ANNEX

Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
tb-petitions@ohchr.org
Fax +41 22 9179022

INCLUDING REQUEST FOR INTERIM MEASURES
(see page 6 below)
Pursuant to Rule 92 of the *Rules of Procedure of the UN Human Rights Committee* (2005)

COMMUNICATION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

Procedure: Communication under the First Optional Protocol to the ICCPR

Date: 28 August 2011

State Concerned: Australia

INFORMATION ON THE AUTHORS

38 people in detention listed in Annex A.

Address:

Various Australian Government Immigration Detention Facilities listed in Annex A.

Address for correspondence on this communication:

Professor Ben Saul
Professor of International Law and Barrister
Sydney Centre for International Law, Faculty of Law
The University of Sydney, NSW 2006, Australia
Email: [redacted]

Authorisation of Communication

The signatures of the authors appear in Annex A.

I, Ben Saul, counsel for the authors, with barrister Julian Gormley and solicitors and/or migration agents Stephen Blanks, Josephine Murphy, and assisted by Amnesty International and Balasubramaniam Vigneswaran, submit this communication at the request and on behalf of the authors. The assistance of Michael McCrudden, Professor Jane McAdam, Dr Maryanne Loughry RSM AM, the Refugee Advice and Casework Service Australia Inc, Kate Bones and Ian Rintoul is acknowledged.

Signed:

Date: 28 August 2011

Contents

SUMMARY OF VIOLATIONS

A. Article 9(1) – Arbitrary and/or unlawful detention

Australia is arbitrarily detaining the authors, contrary to article 9(1) of the ICCPR, because:

(a) Australia has not demonstrated the substantive necessity of the authors' initial or continuing detention;

(b) Australia has not shown that less invasive alternatives to the authors' detention are unavailable or would be ineffective;

(c) The authors' continuing detention is potentially indefinite and unreasonable, since it is neither time limited nor subject to periodic review;

(d) There are no current, pending and realistic prospects of their removal to another country, rendering their continuing detention arbitrary;

(e) The real purpose of the authors' continuing detention – preventive security detention where removal is not realistic – is not specifically authorised by law;

(f) Australia has not declared or notified the existence of a public emergency or any necessity to derogate from its obligations under article 9;

(g) The authors' detention constitutes a prohibited penalty (on account of their 'unlawful' mode of entry to Australia) under article 31(1) of the 1951 Refugee Convention, which is the relevant *lex specialis* qualifying the determination of whether detention is arbitrary under the ICCPR;

(h) The authors' detention pending removal is not supported by international refugee law as the relevant *lex specialis* governing their detention, specifically because neither the grounds of Article 1F nor Article 33(2) of the 1951 Refugee Convention are met.

B. Article 9(2) – No notification of the reasons for detention

Australia has violated its obligation under article 9(2) of the ICCPR to inform each author of the substantive reasons for their individual 'arrest' (which includes taking a person into administrative detention).

C. Article 9(4) – No effective judicial review of detention is available

Australia has violated its obligations under article 9(4) because the authors are:

(a) Unable to effectively challenge the substantive necessity of their detention in the Australian courts. Judicial review is limited to a purely formal determination of whether the authors meet certain narrow statutory criteria;

(b) Unable to effectively challenge the adverse security assessments issued by the Australian Security Intelligence Organisation (ASIO), upon which the decisions to refuse them refugee protection visas and to detain them are based. In particular:

(i) The reasons and evidence for their adverse security assessments have not been disclosed to the authors;

(ii) The authors enjoy no statutory rights to judicially challenge their assessments under the *Australian Security Intelligence Organisation Act 1979* (Cth) ('ASIO Act');

(iii) Australian courts are not empowered to review the substantive 'merits' of adverse security assessments, but are confined to limited judicial review of them for errors of law ('jurisdictional error');

(iv) Such judicial review at common law is practically unavailable, because Australia has not disclosed to the authors any reasons for, or evidence substantiating, their adverse security assessments, and they are therefore unable to identify any *prima facie* errors of law which would permit them to legitimately commence proceedings;

(v) The authors are unable to compel disclosure of the reasons for, or evidence substantiating, their adverse security assessments, both because procedural fairness at common law is reduced to 'nothingness' in their circumstances, and/or public interest immunity would preclude disclosure to them; and

(vi) There is no other special judicial procedure enabling the authors' adverse security assessments, and thus their detention, to be tested to the standard demanded by article 9(4).

D. Articles 7 and/or 10(1) – Inhumane or degrading treatment in detention

Australia has violated its obligations under articles 7 and/or 10(1) because the cumulative circumstances of their detention (*not* detention *per se*), by inflicting serious psychological harm or mental suffering upon them (including serious risks of self-harm or suicide), are are inhuman or degrading. Specifically, such harm cumulatively arises because of:

(a) The protracted, indefinite and arbitrary character of the authors' detention; and

(b) The inadequate conditions of their detention, which include:

(i) Inadequate physical and mental health services;

(ii) Exposure to unrest and violence in detention, and related risks of punitive legal treatment;

(iii) The risk of excessive use of force by the authorities; and

(iv) Risks of witnessing or fearing incidents of suicide or self-harm by others.

E. Articles 17(1), 23(1) and 24(1) – Family and children's rights

In respect of six of the authors (case numbers 13-17 and 20), Australia has violated its obligations to protect family rights under articles 17(1) and 23(1), and specifically to protect minor children under article 24(1). Because the authors' protracted detention is arbitrary under article 9 and unlawful under articles 7 and/or 10(1) of the ICCPR:

(a) The interference in their family life caused by such detention is arbitrary and is not justified under article 17(1);

(b) Such detention, and the failure to release families into the community, amounts to an unjustified failure to protect the unimpeded conduct of family life under article 23(1);

(c) Such detention, and the failure to release families into the community, amounts to unjustified failure to protect the best interests of minor children under article 24(1).

REQUEST FOR INTERIM MEASURES

1. The authors respectfully urge the Committee to request Australia to release them immediately from immigration detention, so as to avoid the 'irreparable damage' of acute psychological harm currently being inflicted upon them there.

2. The Committee may issue interim measures under Rule 92 of the Committee's Rules of Procedure to avoid 'irreparable damage' to a person. The Committee commented on the meaning of 'irreparable damage' in *Stewart v Canada*:

> … what may constitute 'irreparable damage' to the victim within the meaning of rule 86 [now rule 92] cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy....[1]

3. Cases involving irreparable harm have often involved risks of return to torture or death, but the Committee has not limited the concept to such cases. The Committee has stated that what may constitute 'irreparable damage' cannot be determined generally.[2] In *Leghaei v Australia* for example, the Committee issued interim measures to restrain the removal of the foreign parents of a minor Australian citizen child, where the child would otherwise be deprived of both parents in Australia.[3]

4. In the present communication, the authors submit that the 'irreparable harm' threshold for issuing interim measures is met, because the cumulative circumstances of their detention are inflicting serious and potentially irreversible mental suffering upon them, including serious risks of self-harm and/or suicide.

5. **For the purposes of establishing the 'irreparable damage' to which the authors are exposed, the authors reiterate here the whole of Parts D and E below of this communication, and respectfully direct the Committee to those submissions in evidencing the anticipated harm.** To summarise briefly here:

   (a) The authors are presently subject to mandatory, indefinite, arbitrary detention, with no possibility of challenging the grounds of their detention, and no realistic imminent prospect of either release into the community, or safe removal to another State (see Parts A and C of this communication). The protracted, indefinite nature of their detention puts them in a constant state of acute anxiety, uncertainty and stress about their future and the future of their families;

   (b) The authors have not been advised of the grounds of their 'adverse security assessments' under Australian law, and have no effective opportunity to know or challenge the grounds of their assessments (see Part C of this communication), adding to their frustration, disempowerment, and mental distress;

   (c) The authors are detained in very difficult conditions, variously including: inadequate facilities which do not meet international standards of detention; inadequate physical

[1] *Stewart v Canada* (UNHRC 538/1993), 1 November 1996, para. 7.7.
[2] Ibid.
[3] *Leghaei v Australia* (UNHRC 1937/2010) (currently before the Committee on the merits).

and mental health facilities; risks of unrest, riots and violence; risks of excessive use of force against them; risks of witnessing or fearing self-harm, suicides or hunger strikes by detainees; chronic over-crowding; remoteness and inaccessibility of some facilities; extremely hot climatic conditions at some centres; and difficulties accessing adequate legal representation and other external support services (see Part D of this communication); and

(d) Many of the authors are suffering from the acute stress of prolonged and indefinite separation from close family members, including partners and children (see especially Part E of this communication);

(e) The authors have no legal avenues available to them under Australian law to challenge their present treatment, adding to their frustration and a sentiment that their futures are subject to the near-total discretion of the government (see Part C of this communication).

6. Recent statistics bear out the extremely high risks of serious mental harm in detention:

(a) There were 1,100 incidents of threatened or actual self-harm in Australian immigration detention facilities in 2010-11 alone;[4] 620 incidents occurred at the Christmas Island detention facility in that period; and there were 17 recorded instances of children starving themselves in detention 2010-11;[5]

(b) In the six months from January to June 2011, health services in detention treated 723 detainees for 'voluntary starvation'; 1,507 detainees were also hospitalised, including 213 for physical injuries from self-harm, and 72 for psychiatric admissions;[6]

(c) In 2010-11, there were 871 incidents of 'inappropriate' behaviour towards detention centre staff, and 700 such incidents between detainees, indicating the extremely high levels of mental stress and tension in detention; [7]

(d) In June 2011 alone, there were 135 'critical incidents' in detention, including multiple serious injuries, assaults, escapes and self harm, suggesting that detention facilities are highly unsafe or insecure places for detainees.

7. To put it starkly, one of the authors (case number 32), who has been in detention for two years and two months (to August 2011), was hospitalised in Sydney on 15-16 August 2011, after drinking cleaning fluid and cutting his wrists in Villawood detention centre.

8. Another author (case number 25), writes as follows of his feelings in detention:

> My life in detention however is very hard on my mind. I have been detained for 18 months, this makes me very depressed and I am tired by enduring physical and mental pains as a result of my detention. I have to take medicine for that. I feel as though I can't continue any longer to be detained like this…

[4] Commonwealth Ombudsman, 'Inquiry to examine suicide and self-harm in immigration detention', 29 July 2011.
[5] Parliamentary inquiry statistics, in Kirsty Needham, 'Detainee despair: 1500 in hospital', *Sydney Morning Herald*, 17 August 2011.
[6] Ibid.
[7] Ibid.

> I feel like sailing [sic] with hopelessness and isolated and I am an innocent refugee…. I do not know how long I will have to suffer from this indefinite detention. I have seen some friends attempt suicide including by setting themselves on fire. I had to help move a friend down from a tree after he attempted to hang himself with a sari, a friend has banged his head a large number of times against a wall, some have cut themselves….[8]

9. Three authors are children under the age of 7 years whose detention is highly distressing and is putting them at acute risk of mental harm (see Part E below). For instance, an expert psychiatric assessment concluded, for instance, that one child was 'abnormally sad and anxious and could be malnourished' and that 'his normal development has been seriously disrupted and continues to be'.[9]

10. The weight of medical research (including expert psychological and psychiatric evidence) establishes that the above conditions of detention have a high likelihood of inflicting serious mental harm on detainees over time, including as manifest through self-harm or suicide (see Part D of this communication).

11. Multiple recent inquiries into Australia's detention facilities by the Australian Human Rights Commission, which is Australia's peak independent statutory human rights body, have determined that the above conditions of detention have a high likelihood of inflicting serious mental harm on detainees over time (see Part D below).

12. All major peak medical bodies in Australia have strongly criticised the adverse mental health impacts of protracted detention (see Part D below):

    (a) The paramount body, the Australian Medical Association, criticised mandatory detention as 'inherently harmful to the physical and mental health of detainees' in August 2011;[10]

    (b) The Australian Government's own Detention Health Advisory Group, the Australian College of Mental Health Nurses, and the Australian Psychological Society, all called in August 2011 for mandatory detention to be abandoned due to the high levels of self-harm in detention and the risks of such harm;[11]

    (c) The Royal Australian and New Zealand College of Psychiatrists stated in August 2010 that: 'There is clear evidence that detaining vulnerable groups who have experienced torture, trauma and loss for indefinite periods can exacerbate serious mental health problems';[12]

    (d) Other bodies which have condemned detention include the Royal Australian College of General Practitioners; Royal Australian College of Physicians; Committee of Presidents of Medical Colleges; Alliance of Health Professionals concerned about the Health of Asylum Seekers and their Children.

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[8] Author's written statement on file with counsel, case number 25.
[9] See below at Part E.
[10] Kirsty Needham, 'Doctors call for a stop to mandatory detention', *Sydney Morning Herald*, 18 August 2011.
[11] Kirsty Needham, 'Detention centre nurse sacked after criticism', *Sydney Morning Herald*, 19 August 2011, 2.
[12] Royal Australian and New Zealand College of Psychiatrists, 'Mental health of asylum seekers must be considered', 10 August 2011, at http://www.ranzcp.org/latest-news/mental-health-of-asylum-seekers-must-be-considered.html.

13. The peak refugee policy body, the Refugee Council of Australia, said in August 2011 that self-harm in detention 'is beyond anything we have previously seen in Australia' and that the policy is 'profoundly stupid and counterproductive'.[13]

14. The continuing detention of the authors pending final determination of this communication would cause 'irreparable harm' to the authors, due to the serious adverse psychological, physical, and family life affects of the current circumstances of detention. Their release from detention is necessary to avoid such irreparable harm.

15. Of its nature, such psychological harm is *irreversible*, since it can only be treated and mitigated, but not eliminated, once it has been inflicted. In the case of suicide, such harm is plainly also irreversible. Further, the consequences of such harm cannot be wiped out or repaired by *compensation*, given the permanent legacy and consequences of the experience and memory of such serious psychological suffering.

16. Where Australia has not established the substantive necessity of the authors' detention (by bringing evidence that they pose a security risk), and where detention is not subject to periodic review nor effective judicial review, there should be a presumption in favour of the authors' liberty and against their detention, particularly where Australia has not demonstrated that less invasive means are unavailable or would be ineffective.

17. Release is also essential because merits determination of this communication is likely to take up to two years, and some authors have already been detained for over two years, meaning that they could be in detention for well over four years.

18. As noted in Part A below of this communication, where Australia can demonstrate that any of the authors individually pose a security risk, it is open to Australia to consider whether the range of means less invasive than detention would meet its security concerns (including surveillance, bonds or assurances, obligations to report periodically to police, electronic tag bracelets, control orders, or criminal charges).

19. If the authors are not immediately released from detention, there is a high likelihood that one or more of the authors will commit acts of self-harm or suicide in the imminent future, or will suffer serious and enduring psychological harm for years to come.

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[13] Kirsty Needham, 'Doctors call for a stop to mandatory detention', *Sydney Morning Herald*, 18 August 2011.

FACTUAL SITUATION AND DOMESTIC LAW FRAMEWORK

21. This joint communication is brought by 38 authors who are held involuntarily in Australian immigration detention facilities. The authors applied for refugee protection in Australia but were refused it on the basis that Australia assessed them as security risks.

22. 35 of the authors are adults and three of the authors are the dependant minor children (case numbers 14-16) of other authors (case numbers 13 and 17).

23. Most of the authors are Sri Lankan citizens of Tamil ethnicity. One author is a Myanmarese citizen of Rohingya ethnicity (case number 25).

24. The authors' individual cases have been consolidated in this joint communication because they share common factual and legal characteristics for the purposes of the violations alleged. The authors also do not wish to unduly burden the Committee with separately lodging multiple similar claims. Where there are relevant differences in the factual and legal status of individual authors, those distinctions will be raised at the relevant points in this communication.

The Authors' Entry to and Detention in Australia

25. The authors entered Australian territorial waters by various boats between March 2009 and March 2010, for the purpose of claiming legal protection as refugees in Australia. Most of the authors arrived during 2009.

26. Most of the authors did not have valid visas to enter Australia. None of the authors is an Australian citizen or permanent resident under Australian law.

