention Reform) Bill 2009 would have gone some way towards implementing the government's detention values into law, it has lapsed and has not been reintroduced.

Asylum seeker principles

The asylum seeker principles are uncontroversial. They acknowledge Australia's longstanding international obligations and reflect the government's key immigration detention values, namely value 4 (clause 4AAA(3)(a)), value 6 (clause 4AAA(3)(c)), value 7 (clause 4AAA (3)(d) and value 5 (clause 4AAA(3)(b)) with its ambit broadened from immigration detention centres to the full range of immigration detention facilities.

Abolishing mandatory detention

The mandatory immigration regime is inconsistent with Australia's obligations in a number of international instruments, including the United Nations *Convention Relating to the Status of Refugees 1951*⁵ (Refugee Convention), its amending *Protocol Relating to the Status of Refugees 1967*⁶ (Refugee Protocol) in addition to the *International Covenant on Civil and Political Rights*⁷ (ICCPR), *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*⁸ (CAT) and the *Convention on the Rights of the Child*⁹ (CRC).

⁴ UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS, February 1999 at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>

⁵ *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force April 22, 1954.

⁶ *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

⁷ *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, entered into force Mar. 23, 1976

⁸ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, entered in to force June 26 1987

⁹ *Convention on the Rights of the Child*, U.N. Doc. A/44/49 (1989), entered into force Sept.2 1990

In its primary focus on asylum seekers who have arrived in Australia by boat, the detention regime is discriminatory and inconsistent with the Refugee Convention's prohibition on penalties on account of refugees' illegal entry or presence (Article 31(1)). It is also inconsistent with the ICCPR and CRC's prohibition on arbitrary detention. While immigration detention is not arbitrary in and of itself, the decision to detain must be guided by justification and proportionality. The UN Human Rights Committee has considered immigration detention to be arbitrary in circumstances where it is not necessary in all the circumstances of the case and not proportionate to the aims pursued. Unlawful entry into Australia and fear that an asylum seeker may abscond into the Australian community were found by the committee to be insufficient grounds to justify indefinite and prolonged detention, which was accordingly arbitrary in contravention of article 9(1) of the ICCPR.¹⁰

The CRC prohibits the unlawful or arbitrary deprivation of liberty of children and provides that arrest, detention or imprisonment is to be used only 'as a measure of last resort and for the shortest appropriate period of time (art 37(b)). In removing the obligation to detain, the Bill goes some way to avoiding arbitrary detention in contravention of article 9 of the ICCPR and article 39(b) of the CRC.

The impact of indefinite detention is inconsistent with the requirement that on children and adults in detention are required under art 37(c) of CRC and the ICCPR's art 10(1) to be treated with humanity and respect for the inherent dignity of the human person. The UN Human Rights Committee found that the placement in detention of a mentally ill man who had lived in the Australian community for 12 years constituted a violation of article 10 of the ICCPR.¹¹ Mandatory immigration detention may also amount to cruel, inhuman or degrading treatment or even torture (prohibited under article 7 of the ICCPR and articles 16 and 1 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*). The UN Human Rights Committee has found that the failure to remove an asylum seeker from immigration detention in circumstances where it was known that his

¹⁰ *A v Australia*, Communication No. 560/1993; *Mr C v Australia*, Communication No. 900/1999; *Baban v Australia*, Communication No. 1014/2001; *Bakhtiyari v Australia*, Communication No. 1069/2002; *D and E v Australia*, Communication No. 1050/2002; *Danyal Shafiq v Australia*, Communication No. 1324/2004; Saed Shams Communication No. 1255/2004, Kooresh Atvan (1256/2004), Shahin Shahrooei Communication No. 1259/2004, Payam Saadat Communication No. 1260/2004, Behrouz Ramezani Communication No. 1266/2004, Behzad Boostani Communication No. 1268/2004, Meharn Behrooz Communication No. 1270/2004, Amin Houvedar Sefed Communication No. 1288/2004.

¹¹ *Madafferi v Australia*, Communication No. 1011/2001.

mental illness was triggered by his detention experiences and where recommendations had been made by psychiatrists for his immediate removal amounted to a breach of article 7 of the ICCPR.¹² The government's policy values recognise that detention should be a last resort and should seek to ensure the human dignity of detainees. Without legislative backing, these principles have been too readily overlooked. A framework of mandatory detention, as maintained under immigration detention value 1, is inconsistent with remaining 6 detention values. A legislative regime which employs immigration detention only as a last resort and recognises established principles based on Australia's international treaty obligations should be supported.

Proposed section 195B(1) requires the decision to detain to be followed, as soon as practicable, by a written statement setting out the circumstances of detention, the reasons for detention and the grounds for its continuation. The person detained is to be given a copy of the statement pursuant to proposed section 195B(2). Detention for a period in excess of 30 days would only be permissible pursuant to a court order (proposed section 195C). These provisions provide further safeguards against arbitrary detention. They would be strengthened by further articulation of the circumstances in which detention may be justified.