27. All of the authors were detained in immigration detention facilities upon their arrival in Australia. All authors remain in detention at the time of lodging this communication. The different detention facilities holding particular authors are listed at Annex A.

28. The longest period in detention by any of the authors is 2 years and 5 months (case number 30). The shortest period in detention is 12 months – a child born in detention and resident his whole life (case number 16).

29. Five of the authors (case numbers 13-15, 22, 24, 35) were brought to Australia under an agreement between Australia and Indonesia in late 2009. Such persons had been rescued at sea in October 2009 by the Australian customs vessel *MV Oceanic Viking*, which disembarked them at the Indonesian port of Bintan in November 2009. Australia agreed with Indonesia that it would receive these authors into Australia, where they were then detained, pending a permanent resolution of their status. In their interviews with Australia's Department of Immigration and Citizenship ('DIAC'), these authors were informed as follows:

> You have been found to be a refugee but have not met the requirements for resettlement in Australia. You will be taken to Christmas Island and will be in detention pending resolution of your case. May result in you being resettled elsewhere. Australia gave an undertaking to Indonesia that you would leave Indonesia in a short term period. In line with that commitment we need to relocate you until a resettlement solution is found.

The Legal Framework Governing Detention

30. Most of the authors are detained under section 189 of the *Migration Act 1958* (Cth), which governs the detention of those who enter Australia without authorisation under migration law. Section 189(3) provides that the Australian authorities 'must detain' a person who is an 'unlawful non-citizen' in an 'excised offshore place'.[14]

31. The term 'unlawful non-citizen' is defined as 'a non-citizen in the migration zone who is not a lawful non-citizen'.[15] A lawful non-citizen is defined as a non-citizen holding a valid visa in the migration zone.[16]

32. The 'migration zone' is defined as certain Australian land areas and sea installations, but not including the territorial sea.[17]

33. An 'excised offshore place' is defined to include listed Australian islands and territories, sea installations and resources installations, as well as certain areas prescribed by regulations.[18]

34. All of the authors fell within the scope of section 189(3), since they were all 'unlawful non-citizens' who entered the 'migration zone' at various 'offshore excised places'. As such, they were placed in immigration detention.

35. One of the authors (case number 16) is a minor child born in detention in Australia and is separately detained under section 189(1) of the Act as an 'unlawful non-citizen' present in the migration zone.

The Authors' Asylum Applications

36. Most of the authors sought to apply for refugee protection visas in Australia, to allow them to remain permanently in Australia. (The five authors coming from the *Oceanic Viking* were detained in Australian pending a resettlement solution under their separate arrangement with DIAC.)

37. Most of the authors were *prima facie* recognised as refugees by Australia's DIAC (See list at Annex A). The dates of such recognitions are as detailed in Annex A. The authors' letters of notification of refugee status, sent by DIAC, are available on request by the Committee. A sample of one author's letter is provided at Annex B. The other authors' letters are similar in terms.

38. Many of the authors were separately recognised as refugees by UNHCR (see list at Annex A) but sought to apply for permanent protection in Australia.

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[14] Full definition extracted in Annex C. Section 189(2) and (4) alternatively require the detention of persons in Australia, but outside Australia's (legislatively defined) 'migration zone', suspected of seeking to enter that zone or an 'excised offshore place', and who would be 'unlawful non-citizens' if in the migration zone.
[15] *Migration Act 1958* (Cth), sections 5(1) and 14(1). Full definition extracted in Annex C.
[16] *Migration Act 1958* (Cth), section 13. Full definition extracted in Annex C.
[17] *Migration Act 1958* (Cth), section 5(1). Full definition extracted in Annex C.
[18] *Migration Act 1958* (Cth), section 5(1). Full definition extracted in Annex C.

39. In either case, every author recognised as a refugee was refused a visa to remain in Australia following an adverse security assessment by the Australian authorities.

40. Some of the authors (see list at Annex A) were not recognised as refugees, but were nonetheless not permitted to apply for visas on the ground that they were also assessed as a risk to Australia's security.

The Legal Framework Governing Protection Visas

Section 46A Ministerial Power

41. Under section 46A(1) of the *Migration Act 1958* (Cth), visa applications are invalid if made by an 'offshore entry person' who is 'in Australia' and is an 'unlawful non-citizen'.[19] This statutory bar applies to all visa classes, including refugee protection visas. Most of the authors were accordingly not admitted to the 'regular' onshore refugee protection determination system (with the exception of the five authors from the *Oceanic Viking*),[20] which includes, for instance, a right to merits review before the Refugee Review Tribunal.

42. The statutory term 'offshore entry person' is defined as a person who (a) 'entered Australia at an excised offshore place after the excision time for that offshore place' and (b) 'became an unlawful non-citizen because of that entry'.[21]

43. An 'excised offshore place' is deemed 'excised' from the 'migration zone' for the purpose of limiting the ability of offshore entry persons to make valid visa applications.[22]

44. Most of the authors fall within the terms of section 46A (with the exception of the five authors from the *Oceanic Viking*), because they are all 'offshore entry persons' who entered Australia at excised offshore places and are unlawful non-citizens. None of the authors consequently enjoyed any legally enforceable right to apply for a visa.

45. Section 46(A)(2) of the *Migration Act 1958* (Cth) confers a discretionary power upon the Minister for Immigration and Citizenship ('the Minister') to determine that the statutory bar on making a visa application (in section 46(A)(1)) does not apply to a person, '[i]f the Minister thinks that it is in the public interest to do so'.[23] The Minister's discretionary power is non-compellable,[24] and can only be exercised by the Minister personally.[25]

46. In practice, the offshore determination process operates as follows. Before the Minister considers the exercise of the section 46(A)(2) power, a Refugee Status Assessment ('RSA') is conducted by a DIAC officer,[26] considering whether Australia owes

[19] Full text of provision extracted in Annex C.
[20] Who entered Australia lawfully under the arrangement between Australia and Indonesia.
[21] *Migration Act 1958* (Cth), section 5(1). Full definition extracted in Annex C.
[22] *Migration Act 1958* (Cth), section 5(1). Full definition extracted in Annex C.
[23] Full provision extracted in Annex C.
[24] Section 46A(7) of the Act provides that the Minister has no duty to consider whether to exercise the power.
[25] *Migration Act 1958* (Cth), section 46A(3).
[26] Within DIAC's Refugee Status Assessment Unit, by reference to the *Refugees Status Assessment Procedures Manual* of August 2008.

international refugee protection obligations to the person.[27] If an application is unsuccessful, a person may seek Independent Merits Review ('IRM') by a private entity under contract with DIAC.[28]

47. Decisions at first instance and on review are exercises of statutory power under the *Migration Act 1958* (Cth), since the Minister has decided to consider exercising power under either sections 46A or 195A of the Act in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations.[29]

48. Australian legislation and case law on whether Australia owes a person international protection is binding during both RSAs and IRMs.[30] Since the RSAs and IRMs are statutory processes affecting a person's detention, procedural fairness must be accorded.[31] Offshore entry persons are provided with independent migration and legal advice to assist them.

49. If it is determined that Australia owes protection obligations to the person, a security check is conducted. If the person is cleared, DIAC makes a submission to the Minister recommending that he/she consider exercising their power under section 46A(2) of the Act. If the Minister chooses to exercise the power, the offshore entry person may apply for a protection visa in the ordinary way. If his/her application succeeds, he/she is resettled in Australia.

50. If it is finally determined that Australia does not owe protection obligations to the person, then DIAC makes no submission to the Minister as to the exercise of the Minister's power; the Minister does not consider whether to exercise the power; and the person remains unable to make a valid visa application. The person then becomes subject to removal from Australia as soon as practicable under section 198(2) of the Act.

Section 195(A)(2) Ministerial Power

51. If the Minister does not exercise the section 46A(2) power above, there remains the option of the Minister exercising a further discretionary power under section 195A(2) of the Act. That provision empowers the Minister, acting personally and where it is believed to be in the public interest to do so, to grant a visa to a person in detention (under section 189 of the Act).

52. The power is non-compellable (that is, the Minister has no duty to consider whether to exercise it). The same procedural fairness requirements exist as for section 46A. The

[27] Within the meaning of the *Convention relating to the Status of Refugees 1951* as modified by the *Protocol relating to the Status of Refugees 1967*, and incorporated into Australian law by section 36(2)(a) of the *Migration Act 1958* (Cth).
[28] By reference to DIAC's *Guidelines for the Independent Merits Review of Refugee Status Applications* of March 2009.
[29] *Plaintiff M61/2010E & Anor v Commonwealth of Australia* [2010] HCA 41 (11 November 2010) paras. 65-70.
[30] Ibid, paras. 87-88, 96-98.
[31] Ibid, para. 73.

power enables the Minister to consider Australia's obligations under international human rights treaties additional to the Refugee Convention.[32]

53. DIAC officers may recommend to the Minister that he/she consider exercising the power conferred on him/her by s 195A(2) of the Act. Where DIAC does not make a submission to the Minister, the Minister does not give consideration whether to exercise the power.

The Authors' Adverse Security Assessments

54. While many of the authors were recognised by DIAC as refugees, or earlier by UNHCR as refugees, the fact of such recognition does not automatically result in the issue of a visa to remain in Australia.

55. All of the authors were subject to 'adverse security assessments' issued by an executive agency of the Australian government, the Australian Security Intelligence Organisation ('ASIO'), as detailed in Annex A.

56. As a result of the adverse security assessments, all of the authors were notified by DIAC that they did not meet the security requirements for the grant of a protection visa to settle permanently in Australia. The dates of such notification are provided in Annex A. The authors' letters of notification of their adverse security assessments, sent by DIAC, are available upon request by the Committee. A sample of one author's letter is provided at Annex B. The other authors' letters are very similar in terms.

57. None of the authors has been provided with a statement of reasons by ASIO or DIAC for the adverse security assessments made against them. All relevant evidence substantiating the assessments has not been disclosed to the authors by ASIO or DIAC.

The Law on Adverse Security Assessments

58. All authors were notified by DIAC that the Australian Security Intelligence Organisation ('ASIO') assessed each of them as a risk to Australian national security, and as such, that they did not qualify for the grant of a protection visa under Australian law.

59. Section 36 of the *Migration Act 1958* (Cth) establishes the class of 'protection visas'. Section 65(1) of the Act then provides that, after considering a valid application for a visa, the Minister must refuse to grant a visa if he/she is not satisfied that a person has satisfied 'the other criteria for it prescribed by this Act or the regulations'.

60. Schedule 4 to the Migration Regulations 1994 sets out 'Public Interest Criteria' which must be satisfied before the Minister can grant a protection visa. Public Interest Criteria 4002 requires for the grant of a visa that:

> The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.

[32] Such as under the *Convention on the Rights of the Child 1989*, the *International Covenant on Civil and Political Rights 1966*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*. DIAC's Guidelines on Minister's Detention Intervention Power may also be applied.

61. The meaning of 'security' is defined under section 4 of the ASIO Act as:

> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
> (ii) sabotage;
> (iii) politically motivated violence;
> (iv) promotion of communal violence;
> (v) attacks on Australia's defence system; or
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

62. None of the authors' adverse security assessments stipulate any of the specific elements of the definition of 'security' above as the basis for their assessments.

63. Under section 35 of the ASIO Act, a 'security assessment' is defined as:

> …a statement in writing furnished by [ASIO] to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person…

64. Under section 35 of the ASIO Act, an 'adverse security assessment' is defined as:

> a security assessment in respect of a person that contains:
>
> (a) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and
> (b) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person.

65. Under section 35 of the ASIO Act, a 'prescribed administrative action' is defined as: 'the exercise of any power, or the performance of any function, in relation to a person under the Migration Act 1958'.

Review of Adverse Security Assessments

66. Section 36 of the ASIO Act provides that the procedural fairness protections of Part IV of the ASIO Act, including merits review before the Administrative Appeals Tribunal ('AAT'),[33] do not apply to a person who is not an Australian citizen or a permanent resident.[34] The authors accordingly are unable to challenge the merits of their security assessments in the AAT. The Australian Human Rights Commission strongly criticised this in 2011:

[33] *ASIO Act 1979* (Cth), section 54.

[34] Pursuant to Part IV of the *ASIO Act 1979* (Cth), a form of procedural fairness is provided to persons against whom an adverse security assessment has been made. Section 38 requires that such an assessment must be furnished to the affected person within 14 days, unless the Attorney-General is satisfied that withholding notice of the assessment is essential to the security of the nation or disclosure of the grounds of the assessment would be prejudicial to the interests of security.

> While the Administrative Appeals Tribunal (AAT) has the power to review adverse ASIO assessments, access to the AAT is denied to people who are not citizens or holders of either a valid permanent visa or a special purpose visa. In the view of the Commission, this is contrary to basic principles of due process and natural justice. The Commission supports the recommendations of the Inspector-General of Intelligence and Security that access to AAT review should be extended to refugee applicants.[35]

67. Further, because the authors are offshore entry persons, they are not entitled to seek merits review in the Refugee Review Tribunal ('RRT'). The RRT only has power to review 'a decision to refuse to grant a protection'.[36] As noted earlier, with offshore processing, where the Minister does not consider exercising his/her discretionary power to allow a person to make a valid visa application, there is no 'decision' under the *Migration Act 1958* (Cth).

68. Because the authors are unable to challenge the merits of the refusal of their asylum claims by DIAC and/or the Minister in the RRT, they are also unable to challenge the merits of the adverse security assessments in that forum.

69. Further, ASIO issues adverse security assessments after the offshore determination process has been completed, that is, after the RSAs and IMRs have been conducted. There is therefore no offshore process in which the merits of the adverse security assessments themselves can be reviewed as part of the asylum determination process. There is no separate IMR-equivalent process available specifically to review DIAC's reliance upon ASIO assessments after the RSA/IMR process has been completed.

70. Accordingly, no independent 'merits' tribunal is empowered by law to review the substantive grounds and factual basis for the issue of an adverse security assessment by ASIO, or to compel the disclosure of any allegations, evidence, facts or reasons for it.

71. The only avenue available is a limited form of judicial review. The federal courts have jurisdiction to review ASIO decisions on limited legal grounds of 'jurisdictional error', which may include the denial of procedural fairness. However, such review is not a 'merits' review of the factual and evidentiary basis of the ASIO decision, but is limited to the question of whether there has been an error of law (or 'jurisdictional error'). Further, in security cases involving ASIO, the federal courts accept that the content of procedural fairness owed to an affected person can be heavily restricted.[37]

72. In the present communication, the authors have no basis on which to believe that jurisdictional errors have tainted ASIO's decisions to issue adverse security assessments. Since the grounds of those assessments have not been disclosed to the authors, they have no way of determining whether there exist any jurisdictional errors.

The Authors' Continuing Detention

[35] Australian Human Rights Commission, Submission to the Independent Review of the Intelligence Community, April 2011, citing Inspector-General of Intelligence and Security *Annual Report 2006-2007* (2007), 12, and Inspector-General of Intelligence and Security *Annual Report 1998-1999* (1999), paras. 89-91.
[36] *Migration Act 1958* (Cth), section 411(1)(c).
[37] See further below at Part C.

73. As noted earlier, section 189(3) of the *Migration Act 1958* (Cth) empowers DIAC to detain unlawful non-citizens. Under section 196(1) of the Act, such a person must then be kept in immigration detention until the person is:

    (a) removed from Australia under section 198 or 199 of the Act;
    (b) deported from Australia under section 200 of the Act; or
    (c) granted a visa.

74. None of the authors is subject to deportation proceedings. None of the authors has been granted a permanent or temporary visa, and none has been informed that they are found to be eligible for any visa by DIAC or the Minister. None of the authors has been informed that they are being considered for some other visa.

75. All authors are being held for the purpose of removal under section 198 of the Act. Section 198(2) provides that an officer must remove from Australia 'as soon as reasonably practicable' an unlawful non-citizen who has not been immigration cleared, and who has not make a valid visa application or whose valid visa application has been finally determined. All of the authors presently fall within that provision.

76. The Australian authorities have not informed any of the authors of the identity of any particular country to which any author is to be removed.

77. The authors of Sri Lankan nationality solely possess citizenship of that country. Most of those authors have been assessed as refugees for whom return to Sri Lanka is unsafe. None of them wishes to voluntarily return to Sri Lanka.

78. The author of Myanmarese nationality solely possesses citizenship of that country. That author has been assessed as a refugee for whom return to Myanmar is unsafe. That author does not wish to voluntarily return to Myanmar.

79. Australia has not informed the authors of any intention to remove them to their countries of origin. As noted earlier, Australian has accepted that most of the authors are at risk of persecution or other prohibited ill-treatment if returned to their countries of origin. Nor has Australia indicated its intentions in respect of those authors found not to be refugees.

80. Australia has not informed the authors of the existence of any third countries willing to accept them, or of any current active negotiations with specific countries to take them.

81. The duration of each author's detention to August 2011 is set out in the Table on the following page.

Table: Duration of the Authors' Detention

Case No.	Total period in detention to August 2011	Period in detention from arrival to notice of adverse security assessment	Period in detention since notice of security assessment (detention pending removal) to August 2011
1	2 years	1 year 10 months	2 months
2	1 year 11 months	1 year 8 months	3 months
3	1 year 9 months	1 year 7 months	2 months
4	1 year 11 months	1 year 5 months	6 months
5	2 year	1 year 8 months	4 months
6	1 year 5 months	1 year 5 months	1 month
7	2 year	1 year 7 months	5 months
8	2 years 2 months	1 year 4 months	10 months
9	1 year 10 months	1 year 7 months	3 months
10	1 year 11 months	5 months	6 months
11	2 years 2 months	TBC	TBC
12	1 year 5 months	1 year 2 months	3 months
13	1 year 8 months	(Oceanic Viking)	(Oceanic Viking)
14	1 year 8 months	N/A - child	N/A - child
15	1 year 8 months	N/A - child	N/A - child
16	11 months	N/A - child	N/A - child
17	2 years 1 months	1 year 6 months	1 year 7 months
18	2 years	1 year 11 months	1 month
19	1 year 5 months	1 year 5 months	1 month
20	2 years 1 month	1 year 7 months	6 months
21	2 years 1 month	1 year 4 months	9 months
22	1 year 8 months	(Oceanic Viking)	(Oceanic Viking)
23	1 year 11 months	1 year 4 months	7 months
24	1 year 8 months	(Oceanic Viking)	(Oceanic Viking)
25	1 year 11 months	1 year 2 months	9 months
26	2 years	1 year 6 months	6 months
27	1 year 8 months	1 year 2 months	6 months
28	2 years 2 months	1 year 6 months	8 months
29	2 years 2 months	1 year 10 months	4 months
30	2 years 5 months	2 years	5 months
31	2 years 1 month	1 year 4 months	9 months
32	2 years 2 months	1 year 6 months	8 months
33	1 year 9 months	1 year 5 months	4 months
34	1 year 11 months	1 year 6 months	5 months
35	1 year 8 months	(Oceanic Viking)	(Oceanic Viking)
36	1 year 5 months	1 year 5 months	1 week
37	1 year 5 months	1 year 5 months	1 week
38	1 year 5 months	1 year 5 months	1 week

ADMISSIBILITY

82. No binding domestic remedies are available to the authors in respect of the ICCPR violations alleged in this communication.

A. Article 9(1) claim

83. The substantive necessity of the authors' detention cannot be challenged under Australian law, in the terms safeguarded by article 9 of the ICCPR.

84. First, as detailed above,[38] the *Migration Act 1958* (Cth) requires the mandatory detention of offshore entry persons and does not provide for personal assessments of the necessity of detaining particular individuals on legitimate grounds recognised by the Committee under article 9(1) of the ICCPR. There is thus no statutory basis for challenging the substantive necessity of detention.

85. Second, as also detailed earlier,[39] there are no independent merits review tribunals available to authors in which to challenge the substantive necessity of their detention. The only determination processes available to them, the RSA and IMR procedures, are limited to a consideration of their asylum claims and do not permit the review of their detention. DIAC officers 'must' detain offshore entry persons as a result of their mode of entry to Australia, and there is no assessment of the substantive necessity of detention.

86. Third, no Australian court has jurisdiction to assess the substantive necessity of their detention. In this regard the authors refer the Committee to their merits submissions detailing their claims under article 9(4) (see Part C below). In sum, those submissions establish that the Australian courts can only conduct a purely formal review of whether the authors are offshore entry persons, whether they have been granted a visa or not, or whether they are being held pending removal to another country. The courts have no power to assess the substantive 'merits' of the necessity of detaining a particular person.

87. Fourth, while the courts can review administrative decisions on limited legal grounds of 'jurisdictional error', including denial of procedural fairness, such review does not concern the substantive necessity of their detention within the terms protected by article 9(1). Moreover, the authors are not aware of any jurisdictional errors affecting their decisions, precisely because the reasons and evidence behind their adverse security assessments have not been disclosed to them, making it impossible to identify such errors. In such circumstances, there is no basis on which to commence court proceedings.

88. Fifth, the authors enjoy no legal right to judicially compel the disclosure by ASIO of the substantive grounds, evidence or alleged facts upon which their adverse security assessments are based. As such, neither the substantive basis for refusing the authors' visas, nor the substantive basis for their pending removal, and thus the basis of their continuing detention, can be tested in any Australian court or tribunal.

[38] See 'Factual Situation and Domestic Legal Framework'.
[39] Ibid.

89. Finally, the authors are not being held under any express legal power of administrative or preventive security detention, and thus it is not possible for the authors to challenge the validity of their detention under any other legal procedure.

90. The authors accordingly cannot challenge the arbitrariness or lawfulness of their detention within the terms protected by article 9(1) of the ICCPR.

B. Article 9(2) claim

91. There is no legal avenue available under Australian law which enables the authors to compel Australia to disclose to them the substantive reasons for their detention.

C. Article 9(4) claim

92. There is no domestic remedy available to challenge the unavailability of judicial review of the substantive necessity of detention.

93. Australia does not have a constitutional or statutory bill of rights which could remedy the absence of judicial review of the substantive necessity of detention under Australian law, or which could invalidate subordinate legislation which precludes such review.

94. There is also no constitutional provision providing for substantive judicial review of detention within the meaning of article 9 of the ICCPR, such as to override a statutory scheme which does not provide for such review.

95. The only means of remedying such deficiency is by legislation of the federal Parliament, to amend the statutory grounds of detention and to provide for substantive judicial review.

D. Articles 7 and 10(1) claims

96. Under Australian law, the authors cannot challenge Australia's failure to treat them humanely and with dignity in detention.

97. The authors' mandatory detention, and the present conditions of their detention, is authorised by a constitutionally valid statute of the Australian Parliament.

98. Where the authors' conditions of detention are authorised by domestic law, there is no basis under Australian law to challenge inhumane or undignified treatment inflicted by that valid law, in circumstances where the powers conferred by the law are not exceeded.

99. The authors submit that the system of mandatory, indefinite detention applicable to them, and the facilities in which they are detained, are incompatible with article 10(1).

100. It is not contended that the authors' treatment in detention violates Australian law, but rather than detention as authorised by Australian law is inconsistent with article 10(1). In the latter case, no domestic remedies are available to the authors.

101. Australia does not enjoy a constitutional or statutory bill of rights which would permit the authors to challenge the validity of the statute authorising their detention. There is also no constitutional remedy available.

E. Articles 17(1), 23(1) and 24(1) claims

102. There is no binding domestic remedy available to the authors to prevent the arbitrary interference in their family life under article 17(1), or to compel the protection of their families or children in the manner required by articles 23(1) and 24(1) respectively.

103. The authors' mandatory detention, and the present conditions of their detention, is authorised by a constitutionally valid statute of the Australian Parliament. There is no legal basis on which to compel their release from detention, or to seek effective review of their detention, for the reasons summarised above. Child protection laws do not assist, nor do laws concerning the health of the detainees.

104. Australia does not enjoy a constitutional or statutory bill of rights which would permit the authors to challenge the validity of the interferences in their family rights and the failure to protect their families and children. Nor is a constitutional remedy available.

No Other Available Binding Remedies

105. It is well established in the Committee's jurisprudence that the authors do not need to exhaust non-binding remedies, such as the inquiry procedures of the Australian Human Rights Commission, Commonwealth Ombudsman, or Inspector-General of Intelligence and Security, all of which only enjoy powers of recommendation. Nor are the authors required to exhaust any non-compellable discretionary powers of the Minister for Immigration and Citizenship to grant them some other visa to remain in Australia.

No Other International Remedy Pursued

106. The authors have not made claims in any other international forum and believe that the UN Human Rights Committee is the appropriate forum to address their situation.

MERITS

A. Article 9(1) – arbitrary or unlawful detention

Australia has not demonstrated the necessity of the authors' detention

107. The authors' detention is arbitrary or unlawful under article 9(1) because Australia has not demonstrated the necessity of their detention. The authors' detention was unlawful in two separate phases: first, before Australia's decision to refuse them refugee protection; and second, after Australia's refusal decision and pending their removal from Australia.

Pre-Refusal Stage

108. The Committee's previous Views in numerous communications against Australia have determined that Australia's application of mandatory immigration detention to 'unlawful' entrants may violate article 9(1) of the ICCPR. Relevantly, the Committee stated as follows in *A v Australia*:[40]

> 9.2 … the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.
>
> 9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.
>
> 9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. …

109. The Committee confirmed this approach in numerous subsequent communications involving Australia,[41] and in its 2009 Concluding Observations on Australia.[42]

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[40] *A v Australia* (UNHRC 560/1993), 3 April 1997.

[41] See, eg, *Shafiq v Australia* (UNHRC 1324/2004), 13 November 2006, paras. 7.2-7.3; *Shams et al v Australia* (UNHRC 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004), 11 September 2007, para. 7.2; *C v Australia* (UNHRC 900/1999), 28 October 2002, para. 8.2; *Baban et al v Australia* (UNHRC 1014/2001), 6 August 2003, para. 7.2; *Bakhtiyari v Australia* (UNHRC 1069/2002), 29 October 2003, para. 9.3.

[42] UN Human Rights Committee, *Concluding Observations: Australia*, 7 May 2009, CCPR/C/AUS/CO/5, para. 23: 'the Committee remains concerned at its mandatory use in all cases of illegal entry, the retention of the excise zone, as well as at the non-statutory decision-making process for people who arrive by boat to the Australian territory and are taken in Christmas Island. The Committee is also concerned at the lack of effective review process available with respect to detention decisions. (arts. 9 and 14). *The State party should: (a) consider abolishing the remaining elements of its mandatory immigration detention policy; (b) implement the recommendations of the Human Rights and Equality Commission made in its Immigration Detention Report of*

110. The authors acknowledge that administrative detention for security purposes may be lawful in certain circumstances. However, in the present communication, Australia did not provide or demonstrate any lawful, individualised justification for detaining the authors upon their arrival. All of them were automatically detained under Australia's statutory mandatory detention law, merely because they were 'unlawful non-citizens' in an 'excised offshore place'.[43] The statutory framework does not permit an individual assessment of the substantive necessity of detaining a person.

111. Further, the Australian authorities did not individually screen each of the authors upon their arrival to determine whether each author personally presented a risk of absconding, lack of cooperation, or posed a *prima facie* security threat to Australia (such as to justify their detention pending further investigation into those security concerns).

112. The Australian authorities did not inform the authors of the substantive grounds for their detention upon arrival, or provide reasons or evidence substantiating any need to detain them. Australia did not even convey to them a bare assertion that they were *prima facie* assessed to be potential security risks.

113. Further, there was no preliminary security screening procedure in place to determine whether any of the authors personally presented potential security risks, so as to justify detention pending further investigation. The Australian Human Rights Commission commented as follows in April 2011:

> Under the Australian Government's *New Directions in Detention* policy, detention of unauthorised arrivals is for the purpose of conducting 'health, identity and security checks'. Once those checks have been successfully completed, 'continued detention while immigration status is resolved is unwarranted'. The 'security check' required prior to release from immigration detention should not be interpreted as requiring a full ASIO security assessment. Rather, the 'security check' should consist of a summary assessment of whether there is reason to believe that the individual concerned would pose an unacceptable risk to the Australian community were they given authority to live in the community. That assessment should be made at the time of the individual being taken into immigration detention, or as soon as possible thereafter. An individual should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved. An ASIO security assessment, if necessary, can be done while a person is living in the community.[44]

114. In consequence, not only is the initial decision to detain the authors arbitrary for failure to substantiate the need for detention, the continuation of detention was also arbitrary because it did not derive from any assessment of the author's personal circumstances, including as regards any security risks posed by them. The Australian Human Rights Commission observes that the Australian procedures results in unnecessary protracted detention:

> If a person in detention is not referred to ASIO for security assessment until after they have been assessed to be a refugee, they may face a prolonged period of detention. This is because current government policy generally requires that a person remains in immigration detention until their ASIO security assessment is finalised….

2008; (c) consider closing down the Christmas Island detention centre; and (d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.'

[43] *Migration Act 1958* (Cth), section 189(3).

[44] Australian Human Rights Commission, Submission to the Independent Review of the Intelligence Community, April 2011, 3.

> The Commission holds serious concerns about the length of time that many people, particularly those already recognised to be refugees, are spending in immigration detention awaiting the outcome of ASIO security assessments. For example, during our recent visit to the Villawood Immigration Detention Centre, Commission staff met with people who had been held in detention awaiting ASIO security assessments for up to ten months after being recognised as refugees.
>
> Currently, there is no obligation upon ASIO to complete a security assessment with respect to asylum seekers who arrived in Australia without authorisation (largely Irregular Maritime Arrivals (IMAs)) within a specified time frame. The Commission believes that ASIO should be required, by legislation, to complete security assessments for people in immigration detention within a specific time-frame. In the event that the time-frame is not met, ASIO should be required to provide information regarding the delay and an expected time-frame for completion to the individual concerned.[45]

115. The Commission further criticised an insufficient level of resourcing dedicated to the conduct of ASIO security assessments as a factor contributing to the delay.

116. It is well established that detention may also be arbitrary under article 9(1) not only where it is against the law, but where it involves elements of inappropriateness, injustice, lack of predictability or due process of law.[46] The authors further submit that Australia's failure to disclose the essential substance of any concerns Australia may have had about them individually (whether concerning a risk of absconding, security concerns, and so on) denied them 'due process' of law, was unjust, and was additionally arbitrary or unlawful under article 9(1).

117. Even if Australia had made any claims that the authors prima facie posed security concerns, such assertions alone are insufficient to justify detention under article 9(1). Article 9(1) requires substantiation by evidence of the necessity of detention. A mere claim by a State that a person presents a security risk, without any particularisation or substantiation of such claim, is not sufficient to enable a proper assessment to be made of the arbitrariness of detention under article 9(1). Otherwise a State could simply invoke un-scrutinized and un-testable concerns to mask arbitrary or indiscriminate detention.

118. The authors were never provided with any statement of reasons, or disclosed relevant information or evidence, to substantiate any suspicion that they posed security risks which warranted detention pending further investigation and final decision. Moreover, Australia did not provide any procedure for such disclosure to the authors.

119. In the absence of any substantiation of the need to individually detain each author, it may be inferred that Australia's detention of the authors pursues other, illegitimate objectives: a generalised risk of absconding which is not personal to each author; a broader policy or political aim of punishing unlawful arrivals (contrary to article 31 of the 1951 Refugee Convention), or deterring future unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available for administrative purposes. None of these objectives provides a legitimate justification for detention under article 9(1), which presumptively favours individual liberty unless strong grounds for detention exist.

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[45] Ibid, 3-4.

[46] *A v Australia* (UNHRC 560/1993), 3 April 1997, para. 9.2; Communication No. 1134/2002: Cameroon, 10 May 2005, CCPR/C/83/D/1134/2002, para. 5.1; *Van Alphen v The Netherlands* (UNHRC 305/1988), 23 July 1990, para. 5.8; *Mukong v Cameroon* (UNHRC 458/1991), 21 July 1994, para. 9.8.

120. In sum, each of the authors' period of detention between their arrival in Australia and notification of the decision to refuse their visa applications was arbitrary or unlawful under article 9(1) of the ICCPR.