Detention for a defined period, continued subject to court order

The only way to ensure that immigration detention does not become protracted and its continuation arbitrary is to impose statutory time limits. The Bill proposes to amend the Migration Act to allow detainees to apply for an order for release on the basis that there are no reasonable grounds to justify the initial detention or continued detention. It is further proposed that detention for a period exceeding 30 days must be authorised by a magistrate. The safeguards proposed by the Bill seek to once again align Australia's refugee processing regime with its human rights obligations. Australia's treaty obligations require that persons deprived of liberty shall be entitled to take court proceedings and have the court decide on the lawfulness of the detention and order release if the detention is not lawful (Art 9(4) ICCPR, art 37(d) CRC).

¹² *Mr C v Australia*, Communication No. 900/1999.

Article 9(4) of the ICCPR provides that persons deprived of their liberty shall be entitled to taken court proceedings and have the court decide on the lawfulness of their detention. With respect to people held in immigration detention, the UN Human Rights Committee has found that courts' inability to review continued immigration detention and to order release amounts to a breach of article 9(4).¹³

The Bill would allow detainees to issue court applications seeking an order for release from detention on the basis that there are not reasonable grounds to justify the decision to detain or to continue a person's detention (proposed section 195B(3) and (4)). This would bring Australia's immigration detention regime into line with article 9(4) of the ICCPR and article 37(d) of CRC.

¹³ Note 10 above.

Ending offshore processing and the excision policy

*Like many measures which a state may take in the grey, apparently unregulated areas of international law, offshore processing is in fact subject to law, and subject to the rule of law; and so far too little recognition has been given to this...*¹⁴

The policy of excision introduced in 2001 facilitated two distinct forms of offshore processing; processing in declared countries under section 198A of the Migration Act and processing in an excised offshore place. The former was favoured by the Howard government and saw the removal of offshore entry persons removed to Nauru and Manus Island Papua New Guinea (PNG) for processing outside Australian law and the latter favoured by the Rudd and Gillard governments. Serious concerns about the realisation of a range of human rights arose from the practice of processing asylum seekers in other countries under the Pacific Solution. The differential treatment of asylum seekers transferred for processing in other countries was discriminatory and denied asylum seekers the protections which come with processing in Australia, including migration advice, merits review, judicial review and support from outside visitors.

The mental health impact of indeterminate detention was exacerbated by the remoteness and isolation of the offshore facilities. A psychiatrist working in Nauru during the Pacific Solution observed that “I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect”.¹⁵ The Pacific Solution raised significant concerns about the Refugee Convention’s prohibition against expulsion or return (*refoulement*) and was dismissed by Minister Evans as ‘a cynical, costly and ultimately unsuccessful exercise introduced on the eve of a Federal election.’¹⁶ The government’s recent negotiations with countries in the region, including PNG, raises the disturbing prospect of a return to the Pacific Solution. Its exchange negotiations with Malaysia raise significant concerns about the humane treatment of asylum seekers.

¹⁴ Goodwin-Gill G (2007) ‘The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Obligations’ 9 *UTS Law Review* 26-40.

¹⁵ ABC Radio National *PM*; M Colvin and A Fowler, ‘High Rates of Mental Illness among Detainees’, 15 May 2003.

¹⁶ Evans, note 3 above.

The second form of offshore processing, as practiced in recent years on Christmas Island should also cease. Asylum seekers processed on this excised offshore place have been subject to a distinct status determination process. Until the High Court's decision in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia*,¹⁷ the status determination process purported to be non-statutory and unconstrained by the strictures of Australian law and obligations of procedural fairness. Even though Christmas Island is Australian territory, the processing regime adopted key elements of offshore processing in other countries by seeking to isolate asylum seekers processed there from the protections conferred by Australian law and the support and infrastructure available on mainland Australia. In light of its distance from mainland Australia, Christmas Island has been described by former Human Rights Commissioner Graeme Innes as possibly the most remote part of Australia which could be used for the purpose.¹⁸ Although the M61/M69 judgment led to changes in status assessment processes, they did not extend equal safeguards to asylum seekers processed offshore. The effect of delays, over-crowding and limited services and infrastructure are well-known. These have been observed by the Commonwealth Ombudsman, Amnesty International, the Australian Human Rights Commission and others who have visited the Christmas Island facility and witnessed the distress experienced by detainees. The retention of a bifurcated system of refugee processing is incompatible with Australia's human rights obligations.

Conclusion

Subject to greater clarification about the criteria for detention, we recommend that the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 should be enacted.

¹⁷ (2010) 85 ALJR 133; [2010] HCA 41.

¹⁸ Australian Human Rights Commission (2008): *New Christmas Island immigration detention centre should not be used*, 9 December, 2008 at <www.hreoc.gov.au/about/media/media_releases/2008/149_08.html>