Post-Refusal Stage

121. Under Australian law, the basis of the authors' continuing detention after their visa refusal decisions is that they are pending removal from Australia. The authors accept that detention for the purpose of removal may constitute a lawful justification for detention under article 9(1) of the ICCPR.

122. However, the authors submit that the mere fact of being classified under domestic law as subject to removal is not necessarily sufficient to justify detention under article 9(1). Rather, the substantive basis of their eligibility for removal, justifying the detention, must be demonstrated by the State Party.

123. Australia has not disclosed to any of the authors the substantive reasons or evidence for their adverse security assessments, which provide the basis for their ineligibility for a visa and their liability to removal. Each of the authors merely received a 'template' or 'boiler-plate' letter cast in near-identical terms, informing them only that:

> "ASIO assesses [author name] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

124. No further details, allegations or particulars of evidence or reasons for such conclusions are provided to any of the authors in their letters. In such circumstances, there exists only a bare assertion by the executive that a person poses such a security risk as to justify detention, which cannot satisfy the requirements of article 9. The secret basis of the security assessment renders it impossible for the Committee to be satisfied that there is an adequate justification of the necessity of detention.

125. Further, as noted earlier, no independent merits tribunal or Australian court has reviewed, nor is able review, the substantive grounds of the authors' detention, including to determine whether it is justified by security concerns. In such circumstances, there is no basis on which the Committee can be satisfied that State Party's assertion has been tested through an adequate domestic legal process. As such, there is no basis on which the Committee can safely defer to national authorities' assessment of the security risks and thus of the necessity of detention.

126. In addition, detention may be arbitrary under article 9(1) not only where it is against the law, but where it involves elements of inappropriateness, injustice, lack of predictability or due process of law.[47] The authors submit that Australia's failure to disclose the essential substance of any concerns Australia may have had about them individually (whether concerning a risk of absconding, security concerns, and so on) denied them 'due process' of law, was unjust, and was consequently additionally arbitrary and unlawful under article 9(1).

[47] *A v Australia* (UNHRC 560/1993), 3 April 1997, para. 9.2; Communication No. 1134/2002: Cameroon, 10 May 2005, CCPR/C/83/D/1134/2002, para. 5.1; *Van Alphen v The Netherlands* (UNHRC 305/1988), 23 July 1990, para. 5.8; *Mukong v Cameroon* (UNHRC 458/1991), 21 July 1994, para. 9.8; see also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), 172.

127. The authors' detention pending removal can only be justified under article 9(1) if Australia establishes by sufficient evidence that each author individually poses a security risk, so as to justify their liability to removal and the need for their detention. Australia has not done so.

Australia has not shown that less invasive means would be ineffective

128. The Committee has observed that in detention cases, a State Party must demonstrate that, 'in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends'.[48] In an immigration detention context, the Committee has stated that these may include, for example, 'the imposition of reporting obligations, sureties or other conditions'.[49] Thus, even if Australia's security assessment is *prima facie* accepted, or otherwise shown to be correct, the prohibition on arbitrary detention also requires that less invasive means must first be exhausted before detention.

129. Australia has not utilised any alternative means, or demonstrated that such means would be inadequate or inappropriate in meeting its security concerns. Detention is automatic under Australian law. The statutory framework does not require consideration of alternatives to detention before resorting to detention. Nor have the Australian authorities demonstrated that they gave genuine consideration to alternatives to detention for each author personally before resorting to it.

130. Alternatives to detention, which are capable of addressing security concerns, include various forms of human, electronic and telecommunications surveillance by law enforcement after release from detention; electronic tags or bracelets to track a person's physical location; obligations to periodically report to law enforcement; the payment of bonds, assurances or guarantees, to be forfeited upon breach; or the imposition of anti-terrorist 'control orders'.[50]

131. Criminal prosecution is also available where the person is of security concern because of their alleged involvement in prior criminal activities. Specifically, Australian law contains extensive offences relating to war crimes in armed conflicts (including non-international conflicts); crimes against humanity; and torture.[51] Further, Australian law contains extensive offences relating to terrorist acts and terrorist organisations, including numerous inchoate, preparatory, and organisational offences, which apply to both peacetime and war-time conduct. All such offences have extraterritorial application.

132. Australia has not provided any substantiation of the basis for its assertion that the authors are security risks to Australia necessitating detention. Almost all of the authors are Sri Lankan nationals of Tamil origin, who fled Sri Lanka during or after the Sri Lankan civil war. If Australia possesses good evidence to suspect that any of the authors has committed a crime in that context (whether in the course of the non-international armed conflict in Sri Lanka, or by association with an organisation such as the LTTE (Tamil Tigers), such crimes can be amply prosecuted under Australian law.

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[48] *Shams et al v Australia* (UNHRC 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004), 11 September 2007, para. 7.2.
[49] *Baban et al v Australia* (UNHRC 1014/2001), 6 August 2003, para. 7.2.
[50] *Commonwealth Criminal Code*, Division 104.
[51] *Commonwealth Criminal Code*, Division 268.

133. In this regard, the authors submit that article 9(1) requires that prolonged administrative detention should not be used as a substitute for criminal prosecution in cases where there is evidence of criminal wrongdoing that falls within the jurisdiction of the domestic courts. The requirement to exhaust 'less invasive means' includes an obligation to pursue criminal prosecution where possible, since the higher due process safeguards of a criminal proceeding, and the strong judicial protections involved, are 'less invasive' than protracted administrative detention without such safeguards.

134. The Australian Human Rights Commission has recommended that durable solutions should be found for individuals with adverse security assessments, including their removal from detention facilities.[52]

The means are not tailored to any objective risk

135. The assessment of whether less invasive alternatives to immigration detention are available in the circumstances must necessarily be tailored to the nature of the security threat posed by a particular person. Australia has not provided any details whatsoever of the nature of the security risk posed by any particular author. All that is known is that an 'adverse security assessment' by law relates primarily to *Australia's* national security ('the protection of, and of the people of, the Commonwealth and the several States and Territories'), or to certain of Australia's responsibilities towards foreign states.[53]

136. It can only be assumed that the authors' adverse security assessments relate to their suspected conduct committed prior to their entry to Australia. It may then be speculated that the assessments might specifically relate to events in Sri Lanka (potentially in relation to the former non-international armed conflict, and//or the LTTE (Tamil Tigers)). It is now a fact that the conflict there ceased in May 2009, with the defeat of the LTTE. It is also a fact that the LTTE is now effectively defunct as an organisation, both within and outside Sri Lanka.

137. In this context, Australia bears a heavy burden to demonstrate that detaining the authors is necessary to protect the *Australian* community. Any prior activities of the authors in Sri Lanka, concerning a concluded armed conflict or a defunct non-state organisation, cannot easily establish that the authors present a risk to the Australian community, so as to justify detention over the various alternatives to detention.

138. Relevantly, the Australian Government never listed the LTTE as a prohibited 'terrorist organisation' under Australian law, implying that Australia never considered the LTTE as a sufficient terrorist risk to itself to warrant proscription.

139. In the (different) context of exclusion from refugee status, UNHCR has observed that:

> Given this lack of information [about the association of individuals with the LTTE in northern and eastern Sri Lanka during the war], and the wide range of activities which civilians are known to have provided to the LTTE in areas under LTTE control, UNHCR does not consider it appropriate to

[52] Australian Human Rights Commission, *Immigration Detention at Villawood 2011: Summary of observations from visit to immigration detention facilities at Villawood*, Recommendation 5.
[53] *ASIO Act 1979* (Cth), section 4(a) and (b) respectively.

presume that all persons who join the LTTE were heavily and individually involved in acts giving rise to exclusion.[54]

140. UNHCR further observes that many people were coerced into assisting the LTTE,[55] or were forcibly recruited to its cause.

141. In their asylum applications, some of the authors explained the limited ways in which they were involved with the LTTE, in terms which would not be regarded as sufficiently serious by UNHCR to prejudice their refugee status. For example, one of the authors is vision impaired and assisted the LTTE in preparing and decorating for festivals, and helped in the kitchen and in digging bunkers, and his support was motivated by witnessing the Sri Lankan Army kill his father. At no time did he receive military training, or train for or participate in terrorist activities of any kind.

142. In addition, even if any authors were involved in active fighting for the LTTE, it does not follow that they are a national security risk to Australia, or that they are 'terrorists' excludable from refugee status. The LTTE was a non-state armed group in a non-international armed conflict under common article 3 of the four 1949 Geneva Conventions. International humanitarian law does not prohibit participation by members of non-state armed groups in armed hostilities against government military personnel or military objectives, where civilian and civilian objects are not unlawfully targeted.

143. Many LTTE fighters only took part in hostilities against Sri Lankan national armed forces. Where such fighters did not unlawfully target civilians, there may be no reason to believe that they pose any threat to Australia's national security, or are otherwise excludable. Nor was the LTTE prohibited as a terrorist organisation under Australian law at the time. Australia has not demonstrated that any of the authors were involved in unlawful activities against civilians, and for that reason pose a risk to Australia.

144. A further reason to be cautious about any security assessment of the danger posed by the authors is that the provenance of evidence or information about them may be unreliable. The Sri Lankan Government may have provided intelligence to the Australian authorities about the alleged activities of various Sri Lankan citizens of Tamil origin in Australia, potentially including some or all of the authors.

145. If the Australian authorities have relied upon such information in assessing any of the authors, the credibility of that evidence must be seriously questioned. In March 2011, the United Nations Secretary-General's Panel of Experts on Accountability in Sri Lanka found that the Sri Lankan Government's version of events (concerning the final stages of the civil war in Sri Lanka) were 'very different' from the 'credible allegations' identified by other sources, and after a 'rigorous review and assessment of all the available information', the Panel was unable to accept the government's version of events.[56]

146. The UN Panel thus contrasted the government's claim that the final stages of the war were 'humanitarian rescue operation' with a policy of 'zero civilian casualties' with the

[54] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, April 2009, 38.
[55] Ibid, 37.
[56] *Report of the United Nations Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, paras. 172 and 175.

credible allegations it uncovered of 'a wide range of serious violations of international humanitarian law and international human rights law'.[57] There is accordingly very strong reasons to equally doubt the reliability of allegations made by the Sri Lankan authorities concerning the activities of persons suspected of involvement with the LTTE (Tamil Tigers) in that conflict.

147. Regarding the five authors from the *Oceanic Viking*, these authors have become aware that some statements made to UNHCR were obtained by the Australian authorities and considered by ASIO in the security assessment process.[58] These authors are deeply concerned about this misuse of their statements, which were provided to an international agency for international protection purposes and were not intended for Australia's security assessment process. These authors were not informed of any subsequent use that might be made of their statements by a national authority, and thus may have been subjected to unfair self-incrimination.

The authors' indefinite detention is not subject to periodic review

148. The Committee has stated that article 9 requires that 'every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed'.[59] Thus, even if detention may be initially justified on security grounds, article 9 requires periodic review of such grounds and precludes indefinite detention flowing automatically from the fact of original grounds justifying detention.

149. The requirement of period review necessarily implies that article 9 requires the existence of time limits on individual periods of administrative detention, which are only authorised until such time as period review occurs. Upon review, detention can be terminated or renewed as appropriate, depending upon whether the grounds justifying detention persist. Periodic review is a vital safeguard of individual liberty against arbitrary executive detention.

150. This approach is supported by state practice. Under equivalent provisions of the *European Convention on Human Rights*, the European Court of Human Rights has found that the absence of time limits for the review of the lawfulness of detention renders detention (with a view to expulsion) *de facto* indefinite and unlawful.[60] A lack of clear legal provisions establishing the procedure for ordering, extending or terminating detention, and setting time-limits for such detention, can render arbitrary what is initially lawful detention.[61]

151. In the present communication, the duration of the authors' detention has not been subject to periodic review by Australia of the continuing existence any personal grounds justifying their detention. Australian law does not provide any legally enforceable mechanism for the periodic review of the grounds of detention. Detention simply persists until a person receives a visa or is removed from Australia.

[57] Ibid, ii.
[58] Letter from the Australian Government's Inspector-General of Intelligence and Security, Mr Ian Carnell, to solicitor Mr Stephen Blanks, File Ref: 2010/14, dated 8 April 2010, 2 [letter on file with counsel].
[59] *A v Australia*, para. 9.4; *Shafiq v Australia*, para. 7.2.
[60] *Sultanov v Russia*, ECHR App. No. 15303/09 (4 November 2010), para. 86; *Yuldashev v Russia*, ECHR App. No. 1248/09 (8 July 2010), para. 98.
[61] *ZNS v Turkey*, ECHR App. No. 21896/08 (19 January 2010), para. 56.

152. As such, Australian law does not specify any maximum individual periods of detention of a particular person, the expiry of which triggers a periodic review and a fresh assessment of whether a further, time-limited period of detention is justified. Australian law therefore permits definite detention, in circumstances where a person is ineligible for a visa and is not removed (or cannot be removed) from Australia. The substantive necessity of such enduring detention is not subject to periodic review by the courts.

Detention becomes arbitrary where there is no reasonable prospect of removal

153. The Committee has indicated that an initially lawful detention may become arbitrary under article 9 where a 'reasonable prospect' or likelihood of expelling a person no longer exists and detention is not terminated.[62] State practice confirms this approach. In notifying its derogation from article 9 of the ICCPR in December 2001, the United Kingdom stated as follows:

> In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 9 of the Covenant. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 7 of the Covenant. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that the international obligations of the United Kingdom prevent removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.[63]

154. In consequence, the United Kingdom derogated from article 9 to prevent the exercise of an extended detention power under UK law from being 'inconsistent' with the ICCPR.

155. Article 5(1)(f) of the *European Convention on Human Rights*, which provides for detention pending removal equivalently to article 9 of the ICCPR,[64] is similarly interpreted. The European Court of Human Rights has found that a person can only be detained pending expulsion where 'action is being taken with a view' to expulsion[65] and where expulsion proceedings are 'in progress'.[66] A State must pursue expulsion proceedings actively and with due diligence.[67] A person cannot continue to be lawfully detained where there is no 'realistic prospect of their being expelled' and it is insufficient that a State is keeping the possibility of expulsion 'under active review'.[68]

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[62] *Jalloh v The Netherlands* (UNHRC 794/1998), 26 March 2002, para. 8.2; see also *Baban et al v. Australia* (UNHRC 1014/2001), 6 August 2003, para. 7.2.
[63] Notification of the United Kingdom's derogation from article 9 of the *International Covenant on Civil and Political Rights*, 18 December 2001.
[64] Art. 5(1)(f) of the *European Convention on Human Rights* authorises detention of 'a person against whom action is being taken with a view to deportation or extradition'.
[65] *Chahal v United Kingdom* (1996) 23 EHRR 413, para. 112.
[66] Ibid, para. 113.
[67] Ibid.
[68] *A and ors v United Kingdom*, ECHR App. No. 3455/05 (19 February 2009), para. 167.

156. National law in various States (such as the United States and United Kingdom) supports this approach in cases involving detention pending removal.[69] The United States Supreme Court, for instance, has imposed a presumptive six-month limit on detention pending removal,[70] to preclude indefinite detention where removal is not 'reasonably foreseeable'.[71] The current work of the International Law Commission, concerning the human rights in detention of aliens subject to expulsion, also supports this approach:

> The duration of detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.[72]

157. In contrast to the requirements of international law, the Australian High Court has confirmed the validity of indefinite immigration detention in *Al Kateb v Godwin*,[73] involving the same statutory provisions under which the present authors are detained.[74] In another case, *Re Woolley*, a judge of the High Court of Australia explicitly stated that the apparent unlawfulness of Australia's mandatory detention regime does not affect its domestic constitutional validity:

> The decisions of the United Nations Human Rights Committee in *A v Australia*, *C v Australia* and *Bakhtiyari v Australia*, the deliberations of the United Nations Working Group on Arbitrary Detention and the detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a regime which authorises the mandatory detention of unlawful noncitizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time. They suggest that something more is required if the regime is not to be found to breach the Refugees Convention, the ICCPR or the Convention on the Rights of the Child, or to be otherwise contrary to international law. Something more may include periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens.
>
> However, the issue in this Court is not whether the detention of the present applicants is arbitrary according to international jurisprudence, whether it constitutes a breach of various Conventions to which Australia is a party or whether it is contrary to the practice of other states.[75]

158. The authors submit that there are no realistic prospects of their removal within a reasonably foreseeable period, such that their detention can no longer be justified for the purpose of removal under article 9. None of the authors has been informed that an active proceeding to remove them to a specifically identified country is underway.

159. Most of the authors solely possess Sri Lankan nationality, and one author solely possesses Myanmarese nationality. Australia has notified most of the authors that they are recognised as refugees, and are considered at risk of persecution if returned to Sri Lanka or Myanmar. Alternatively, some of the authors may be at risk of torture or inhuman or degrading treatment if returned to Sri Lanka, and are therefore protected by Australia's obligations under the article 7 of the ICCPR and under the *Convention*

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[69] *Zadvydas v Davis*, 533 US 678 (2001) (US Supreme Court); *R v Governor of Durham Prison, ex parte Singh* [1984] All ER 983.
[70] *Zadvydas v Davis*, 533 US 678 (2001) (US Supreme Court) at 701 (Justice Breyer for the majority).
[71] *Clark v Martinez*, 125 Sup. Crt. 716 (2005).
[72] Draft Article B(3)(a), in ILC, Report on the work of its 62nd session (3 May to 4 June and 5 July to 6 August 2010), UNGAOR, Official Records, 65th Session, Supplement No. 10 (A/65/10), p. 279.
[73] *Al Kateb v Godwin* [2004] HCA 37.
[74] *Migration Act 1958* (Cth), sections 196 and 198 [full text extracted at Annex C].
[75] *Re Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49, paras. 114-115 (McHugh J).

against Torture. Australia has not informed any of the authors that it intends to return them to Sri Lanka or Myanmar, and the authors therefore understand that Australia does not intend to remove them to those places.

160. Nor has Australia informed the authors that any third country has agreed to accept them, or that active negotiations for such purpose are underway with any specific third countries, or that there exists any time frame concerning such negotiations. No third country is obliged to admit non-nationals such as the authors. It is also highly improbable that any third country would agree to accept the authors when they have been assessed by Australia as a risk to security. Consequently, Australia is no longer lawfully detaining the authors for the purpose of (active) removal within the terms of article 9, where there is no genuine prospect of them being removed.

161. Unlike the United Kingdom, Australia has not declared or notified the existence of a public emergency threatening the life of the nation under article 4 of the ICCPR. As such, Australia has not lawfully suspended the protection under article 9 against the continuation of detention which is no longer genuinely for the purpose of active and realistic expulsion proceedings.[76] At law they should be prosecuted or released.[77]

162. Further, the authors observe that the hardship of protracted detention is a factor in considering the reasonableness of the length of their detention under article 9.[78] In this regard, the authors reiterate their submissions in Parts D and E, concerning the adverse impact of their detention upon their mental health.

The true purpose of the authors' detention is not specifically authorised by law

163. As noted above, Australia has not demonstrated that there are active removal proceedings underway in respect of each author and involving specifically identified States. In such circumstances, the exercise of the power to detain the authors pending their removal does not satisfy the requirements of article 9 of the ICCPR.

164. The true purpose of the authors' continuing detention appears to be administrative or preventive security-based detention, unrelated to active expulsion proceedings, in circumstances where Australia is not willing to release them into the community. Australia appears to be misusing its statutory 'detention pending removal' power as a disguised or de facto administrative, security detention power.

165. If that is the true purpose of the authors' detention, it would have to be specifically authorised by domestic law to be lawful under article 9(1). Article 9(1) relevantly provides: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' The basis for detention must thus be specifically authorised and sufficiently circumscribed by law.[79]

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[76] See *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[77] European Council on Refugees and Exiles (ECRE), 'Position on Exclusion' (March 2004), paras. 11, 60; see also Jane McAdam, *Complementary Protection in International Refugee Law* (OUP, Oxford, 2007), 231-232.

[78] *Baban et al v Australia* (UNHRC 1014/2001), 6 August 2003, para 7.2.

[79] Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, Oxford University Press, 2004), 308 (quoting Dinstein).

166. Australia has not invoked any other domestic legal power to justify their detention, on security grounds, in terms consistent with article 9. Australia does not, for instance, purport to detain the authors under a security detention power of the kind authorised in the United Kingdom in relation to its derogation from article 9 of 2001. Instead, Australia is utilizing immigration detention powers for the improper ulterior purpose of preventive security detention, in circumstances where the purpose of detention is not specifically authorised by law. Such detention violates article 9(1) of the ICCPR.

International refugee law is relevant as lex specialis

167. Additional legal considerations apply to the position of those authors who were recognised as refugees by Australia. Australia's obligations under article 9 of the ICCPR must be interpreted in the light of international refugee law, since the latter law constitutes the *lex specialis* concerning detained refugees. Australia is a party the 1951 Refugee Convention.

168. In the *Nuclear Weapons Advisory Opinion*, the International Court of Justice explained the complementary relationship between international humanitarian law and international human rights law:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war…. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[80]

169. By close analogy: (a) it is well accepted that international refugee law and international human rights law apply complementarily; (b) refugee law is the 'special' law viz-a-viz human rights law; (c) the test of what is an arbitrary detention (under article 9 of the ICCPR) falls to be determined by refugee law as the *lex specialis*. Thus, whether the authors' detention is 'arbitrary' can be determined by whether it is lawful or unlawful under refugee law.

The authors' detention is a prohibited penalty

170. The authors firstly submit that their detention is 'arbitrary' under article 9(1) of the ICCPR because it violates article 31(1) of the Refugee Convention. Article 31(1) of the Refugee Convention prohibits the imposition of 'penalties' on account of the unlawful mode of entry to a State, as follows:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

171. Article 31 does not automatically prohibit administrative detention as a 'penalty', and such detention may be lawful where it is necessary and proportionate. However,

[80] *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons*, 1996 ICJ Rep. 226, para. 25.

administrative detention will constitute a 'penalty' where it is unnecessary, arbitrary or discriminatory. The eminent refugee law jurists Goodwin-Gill and McAdam state as follows:[81]

> The term 'penalties' is not defined in article 31, prompting the question whether it encompasses only criminal sanctions, or whether it also extends to administrative penalties (such as administrative detention). Following the Human Rights Committee's reasoning that the term 'penalty' in article 15(1) of the ICCPR66 must be interpreted in light of that provision's object and purpose, article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence. An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended. *Thus, measures such as arbitrary detention … may constitute 'penalties'*. This is supported by Executive Committee Conclusion No. 22 (1981), which states that asylum seekers should 'not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful'. …
>
> *Though administrative detention is technically permissible under article 31(2), it will be equivalent to a penal sanction whenever basic safeguards are lacking (with respect to conditions, duration, review and so on). In this context, the distinction between administrative and criminal sanctions becomes irrelevant, and the key issue is whether the measures taken are reasonable and necessary, arbitrary or discriminatory, or a breach of human rights law*.[82] [emphasis added; footnotes omitted]

172. In the present communication, the authors submit that Australia violated article 31(1) of the Refugee Convention because:

(a) Their detention was arbitrary and unreasonable, because the grounds of detention were not substantiated by the State Party and did not justify it (see submissions above, reiterated here); and

(b) They were mandatorily detained because of their illegal entry to Australia, in circumstances where non-citizens who enter Australia lawfully and apply for asylum are not mandatorily detained.[83] The authors were accordingly treated less favourably than similarly situated asylum seekers / refugees under Australian law. There was no objective justification for their differential treatment, in circumstances where the State Party did not individually substantiate the necessity of detaining each o the authors and the decision to mandatorily detain them was arbitrary.

(c) Such detention accordingly constituted a 'penalty' prohibited by article 31(1).

173. Since the authors' detention constitutes an unlawful penalty under international refugee law, it necessarily renders their detention 'arbitrary' under article 9(1) of the ICCPR.

Potential inconsistency with the exception to non-refoulement

174. The authors also submit that detention for the purpose of removing a refugee will only be lawful under article 9(1) if the *basis* of removal is lawful under international refugee law. The question arises whether the security grounds asserted by Australia for denying protection to the authors are consistent with international refugee law.

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[81] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007), 266.
[82] Ibid.
[83] The Migration Act 1958 (Cth) does not provide for the mandatory detention of non-citizens who enter Australian with permission and then subsequently apply for protection as refugees, even though such persons may equally present risks of absconding, which Australia claims justifies detaining unlawful arrivals.

175. The Refugee Convention contains three specific provisions concerning security threats (Article 1F, Article 32, and Article 33(2)), and which restrict the circumstances in which States can remove persons (and thus, detain such persons for the purpose of removal). The authors submit that Australia has not satisfied the relevant legal tests.

176. Since the authors are not 'lawfully' present in Australia within the meaning of article 32 of the Refugee Convention, that provision concerning the expulsion of lawfully resident refugees to a safe third country does not apply.

177. Australia has not indicated to the authors any destination countries to which they will be removed, whether their countries of origin or any third country. Where their removal destination is unknown – and thus could include their country of origin (*refoulement*), a country where 'chain *refoulement*' may occur, or a safe third country – detention pending removal can only be justified if it is consistent with the 'exception' to non-refoulement under article 33(2) of the Refugee Convention. The grounds for removal, which justify detention, must be consistent with the legal test for removal under refugee law, which contains safeguards to ensure that refugees are not arbitrarily removed from a country of asylum, for conduct which is not sufficiently serious to warrant removal.

178. Article 33(1) of the Refugee Convention protects against refoulement as follows:

> No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

179. Article 33(2) of the Refugee Convention provides for an exception to non-refoulement:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

180. The exception to non-refoulement establishes a high threshold according to UNHCR:

> Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum.[84]

181. Accordingly, if Australia is seeking to return the authors to persecution in their country of origin (Sri Lanka or Myanmar), then it would need to demonstrate that there are 'reasonable grounds' for regarding the authors as 'an extremely serious', 'exceptional', or 'major actual or future' threat to Australia, and that their removal is necessary as a 'last resort' to counter that threat. It would not be sufficient for Australia to establish that the authors posed security threats in the past, or in another country (such as Sri Lanka or Myanmar). It must demonstrate that they seriously threaten Australia now or in future.

[84] UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, para. 10.

182. As argued at above and reiterated here, Australia has not provided any evidence or substantiation of its claim that that authors pose a security risk to Australia. Even if the authors are a security risk of some kind, Australia has not provided any evidence or substantiation that they are such an 'extremely serious threat' as to necessitate their removal from Australia to protect the community, or that less invasive means for protecting the community are unavailable.

183. If Australia intends to expel the authors to a country other than their country of origin, Australia would also need to demonstrate that such country does not present a risk of 'chain *refoulement*' to their countries of origin, and is in fact a safe third country.

184. Australia has not identified any country to which it proposes to return the authors. The authors submit that their detention can only be justified for the purpose of a lawful removal, whether justified under the exception to non-refoulement (according to the higher threshold for removal set out above), or where removal to a safe third country is justified by genuine security concerns. Since Australia has not substantiated any grounds for suspecting the authors to threaten security, it has not established any basis for detention pending removal under refugee law.

Inconsistency with Article 1F of the Refugee Convention

185. Australia has recognised most of the authors as refugees (see Annex A). As noted above, article 32 of the Refugee Convention does not apply to them; article 33(2) will not apply where Australia does not return them to persecution; and if Australia does seek to return them to persecution, it has not demonstrably met the requirements of article 33(2).

186. Australia has not applied the 'exclusion clauses' of Article 1F of the Refugee Convention to the authors, given that Australia has expressly recognised their refugee status. Article 1F excludes from refugee status persons concerning whom there are serious reasons for considering that they have committed (outside Australia) certain international crimes, serious non-political crimes, or acts contrary to United Nations principles and purposes. Having not applied the exclusion clauses, Australia does not therefore claim that any of the authors have committed any Article 1F acts, such as war crimes or terrorism.

187. In this regard, the authors submit that Australia's 'security assessment' of them is not compatible with international refugee law. Australia's security assessment operates as an additional, unilateral ground for excluding refugees which is not authorised under the Refugee Convention, and which exceeds what is permitted by it. Australia has substituted its own 'national security' test for the exclusion of refugees instead of applying Article 1F. Refugees can only be excluded from protection if they are suspected of committing the serious conduct specified under Article 1F, or pose risks under article 33(2), and not where they fall within the wide meaning of 'security' under Australian law (set out on page 15 above). Exclusion is limited to the serious acts under article 1F because of the importance of refugee protection, and of preventing arbitrary unilateral exclusion by states where the refugee's conduct is not sufficiently serious.

188. Where Australia has not established the grounds for the authors' exclusion under article 1F, their detention cannot be justified pursuant to enforcing article 1F. Further, their detention cannot otherwise be justified under international refugee law once their refugee status has been recognised and neither Article 1F nor Article 33(2) applies.

B. Article 9(2) – No notice of reasons for detention

189. Article 9(2) of the ICCPR provides that:

> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

190. The first part of article 9(2) ('Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest') applies not only to an 'arrest' in a criminal law context, but to any deprivation of liberty by detention. Only the second part of Article 9(2) is so confined to criminal charges ('and shall be promptly informed of any charges against him'). The Committee's General Comment No. 8 (1982) on Article 9 confirms this interpretation, in differentiating the scope of the first and second parts of article 9(2):

> It is true that some of the provisions of article 9 (*part of para. 2* and the whole of para. 3) *are only applicable to persons against whom criminal charges are brought*. *But the rest,* and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, *applies to all persons deprived of their liberty by arrest or detention.*[85] [emphasis added]

191. The eminent jurist Manfred Nowak also confirms this approach in his distinguished commentary on the ICCPR,[86] as does state practice concerning the equivalent provision of the European Convention on Human Rights.[87]

192. As regards the content of the information which must be provided to a person upon their detention, the Committee held in *Drescher v Uruguay* that a person must be informed of the 'substance' of the reasons for their detention, and it is not sufficient to simply inform a person that they are being held under unspecified 'security measures':

> With regard to the author's contention that her husband was not duly informed of the reasons for his arrest, the Committee is of the opinion that article 9 (2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.[88]

193. In the present communication, the authors submit that they were never informed by Australia of the substantive reasons for their detention. At most, they were made aware that they were detained because they were 'offshore entry persons' and 'unlawful non-citizens' liable to detention under the *Migration Act 1958* (Cth). The authors were only made aware that their detention was supported by the purely formal and self-evident fact they fell within these legal categories under domestic law.

194. In this regard, the authors submit that article 9(2) necessarily requires that a detainee must be informed of the substantive necessity allegedly justifying their detention. For

[85] UN Human Rights Committee, *General Comment No. 8: Right to liberty and security of persons (Article 9),* 30 June 1982.
[86] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), 174.
[87] Article 5(1)(c) of the ECHR provides a right to know the reasons for arrest, and is interpreted to apply to civil as well as criminal powers (*Van der Leer v Netherlands*, A 170 (1990), paras. 27-28), including detention of asylum seekers (*Saadi v United Kingdom*, 11 July 2006).
[88] *Adolfo Drescher Caldas v Uruguay* (UNHRC 43/1979), 1990, para. 13.2.

instance, they must be informed that the State has grounds to suspect that the person individually presents a risk of absconding, or a security risk, or that there is some sufficient reason for their detention. None of the authors was informed of any such substantive reason, particularised to their circumstances, for detaining them. As such, Australia breached its obligation to the authors under article 9(2) of the ICCPR.

C. Article 9(4) – No effective judicial review of detention

Judicial review of detention is not available

195. The authors have been denied the right to judicial review of detention under article 9(4), which requires substantive judicial review of the necessity of detention. Numerous UN Committee decisions have found that Australia's procedures do not meet the requirements of article 9(4). Those Views equally apply to the present authors' situation, which is subject to a similar legal regime concerning judicial review of detention.

196. The Committee held in *A v Australia* that judicial review of detention must be 'real' and not limited to a merely formal assessment of whether a person falls into a self-evident factual category under domestic law. The Committee stated as follows:

> … court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant.[89]

197. In that communication, the Committee found that the Australian courts were 'limited to a formal assessment of the self-evident fact' of whether a person was a 'designated person' under the domestic legislation, but had no power to review detention or to order a person's release. Such limited grounds of judicial review did not satisfy article 9(4).

198. In subsequent communications, following amendments to Australian law, similar Views have been expressed by the Committee in relation to judicial review remaining limited to a formal determination of whether a person is an 'unlawful non-citizen'.[90] The courts were unable to make 'a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case'.[91] Such limited grounds of judicial review were found not to satisfy article 9(4).

199. The Committee has maintained its jurisprudence on this issue despite a continuing refusal by Australia to accept, in good faith, the Committee's interpretation of the Covenant as the authoritative body as entrusted by international law.

200. The authors submit that the legal situation concerning the unavailability of judicial review of detention in Australia remains incompatible with article 9(4) of the ICCPR, for the reasons previously stated by the Committee. In fact, the legal situation under domestic law has deteriorated since the Committee's previous Views.

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[89] *A v Australia* (UNHRC 560/1993), 3 April 1997, para. 9.5.

[90] *C v Australia* (UNHRC 900/1999), 28 October 2002, para. 7.4; *Shafiq v Australia* (UNHRC 1324/2004), 13 November 2006, paras. 7.3-7.4; *Shams et al v Australia* (UNHRC 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004), 11 September 2007, para. 7.3; *Baban et al v Australia* (UNHRC 1014/2001), 6 August 2003, para. 7.2.

[91] *C v Australia* (UNHRC 900/1999), 28 October 2002, para 7.4; see also *Baban et al v Australia* (UNHRC 1014/2001), 6 August 2003, para. 7.2.

201. As regards the grounds of the authors' initial detention, Australian law now expressly prohibits proceedings being brought in the courts relating to the status of a person as an 'offshore entry person', or the lawfulness of the detention of an 'offshore entry person'.[92] The authors are therefore barred by statute from challenging even their formal or self-evident factual designation as offshore entry persons subject to mandatory detention.

202. Further, as regards the authors' continuing detention, Australian law also expressly prohibits the courts from releasing an unlawful non-citizen from detention, except for removal or where the person has been granted a visa.[93]

203. The courts are therefore precluded from reviewing the substantive necessity of detention as required by article 9(4), including by reference to any personal risk factors pertaining to individual authors. The only judicial review available concerns the purely formal determination whether a person is subject to removal, or has been granted a visa. As such, the authors submit that Australia is in breach of its obligation under article 9(4).

Judicial review of the underlying adverse security assessments is also not available

204. Where detention is purportedly justified by a State on security grounds, the requirement of substantive judicial review of the grounds of detention under article 9(4) necessarily requires a judicial inquiry into the information or evidence upon which a security assessment is based. Without access to such evidence, a court is not in a position to effectively review the substantive grounds of detention.

205. At a minimum, such judicial inquiry requires disclosure to the court of all relevant evidence which the State relied upon in making an adverse security assessment. In appropriate cases, certain information may be provided confidentially to the court to protect intelligence sources or otherwise safeguard essential security interests. The authors submit, however, that it would not be compatible with article 9(4) for a State to withhold relevant evidence from the court itself under any circumstances.

206. As regards the standard of review, the Committee found in *Ahani v Canada* that a mandatory judicial review of the 'reasonableness' of a State's security assessment, including its 'evidentiary foundation', conducted 'promptly after the commencement of mandatory detention' (meaning within one week of its commencement), is 'in principle' sufficient to satisfy article 9(4).[94] The Committee appears to accept that a full 'merits' review of detention by a court, for instance, to determine its factual 'correctness' as opposed to its legal 'reasonableness', is not necessarily always required.

207. Nonetheless, the content of the 'reasonableness' in *Ahani v Canada* provided a high level of protection to a detainee. The Committee observed as follows:

> … at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine

[92] *Migration Act 1958* (Cth), section 494AA(1).
[93] *Migration Act 1958* (Cth), section 196(3).
[94] *Ahani v Canada* (UNHRC 1051/2002), 15 June 2004, paras. 10.2-10.3.

> witnesses [including two Canadian security service officers]. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author.[95]

208. Accordingly, the Committee's jurisprudence establishes that judicial review of the substantive justification for immigration security detention under article 9(4) requires a minimum degree of disclosure of evidence to the detainee personally, and an opportunity to effectively challenge that evidence in an adversarial court proceeding. (Such procedural rights under article 9(4) exist independently of the rights under article 13 reserved for *lawful* aliens.)

209. The above approach is supported by wider state practice. Article 5(4) of the *European Convention on Human Rights* is functionally equivalent to article 9(4) of the ICCPR and confirms the above interpretation of the latter provision. The procedural requirements of article 5(4) of the ECHR are less stringent than fair trial guarantees in criminal cases under article 6(1) of the ECHR (which is similar to article 14 of the ICCPR); and rights under article 6 cannot be directly applied in article 5(4) (detention) cases.[96]

210. Article 5(4) must, however, 'provide guarantees appropriate to the kind of deprivation of liberty in question', particularly as regards long-term detention.[97] Further, the procedural guarantees in article 5(4) 'are derived from the right to an adversarial trial as laid down in Article 6'.[98] In *A and others v United Kingdom,*[99] the Grand Chamber of the European Court of Human Rights held that the 'dramatic impact' of lengthy and potentially indefinite administrative detention of non-citizen suspected terrorists, not capable of removal, demanded the importation of 'substantially the same fair trial guarantees' of a criminal trial (under article 6 of the European Convention, equivalent to article 14 of the ICCPR) into proceedings challenging the lawfulness of detention.

211. In particular, such guarantees were found to include a minimum degree of disclosure *personally* to a detainee. While the protection of classified information may be justified to protect national security, the European Court held that it must be balanced against the requirements of a fair hearing.[100] The starting point is that it is 'essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.[101] Where 'full disclosure' is not possible, however, a person must still enjoy 'the possibility effectively to challenge the allegations against him'.[102]

212. Further, 'where all or most of the underlying evidence remained undisclosed', 'sufficiently specific' allegations must be disclosed to the affected person to enable that person to effectively provide his representatives (including security-cleared counsel)

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[95] Ibid, para. 10.5.
[96] *Reinprecht v Austria*, ECHR App. No. 67175/01 (12 April 2006) at paras. 39-40.
[97] *Reinprecht v Austria*, ECHR App. No. 67175/01 (12 April 2006), para. 31; see also *Assenov and Others v. Bulgaria*, ECHR App. No. 90/1997/874/1086 (28 October 1998), para. 162; *Megyeri v Germany*, ECHR App. No. 13770/88 (12 May 1992), para. 22.
[98] *Garcia Alva v Germany*, ECHR App. No. 23541/94 (13 February 2001), para. 39.
[99] *A and others v United Kingdom*, ECHR App. No. 3455/05 (19 February 2009). A similar approach has been taken in 'control order' cases, where the more stringent standard of fairness applicable in criminal trials was applied even though such proceedings did not involve a criminal penalty: *Secretary of State for the Home Department v AF and another* [2009] UKHL 28, para. 57.
[100] *A and others v United Kingdom*, ECHR App. No. 3455/05 (19 February 2009), paras. 217-218.
[101] Ibid, para. 218.
[102] Ibid.

'with information with which to refute them'.[103] The provision of purely 'general assertions' to a person, where the decision made is based 'solely or to a decisive degree on closed material' will not satisfy the procedural requirements of a fair hearing.[104] On the facts, the Court held that the affected person's hearing had been unfair because the case against him was largely in closed material and the open case was insubstantial.

213. Earlier immigration security detention cases are also relevant practice. In the seminar case of *Chalal v United Kingdom*, the European Court found a violation of article 5(4) of the ECHR (equivalent to article 9(4) of the ICCPR) where the domestic courts were not able to review a decision to detain a person on security grounds.[105] In that case, only a non-judicial procedure was available, which denied the affected person a right to legal representation, only provided an 'outline' of the grounds for deportation, and had no power of decision to bind the relevant minister. The European Court stated:

> The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved…
>
> The Court attaches significance to the fact that … in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.[106]

214. In the later immigration security detention case of *Al-Nashif v Bulgaria*, the European Court found a violation of article 5(4) where a minister's decision concerning national security was not subject to judicial review, the reasons for the decision were not published, and the detainee was not given access to a lawyer. The European Court reiterated that to ensure the protection of individuals against arbitrariness, '[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved'.[107] It also emphasised that 'there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice'.[108] The Court relevantly stated:

> Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information….
>
> The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[109]

[103] Ibid, para. 220.
[104] Ibid.
[105] *Chahal v United Kingdom*, ECHR App. No. 22414/93 (15 November 1996), paras. 129-132.
[106] Ibid, para. 131.
[107] *Al-Nashif v Bulgaria*, ECHR App. No. 50963/99 (20 September 2002), para. 94.
[108] Ibid, para. 97.
[109] Ibid, paras. 123-124.

The authors' situation

215. The authors observe that the above minimum procedural requirements required by article 9(4) are not available to them under Australian law. First, there is no opportunity for merits review of adverse security assessments in any Australian court or tribunal. As the Australian courts have stated of such cases, 'the merits and validity of ASIO's assessment that the applicant is a risk to Australia's national security are not a matter that, in a judicial review proceeding like this, are for the court to pass upon'.[110]

216. Secondly, unlike in *Ahani v Canada*, the authors were detained for protracted periods *before* any adverse security assessments were issued against them. For the duration of such detention, there was no opportunity for judicial review of any purported security justification for their detention where such decisions had not been formally made or communicated to them. There was no prima facie assessment of their security status.

217. Thirdly, unlike in *Ahani v Canada*, once adverse security assessments had been issued, there was no automatic and prompt judicial review of them. As noted earlier, no administrative tribunals or Australian courts are empowered to review the merits of an adverse security assessment.

218. Limited judicial review of security assessments is available to the authors should they choose to commence proceedings. However, such judicial review is substantially less protective than the 'reasonableness' review in *Ahani v Canada*, and does not satisfy the requirements of article 9(4).

219. The authors recall that in *Ahani v Canada*, the affected person was provided with a redacted summary of information reasonably informing him of the claims made against him, and the court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case against him, and the author was able to, and did, present his case and cross-examine witnesses. In contrast, Australian judicial review is far less protective of the authors, and provides no real protection in their circumstances. The reasons are three-fold as set out below.

No grounds to commence judicial review proceedings

220. First, the authors have no basis on which to commence judicial review proceedings, and thereby to gain access to judicial review. Judicial review proceedings can only be commenced if the authors are able to identify an error of law or 'jurisdictional error'. Because Australia has not disclosed the reasons for the adverse security assessments, or the evidence or information upon which they are based, it is impossible for the authors to identify whether any errors of law have been made by ASIO.

221. The Australian Federal Court has acknowledged in a previous case that '[w]ithout knowing what reasons led the Director-General to form his adverse judgments, the applicants cannot point to direct evidence of error', nor 'can error be inferred by reasons of the failure of the Director-General to provide his reasons to the applicant or to the Court'.[111] Further, the Australian Human Rights Commission remarks as follows:

[110] *Leghaei v Director-General of Security* [2005] FCA 1576, para. 91.
[111] *Sagar v O'Sullivan* [2011] FCA 182, para. 69.

> The Commission has serious concerns about the lack of transparency of the ASIO security assessment process and the limited access to independent oversight of security assessments for IMAs. The Commission is concerned that currently:
>
> - there is inadequate information available about the ASIO security assessment process
> - people who have received an adverse assessment are not provided with information about the basis of that assessment
> - there is no merits review and limited judicial review of security assessments available to IMAs
> - there is limited independent oversight of ASIO security assessment processes. …
>
> Accordingly, the vast majority of people in immigration detention are not entitled to any information regarding the basis on which an adverse assessment is made. This means that an affected person is not provided with the information necessary to contest an adverse security assessment. The Commission is concerned that this could amount to a lack of procedural fairness and could prevent a blatant error, such as an error of identification, being identified.
>
> The lack of information regarding the basis on which an adverse assessment is made is particularly concerning because of the consequences for the individuals concerned, which may include indefinite detention, potential removal from Australia, and separation from family members who may be released from detention into the community. [112]

222. Any proceedings commenced by the authors would accordingly be purely speculative, potentially an abuse of the court's process, and bound to fail. The authors would also be liable for heavy costs orders for proceedings brought in these circumstances.

Nominal procedural fairness renders judicial review purely formal and ineffective

223. Second, even if the authors were able to commence judicial review proceedings, the content of procedural fairness available to them under Australian law is so diminished as to preclude any meaningful challenge to, or review of, their adverse security assessments. The leading decision is the Australian Federal Court case of *Leghaei v Director General of Security*,[113] upheld on appeal in the full Federal Court.[114] In those decisions, it was determined as follows:

    (a) Persons who are not Australian citizens or permanent residents are statutorily precluded from receiving notification of, a statement of reasons for, or a right to review of, or procedural fairness rights in respect of, the issue of adverse security assessments under the ASIO Act;[115]

    (b) The common law still provides a degree of procedural fairness to such persons. However, there is only a duty to afford 'such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security';[116]

    (c) That obligation will be 'discharged by evidence of the fact and content of such genuine consideration by the [ASIO] Director-General personally'.[117] Where the

[112] Australian Human Rights Commission, Submission to the Independent Review of the Intelligence Community, April 2011, 5-6.
[113] *Leghaei v Director General of Security* [2005] FCA 1576.
[114] *Leghaei v Director General of Security* (2007) 241 ALR 141.
[115] *Leghaei v Director General of Security* [2005] FCA 1576, paras. 70-71.
[116] *Leghaei v Director General of Security* [2005] FCA 1576, para. 83.
[117] Ibid, para. 86.

ASIO Director-General determines that no disclosure whatsoever is consistent with a lack of prejudice to national security, no disclosure need be made;

(d) The courts lack expertise in evaluating security intelligence ('Courts are ill-equipped to evaluate intelligence')[118] and are not in a position to form a contrary view as to the opinion of the ASIO Director General;

(e) In consequence, in a given case, it may be that 'the content of procedural fairness is reduced, in practical terms, to nothingness',[119] a view confirmed by the full Federal Court on appeal.[120]

224. In these circumstances, it would be futile for the authors to seek to challenge their adverse security assessments in the courts. ASIO has not provided the authors with any reasons, evidence or information on which their adverse security assessments are based. They have no reason to believe that ASIO's position would change in court proceedings. It is obvious that the existing non-disclosure to them is based on the view of the ASIO Director General that it would cause prejudice to national security to disclose anything to them. There would be no real possibility of successfully seeking disclosure in court.

225. The Australian legal position is thus entirely different from the situation in *Ahani v Canada*, where the affected person was informed of the essence of the case against him and had an opportunity to effectively challenge it. By contrast, Australian court proceedings would not provide effective judicial review of the grounds of the detention in terms required by article 9(4) of the ICCPR.

226. While all reasons, information and evidence can be withheld from the authors, it may still be possible for certain information or evidence could be disclosed to the court and/or the authors' counsel (if security-cleared) on judicial review (as occurred in the *Leghaei* case). However, such process would still not satisfy the requirements of article 9(4).

227. As noted above, the courts have accepted that they lack the expertise to evaluate security information, such that their review of the evidence in such cases remains largely formal and is ineffective in determining whether the evidence supports the security case justifying detention. Further, the Australian courts have clearly stated that they do not engage in merits review in such cases.[121]

228. In addition, even if the authors' counsel were provided with more evidence or information than the authors, such procedure would not be sufficient to satisfy article 9(4). Counsel would be unable to disclose the substance of that information in any manner to the authors, such that the authors would be unable to instruct their counsel on dealing with such evidence (including challenges to its accuracy or reliability, or to provide explanations for it). Moreover, ASIO still retains the discretion whether to disclose anything to the authors' counsel, who cannot legally compel any minimum level of disclosure by ASIO (such as the essence of the case against the authors).

229. The Australian process is thus fundamentally less fair and protective than the situation in

[118] Ibid, paras. 84, 87.
[119] Ibid, para. 88.
[120] *Leghaei v Director General of Security* (2007) 241 ALR 141, at 146-147.
[121] *Sagar v O'Sullivan* [2011] FCA 182, para. 91.

Ahani v Canada. It also contrasts with the approach in detention cases under European human rights law, where an irreducible minimum disclosure of the security case against a person is necessary to guarantee proper judicial review of detention.[122] The Australian courts have explicitly distinguished Australian law from the approach to disclosure under European human rights law mentioned above.[123]

Public interest immunity renders judicial review nominal and ineffective

230. Third, even if the authors could commence judicial review proceedings, ASIO could claim 'public interest immunity' to preclude the authors from challenging any adverse security evidence in court. The effect of a successful public interest immunity claim is to preclude the admission of the relevant information into evidence in a judicial review proceeding.[124] It is thus not only unavailable to the affected person, but also cannot be relied upon by the court itself. Such claim is additional to the reduction of procedural fairness as above, which also operates to preclude disclosure and effective challenge to an adverse security assessment.

231. The test for public interest immunity was set out in the High Court of Australia case of *Church of Scientology v Woodward* as follows:

> … discovery would not be given against the Director-General [of ASIO] save in a most exceptional case. The secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc. is essential to national security, and the public interest in national security will seldom yield to the public interest in the administration of civil justice…[125]

232. Public interest immunity has been claimed by ASIO in recent Federal Court cases involving adverse security assessments involving non-citizens.[126] In 2011 the Australian Human Rights Commission strongly criticised this practice on human rights grounds:

> There is very little practical opportunity for substantive judicial review of adverse security assessments. Although the High Court of Australia has held that ASIO decisions are subject to judicial review,[127] the ability of ASIO to withhold from an applicant and the court the information on which it has relied means that challenging that information is virtually impossible. The case of *Parkin v O'Sullivan* is illustrative of this difficulty. Although an order of discovery was made against ASIO, production of the relevant documents was refused on the basis that it would prejudice national security and would be contrary to the public interest. Accordingly, none of the relevant documents was admitted into evidence for the substantial hearing. In *Sagar v O'Sullivan*, Justice Tracey found that 'in some rare cases, such as the present, no jurisdictional error is made if sensitive security information is withheld from an applicant and the applicant is not, as a result, alerted to prejudicial material on which the information has been based'. Consequently, the practical difficulties in obtaining the necessary evidence and the restricted scope of procedural fairness in the context of security assessments by ASIO as interpreted by Australian courts make judicial review an ineffective appeal avenue.[128]

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[122] See above: *A and others v United Kingdom*, ECHR App. No. 3455/05 (19 February 2009), paras. 217-218.
[123] *Parkin v O'Sullivan* (2009) 260 ALR 503, para. 43 (distinguishing *Secretary of State for the Home Department v AF (No 3)* [2009] 3 WLR 74).
[124] *Gypsy Jokers Inc v Commission of Police (WA)* (2008) 234 CLR 532, para. 24; see also *Parkin v O'Sullivan* (2009) 260 ALR 503, para. 32.
[125] *Church of Scientology v Woodward* [1982] HCA 78, para. 16 (Brennan J).
[126] *Parkin v O'Sullivan* (2009) 260 ALR 503; *Sagar v O'Sullivan* [2011] FCA 182.
[127] *Church of Scientology Inc v Woodward* (1982)154 CLR 25.
[128] Australian Human Rights Commission, Submission to the Independent Review of the Intelligence Community, April 2011, 6. [footnotes omitted]

233. In the present communication, ASIO has refused any disclosure to the authors. The authors have no reason to believe that ASIO would change its mind in judicial review proceedings by not resisting any claim for disclosure, either by not claiming public interest immunity, or by determining that procedural fairness would now allow disclosure without prejudicing national security. Moreover, as noted earlier, the lack of disclosure itself precludes the authors from identifying any errors of law which would enable them to commence judicial review proceedings in the first place.

234. In consequence, the authors have not been able to effectively contest their adverse security assessments, and thus the substantive grounds of their detention, since they have not been informed of the substance or particulars of any allegations against them. Australia has not, and does not, provided effective judicial review of their detention as required by article 9(4) of the ICCPR.

Relevance of the European jurisprudence

235. The authors further submit that Australia has violated article 9(4) because the review available is not consistent with the European jurisprudence on article 5(4) of the ECHR, which is relevant practice informing the equivalent scope of article 9(4). In particular:

(a) The authors were never provided with an irreducible minimum of disclosure of the essential cases against them, to enable effective challenge, but instead were only provided with purely general assertions (as per *A v UK*);

(b) Australia effectively extinguished any meaningful rights of judicial review available to the authors, by refusing disclosure of reasons or evidence to them and thus making it impossible to identify errors of law ('jurisdictional error') so as to enable them to commence judicial review proceedings;

(c) Australia did not provide any other adversarial special procedure for enabling effective review of the reasons for the decisions and the evidence (such as a 'special advocate'), in order to reconcile the authors' rights to effective review with security concerns to protect classified information. Merits review was also wholly unavailable;

(d) In consequence, Australia in fact did away with effective control of the lawfulness and non-arbitrariness of the authors' detention by simply asserting that security is at stake.

D. Article 7 and/or Article 10(1) – Inhuman treatment

236. Australia has violated its obligation under article 10(1) to treat the authors in detention with 'humanity' and 'dignity', because there is a high probability that the circumstances of their detention are inflicting serious mental suffering or psychological harm upon them. For the same reason, Australia has also violated its obligation under article 7 not to treat the authors in an inhumane or degrading manner.

237. The Committee found in *Jensen v Australia* that detention may involve cruel, inhuman or degrading treatment under article 7, or ill-treatment under article 10(1), where a detainee can 'demonstrate an additional exacerbating factor beyond the usual incidents of detention'.[129] In *C v Australia*, the Committee accepted the following as a relevant additional factor in the circumstances of that case:

> … the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.[130]

238. The Committee observed that there reached a point where 'it was evident that there was a conflict between the author's continued detention and his sanity'.[131] It was not contested that 'the author's psychiatric illness developed as a result of the protracted period of immigration detention'.[132] The author's mental state, including a suicide attempt, 'reached such a level of severity that irreversible consequences were to follow'.[133]

239. The authors observe that a similar approach has been adopted by the European Court of Human Rights under the *European Convention on Human Rights*.[134]

240. In this communication, the authors submit that the combined arbitrary character of their detention, its protracted and/or indefinite duration, and the difficult conditions of detention, are cumulatively inflicting serious, irreversible psychological harm upon them, contrary to article 7 and/or article 10(1) of the ICCPR.

241. Those three features – arbitrariness, protracted/indefinite duration, and harsh conditions – provide the necessary 'additional exacerbating factor beyond the usual incidents of detention. The arbitrariness and protracted / indefinite nature of the authors' detention has already been established above in this communication. The difficult conditions of detention are described below, along with the mental harm inflicted upon the authors by these cumulative factors.

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[129] *Jensen v Australia* (UNHRC 762/1997), 22 March 2001, para. 6.2.
[130] *C v Australia* (UNHRC 900/1999), 28 October 2002, para. 8.2.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] *Dybeku v Albania*, ECHR App. No. 41153/06, 18 December 2007 (finding that a detainee's psychological condition can render them more vulnerable that the average (lawfully held) detainee and that detention can exacerbate their feelings of distress, anguish and fear. The feelings of inferiority and powerlessness which are typical of those suffering from mental disorders required increased vigilance in reviewing whether the prohibition on inhuman and degrading treatment (under article 3 of the ECHR) had been complied with. The cumulative effects of entirely inappropriate conditions of detention had a detrimental effect on the detainee's health and well-being, and the nature, duration and severity of his ill-treatment was inhuman and degrading.

242. Most of the authors are presently detained at Villawood, Christmas Island, Maribyrnong, Sherger, and Curtin (see list at Annex A) and the objectively harsh conditions in detention there are described below, along with relevant research establishing the adverse mental health effects of protracted detention.

Mental Health in Detention – Research

243. Leading mental health researchers have established that protracted immigration detention in Australia may have serious adverse mental health impacts on detainees.[135] In 2010, one of the largest Australian studies (Green and Eager) involving over 700 detainees found a 'clear association' between time in detention and rates of mental illness, with especially poor mental health in those detained for more than two years.[136]

244. In another recent study by eminent researchers (Silove, Austin and Steel, 2007), persons detained for protracted periods (more than six months) in Australian detention facilities experienced twice the rate of mental distress (depression and post-traumatic stress disorder) than those detained for shorter periods (less than six months). Mental distress also lasts considerably longer on release from detention for those detained for protracted periods. The study found as follows:

> The results showed a strong association between past detention, particularly for those held for 6 months or longer, and persisting mental distress. Those experiencing prolonged detention had high rates of depression (54%) and PTSD (49%) compared with those held in detention for less than 6 months (25% for both depression and PTSD) and those who were not detained (depression 23%; PTSD 11%). Over 70% of detainees held for 6 months or longer continued to report disturbing memories of their time in detention and feelings of extreme depression and hopelessness when thinking about detention, even though, on average, 3 years had elapsed since release. A multilevel model showed that experiences of past detention and ongoing temporary protection each played an important role in predicting poor ongoing mental health, even when levels of past trauma and relevant demographic factors were taken into account.[137]

245. The study further found that detention causes mental distress beyond any underlying trauma resulting from persecution or violence that is part of many refugees' experience:

> Although the two groups had experienced similar levels of pre-migration trauma, the recently detained group reported higher scores on all mental health indices, namely, depression, anxiety, PTSD and psychological disability. Exposure to harsh detention experiences and ongoing postmigration stress each contributed to persisting symptoms of PTSD.[138]

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[135] See, eg, Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359, 382; P Austin, D Silove and Z Steel, 'The impact of Immigration Detention on the Mental Health of Asylum Seeker', in Katharine Gelber & Adrienne Stone (ed.), *Hate Speech and Freedom of Speech in Australia* (The Federation Press, Sydney, 2007), 100–112; D Silove and Z Steel, 'The culture of deterrence: the mental health impact of Australia`s asylum policies', in KS Bhui and D Bhugra (eds), *Culture and Mental Health A comprehensive textbook* (Edward Arnold, London, 2007), 260-267; see also sources on children in detention cited below at Part E.

[136] J Green and K Eagar, 'The health of people in Australian immigration detention centres' (2010) 192 *Medical Journal of Australia* 65-70.

[137] Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359, 382.

[138] Ibid, 383.

246. Another recent study (2010) found that psychological and interpersonal difficulties suffered by long term detainees after their release from detention were the legacy of their adverse experiences in detention. The ongoing difficulties included: a sense of insecurity and injustice; difficulties with relationships; profound changes to view of self; depression and demoralisation; concentration and memory disturbances; persistent anxiety; and high rates of depression, anxiety, post-traumatic stress disorder, and low quality of life.[139]

247. The findings of these clinical studies are generally consistent with other studies in Australia and internationally, the testimony of health professionals, and inspection and inquiry reports in Australia by the Australian Human Rights Commission, Commonwealth Ombudsman, and federal parliamentary committees.[140] Some of these findings are summarised or reproduced in Annex D.

248. International research on immigration detention elsewhere confirms such impacts.[141] For example, a study of protracted detention in the United States found that high rates of adverse psychological symptoms were significantly correlated with length of detention, and that detention exacerbates such symptoms. The symptoms included depression in 86% of detainees, anxiety (77%), and post-traumatic stress disorder (50%).[142] One quarter of detainees reported suicidal thoughts in detention. Around 70% of detainees reported that their mental health had substantially worsened in detention.

249. The research clearly establishes that anyone held for a protracted period in immigration detention is highly likely to experience mental distress as a result of detention. Detention also compounds pre-existing traumatic symptoms (including torture or trauma), and makes treatment difficult where detention itself is 'largely responsible for the persistence of mental distress'.[143] As shown further below, health services are unable to effectively treat such harms. Protracted detention further results in the prolongation of mental harm for significant periods even after release from detention.

250. The authors have been detained for between one year and two and half years as of August 2011. As established above by this communication, their detention has been arbitrary for the whole of those periods. The mental health consequences of protracted detention in the detention facilities in which the authors are held are set out below.

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[139] Guy Coffey, Ida Kaplan, Robyn Sampson, Maria Montagna Tucci, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70 *Social Science & Medicine* 70 (2010) 2070-2079 (a study of 17 refugees detained on average for three years and two months).

[140] Ibid, 365-380.

[141]

[142] Allen S Keller, Barry Rosenfeld, Chau Trinh-Shevrin, Chris Meserve, Emily Sachs, Jonathan A Leviss, Elizabeth Singer, Hawthorne Smith, John Wilkinson, Glen Kim, Kathleen Allden, Douglas Ford, 'Mental health of detained asylum seekers' (22 November 2003) 362 *The Lancet* (a study of 70 detainees); see also Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (Boston and New York, 2003).

[143] Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359, 385.

Mental Health in Detention Facilities

251. In its visit to Villawood detention centre in Sydney in late February 2011, where many are detained, the Australian Human Rights Commission summarised its concerns about the mental health impacts of prolonged or indefinite detention there as follows:

> The Commission has long held serious concerns about the detrimental impacts on people's mental health and wellbeing when they are held in immigration detention facilities for prolonged and indefinite periods of time. The Commission has repeatedly raised these concerns with DIAC and successive Ministers for Immigration, and in public reports regarding conditions in immigration detention facilities.
>
> The Commission's concerns have escalated over the past year as thousands of people are being detained for prolonged periods, and clear evidence has become available of the poor mental health of many people in detention. This includes high rates of self-harm and five apparent suicides in immigration detention facilities – three of which occurred at Villawood IDC.
>
> During its visit, the Commission was seriously concerned about the noticeable impacts of holding people in detention for prolonged and indefinite periods. Many people spoke of feelings of frustration, distress and demoralisation after being detained for a long period of time, and many spoke of the uncertainty and anxiety caused by being detained for an indefinite period of time. People also spoke about the psychological impacts of their prolonged detention, including high levels of sleeplessness, feelings of hopelessness and powerlessness, thoughts of self-harm or suicide, and feeling too depressed, anxious or distracted to take part in recreational or educational activities. The Commission was troubled by the palpable sense of frustration and incomprehension expressed by many people. This appeared to have contributed to marked levels of anxiety, despair and depression, leading to high use of sedative, hypnotic, antidepressant and antipsychotic medications and serious self-harm incidents.[144]

252. The Commission was also troubled by Australia's limited use of 'community detention' as an alternative to detention centres for people with mental health concerns (including self-harm) or backgrounds of torture or trauma.[145]

253. Likewise, in its report of 2010 on immigration detention at Christmas Island, the Australian Human Rights Commission found as follows:

> It is well established that holding people in immigration detention, particularly for prolonged periods, can have devastating impacts on their mental health. During its visit, the Commission heard from some people in detention that the time they had spent in detention was having detrimental psychological impacts….
>
> The Commission has noted in past reports the difficulties associated with treating people who are in detention for prolonged and uncertain periods. Often, detention itself causes or exacerbates mental health concerns. Because mental health staff do not control the length of a person's detention, they cannot effectively address this cause of distress for detainees. The Commission has consistently called for the repeal of the mandatory detention system, in part because of the effects it can have on the mental health and wellbeing of people detained.[146]

254. Similar serious concerns have been expressed by the Commission in relation to other immigration detention facilities, such as at Leonora (a small and remote township in Western Australia) and Darwin (in the Northern Territory).[147]

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[144] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 20.
[145] Ibid.
[146] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 50.
[147] Australian Human Rights Commission, *Immigration Detention in Leonora 2011*, 6, 10-11; Australian Human Rights Commission, *Immigration Detention in Darwin 2011*, 6, 10-11.

255. Virtually all peak Australian expert medical bodies have criticised the adverse mental health impacts on immigration detention, including the:

(a) The Australian Government's own Detention Health Advisory Group;

(b) Australian Medical Association (mandatory detention is 'inherently harmful to the physical and mental health of detainees');[148]

(c) Royal Australian and New Zealand College of Psychiatrists ('There is clear evidence that detaining vulnerable groups who have experienced torture, trauma and loss for indefinite periods can exacerbate serious mental health problems');[149]

(d) Royal Australian College of General Practitioners;[150]

(e) Royal Australian College of Physicians;[151]

(f) Committee of Presidents of Medical Colleges;[152]

(g) Alliance of Health Professionals concerned about the Health of Asylum Seekers and their Children;[153]

(h) Australian College of Mental Health Nurses;[154]

(i) Australian Psychological Society.[155]

256. Legal representatives of asylum seekers in detention have also expressed their concerns about the psychological impacts of detention. Typical is this submission by the Refugee Advice and Casework Service to a current federal parliamentary inquiry in 2011:

> In RACS' experience, mandatory detention of asylum seekers has a profoundly detrimental effect on detainees' psychological health. Mental health appears to deteriorate as the length of time in detention increases.
>
> The impact of detention on clients' mental health is sometimes explicitly communicated to RACS' agents, and is also apparent to RACS through observation of our clients' tone, demeanour and ability to communicate and engage with the legal process.

[148] Kirsty Needham, 'Doctors call for a stop to mandatory detention', *Sydney Morning Herald*, 18 August 2011.
[149] Royal Australian and New Zealand College of Psychiatrists, 'Mental health of asylum seekers must be considered', 10 August 2011, at http://www.ranzcp.org/latest-news/mental-health-of-asylum-seekers-must-be-considered.html.
[150] Royal Australian College of General Practitioners, 'Health Care for Refugees and Asylum Seekers', at http://www.racgp.org.au/refugeehealth.
[151] Alliance of Health Professionals concerned about the Health of Asylum Seekers and their Children, Submission to the Human Rights and Equal Opportunity Commission, May 2002, at http://www.cpmc.edu.au/docs/hreoc_submission.pdf.
[152] Ibid.
[153] Ibid.
[154] Kirsty Needham, 'Doctors call for a stop to mandatory detention', *Sydney Morning Herald*, 18 August 2011.
[155] Kirsty Needham, 'Doctors call for a stop to mandatory detention', *Sydney Morning Herald*, 18 August 2011.

> Many common symptoms of mental health disorders we come across are: forgetfulness, confusion, anger, frustration, loss of appetite, poor hygiene, insomnia, anxiety, suicidal thoughts, suicide attempts, and self-harm.
>
> A number of our clients have developed serious psychological conditions while they have been in detention. This contrasts starkly to the condition of RACS' onshore protection visa applicants who remain in the community. These clients are far more able to recover from past trauma, heal themselves physically and psychologically, and integrate and establish themselves in the Australian community.
>
> RACS is also concerned that the psychological health of many of our clients impacts their ability to articulate their protection claims and engage with the Protection Obligations Determination process undertaken by DIAC. For example, psychological illness often hinders memory and the clarity with which clients express their thoughts. This can result in inconsistencies or variations in clients' evidence, which is frequently used as a ground for reaching a negative decision by decision-makers, because it is said to undermine the applicant's credibility. However, in our experience, prolonged psychological distress, rather than lack of credibility, is often the more probable explanation. On this basis, RACS believes that the mandatory detention of irregular maritime arrivals can prejudice the proper assessment of claims for asylum.[156]

257. The available evidence objectively establishes that, as a result of protracted, indefinite, arbitrary detention, the authors are at high risk of suffering serious mental distress.

Mental Health – Suicide and Other Self-harm

258. The serious mental health concerns in detention are evidenced by a large number of incidents of self-harm. DIAC reported 1,100 incidents of threatened or actual self-harm in immigration detention facilities in 2010-11.[157] Fifty-four incidents occurred in the first week of July 2011 alone. [158] The Commonwealth Ombudsman's inspection visits to the detention facilities at Curtin, Leonora and Christmas Island since March 2011 identified the mental health and well-being of detainees as a 'significant issue of concern', including an 'alarming' incidence of self-harm at Christmas Island.[159] The Ombudsman stated in April 2011:

> Most critically, I am concerned about the seemingly high incidence of self-harm and the high number of apparent suicides within the immigration detention network when compared to previous periods of high numbers in immigration detention and to other detention environments such as Australian prisons and police custody facilities. [160]

259. The Australian Human Rights Commission has also expressed its 'alarm' about self-harm in immigration detention facilities:

> The Commission has raised concerns about self-harm among people in immigration detention in a number of recent reports, and has also directly raised concerns with DIAC and the Minister for Immigration. The Commission has become increasingly alarmed over the past few months about the high rates of self-harm across the detention network, including at Villawood. During its visit, the Commission heard about a number of self-harm incidents, including voluntary starvation and ingestion of detergent and chemicals. At Villawood IDC the Commission met with people who had visible scars

[156] Refugee Advice and Casework Service (Australia), Submission to the federal Parliamentary Joint Select Committee Inquiry on Australia's Immigration Detention Network, August 2011.
[157] Commonwealth Ombudsman, 'Inquiry to examine suicide and self-harm in immigration detention', 29 July 2011.
[158] Ibid.
[159] Ibid.
[160] Commonwealth Ombudsman, 'Govt breaches its own care principles? Ombudsman investigates', 14 April 2011.

> from self-harming, and with one person who had recently been hospitalised following serious self-harm.
>
> DIAC provided the Commission with records indicating that over a six month period there were 18 reported incidents of actual or attempted self-harm at Villawood IDC. This included people who cut themselves, people who struck their head, and a man who attempted to hang himself the day after another man apparently committed suicide at Villawood IDC.[161]

260. The Commission further stated that it was 'deeply troubled by the deaths of six men in Australia's immigration detention facilities over the past nine months, five of which appear to have been the result of suicide'.[162] Three suicides occurred at Villawood in three months. There have also been suicide attempts, including an attempted hanging at Villawood one day after another suicide there. While coronial inquests are pending, the Commission expressed its 'grave concerns about the ongoing risk of suicide and self-harm at Villawood' and at other detention facilities.[163]

261. Similar concerns about risks of self-harm have been expressed by the Commission in relation to other immigration detention facilities, such as at Darwin.[164] During 2011, there have also been reports of hunger strikes at Sherger Immigration Detention Centre (in remote far north Queensland), and self-harm by a detainee who cut his throat, and another detainee who cut his arm.[165] At Darwin, self-harm even by children as been reported in 2011:

> There are reports from Darwin of children under the age of 10 self-harming, and we are beginning to see infants with severe separation anxiety, adolescents with severe depression and posttraumatic stress disorder, and parents who have lost the capacity to care adequately for their children.[166]

262. There are also adverse mental health consequences for those who witness self-harm by other detainees, which contributes to the climate of anxiety, uncertainty and fear.

263. The Australian government's advisory body on health in detention, the Australian College of Mental Health Nurses, and the Australian Psychological Society, all called in August 2011 for mandatory detention to be abandoned due to the high levels of self-harm in detention and the risks of such harm.[167]

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[161] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 21-23.
[162] Ibid.
[163] Ibid.
[164] Australian Human Rights Commission, *Immigration Detention in Darwin 2011*, 11.
[165] AAP, 'Sherger asylum seekers end strike', *Sydney Morning Herald*, 25 July 2011.
[166] Jon Jureidini and Julian Burnside, 'Children in Immigration Detention: A Case of Reckless Mistreatment' (2011) 35 *Australian and New Zealand Journal of Public Health* 304, 304; see earlier S Mares and J Jureidini, 'Psychiatric Assessment of Children and Families in Immigration Detention: Clinical, Administrative and Ethical Issues' (2004) 28 *Australian and New Zealand Journal of Public Health* 16; Z Steel, S Momartin, C Bateman, A Hafshejani, D Silove, N Everson, K Roy, M Dudley, L Newman, B Blick, S Mares, 'Psychiatric Status of Asylum Seeker Families Held for Protracted Period in a Remote Detention Centre in Australia' (2004) 28 *Australian and New Zealand Journal of Public Health* 520; L Newman and Z Steel, 'The child asylum seeker: psychological and developmental impact of immigration detention' (2008) 17 *Child and Adolescent Psychiatric Clinics of North America* 665-683; L Newman, M Dudley, Z Steel, 'Asylum, detention, and mental health in Australia' (2008) 27 *Refugee Survey Quarterly* 110-127.
[167] Kirsty Needham, 'Detention centre nurse sacked after criticism', *Sydney Morning Herald*, 19 August 2011, 2.

264. The peak body, the Refugee Council of Australia, said in August 2011 that self-harm in detention 'is beyond anything we have previously seen in Australia'' and that the policy was 'profoundly stupid and counterproductive'.[168]

265. The available evidence objectively establishes that, as a result of protracted, indefinite, arbitrary detention, the authors are at high risk of suffering serious mental distress.

Physical Conditions of Detention

266. The impact of protracted, indefinite, and arbitrary detention on the authors' mental health is exacerbated by the physical conditions of the detention facilities. The Australian Human Rights Commission has expressed concern at the 'harsh and punitive' environment at Villawood IDC,[169] and at Darwin NIDC,[170] with the use of extensive high wire fencing and surveillance. Christmas Island IDC was similarly described as 'prison-like'.[171] Villawood was described as an 'extremely restrictive environment in which to hold people who could be facing a long period in detention'.[172] The Commission commented on the punitive character of detention facilities (here, Christmas Island), as follows:

> … the Commission's overarching concerns about the prison-like nature of the IDC remain. In the Commission's view, it is neither necessary nor appropriate to hold asylum seekers in a high security detention centre on Christmas Island. Asylum seekers are detained under the Migration Act because they do not have a valid visa. They are not detained because they are under police arrest or because they have been charged with or convicted of a criminal offence. The treatment of immigration detainees should therefore be as favourable as possible, and in no way less favourable than that of untried or convicted prisoners. The use of a maximum security environment to detain virtually all single adult males is also inconsistent with the government's policy that people should be detained in the least restrictive form of detention appropriate to an individual's circumstances. In addition, many of the security measures appear unnecessary given the extreme isolation of the IDC.[173]

267. The Commission stated that the inadequate infrastructure and facilities on Christmas Island 'are not appropriate for asylum seekers' at all.[174] This situation has been exacerbated by overcrowding in Christmas Island, with many people previously accommodated in tents.[175] Concerns were further expressed about access to and cleanliness of facilities such as toilets and showers at Christmas Island.[176] These conditions combine to create an 'oppressive atmosphere'[177] and a lack of privacy and personal security.

268. At other facilities, accommodation is often of inadequate quality, with 'very little space or privacy' in Villawood's dormitory style bedrooms.[178] There is limited space and facilities for recreation at Villawood,[179] Christmas Island,[180] Darwin[181] and Leonora[182]

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[168] Kirsty Needham, 'Doctors call for a stop to mandatory detention', *Sydney Morning Herald*, 18 August 2011.
[169] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 16.
[170] Australian Human Rights Commission, *Immigration Detention in Darwin 2011*, 7.
[171] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 6.
[172] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 12.
[173] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 31.
[174] Ibid.
[175] Ibid, 29.
[176] Ibid, 35.
[177] Australian Human Rights Commission, *2008 Immigration Detention Report*, 23.
[178] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 16.
[179] Ibid.

centres. Concerns have been expressed about cleanliness and public health risks associated with the state of hygiene facilities at Christmas Island.[183]

269. The physical environments of the Leonora and Christmas Island facilities are also particularly harsh[184], limiting opportunities for outdoor recreation and putting further strain on limited indoor recreation options. The remote locations of these centres also limit access to services and community-based support.[185] Complaints were received across the centres about the lack of meaningful activities or regular excursions.[186] Overall, concerning Christmas Island the Commission concluded that:

> Current conditions are not consistent with international human rights standards which require accommodation in detention facilities to meet the requirements of health and human dignity, with appropriate regard paid to issues including climatic conditions, minimum floor space, lighting and ventilation.[187]

270. These poor detention conditions serve to create tensions and worsen the psychological state of detainees.[188] Similar serious concerns about the inadequacy of detention conditions have been expressed by the Commission in relation to other facilities, such Leonora and Darwin.[189] The Commonwealth Ombudsman has also expressed concern at the pressure on services at Christmas Island.[190]

271. The cumulatively inadequate conditions of detention aggravate the authors' mental distress, which arises out of their protracted, indefinite and arbitrary detention.

Unrest and Violence in Detention

272. Unrest, protests and violence by detainees in detention is a symptom of the acute frustration and mental distress felt by many detainees. In June 2011, for example, there were riots in Christmas Island detention facility, involving up to 100 detainees.[191] Likewise, in April 2011 there were protests by detainees at Villawood detention centre, with some detainees occupying the roof of a building for many days and refusing to come down.[192] Dr Chris Bowden from the NSW Institute of Psychiatry described such actions as a response to 'extraordinary stress' and desperation.[193]

273. Witnessed distressing unrest or violence is in turn distressing and traumatic for other detainees not involved in such protests but who cannot avoid living amongst it.

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[180] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 41, 55.
[181] Ibid, 7.
[182] Australian Human Rights Commission, *Immigration Detention in Leonora 2011*, 7.
[183] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 35.
[184] Australian Human Rights Commission, *Immigration Detention in Leonora 2011*, 7.
[185] Ibid; Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 4.
[186] Human Rights and Equal Opportunities Commission, Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia, 4 August 2008, 191.
[187] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 35.
[188] Ibid, 37.
[189] Ibid, 11.
[190] Commonwealth Ombudsman, *Christmas Island Immigration Detention Facilities*, February 2011, 14-15.
[191] Kirsty Needham, 'More rioting as UN slams mandatory detention', *Sydney Morning Herald*, 11-12 June 2011, 11.
[192] Glenda Kwok, 'Mad for freedom, detained to breaking point: experts explain how minds snap at Villawood', Sydney Morning Herald, 27 April 2011.
[193] Ibid.

274. In response to the unrest, the Australian Parliament passed legislation[194] which permits the Minister to refuse or revoke refugee protection on the basis of a conviction for *any* crime committed in detention, no matter how minor and even if the conviction attracted no prison sentence.[195] The law removes the previous requirement that a person be convicted of a crime and sentenced for a minimum of 12 months in prison.

275. The law has been criticised by international lawyers for allowing revocation of refugee protection on the basis of minor criminal offences that pose no real threat to the community; for treating detained refugees unequally vis-à-vis other aliens or refugees; and for imposing harsher penalties on certain refugees on account of their illegal entry.[196] Further, as the Sydney Centre for International Law at The University of Sydney argued:

> … many offences committed in immigration detention in Australia must be understood against the background of serious psychological harm which is medically documented as stemming from detention in certain circumstances, and which can adversely affect the behaviour of detainees. It would be highly inappropriate for the law to enhance the punishment of detainees for the predictable mental health consequences of poor government policy choices concerning mandatory detention. [197]

276. Australia has accordingly reacted to the acute mental distress inflicted by its detention policy by further punishing those who manifest the symptoms of such distress.

277. The unrest and violence occurring in detention facilities aggravates the authors' mental distress, which arises out of their protracted, indefinite and arbitrary detention.

Excessive Use of Force in Detention

278. The Australian Human Rights Commission has expressed its concern about the possibly excessive use of force in detention, including allegations of the threatened use of a 'cattle prod-like baton' by guards escorting detainees from Christmas Island to funerals in Sydney.[198]

279. The Commission has also heard complaints about the distressing use of restraints (such as handcuffs) on detainees travelling to medical appointments from Villawood, or where restraints were not removed when a detainee needed to use the toilet. [199] The Commission expressed concern that policies regarding the use of restraints failed to specify clear procedures for their use, including as regards their necessity, and use of minimal force. [200]

280. The Commission further expressed concerns about the use of force in incidents at Christmas Island and elsewhere in 2011:

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[194] Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011.
[195] *Migration Act 1958* (Cth), sections 500A and 501.
[196] See Sydney Centre for International Law, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, 30 May 2011, at http://sydney.edu.au/law/scil/documents/2011/SCIL_Sub_%20Migration_Act_May_2011.pdf.
[197] Ibid.
[198] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 27.
[199] Ibid.
[200] Ibid.

> … during which tear gas and 'bean-bag bullets' were used against asylum-seekers in immigration detention, as well as incidents in other detention facilities.
>
> Commission President and Human Rights Commissioner Catherine Branson QC said the ongoing nature of the incidents, including the reported use of tear gas again last night, was particularly disturbing.
>
> "These incidents highlight the urgent need for the Australian Government to reconsider the system of mandatory and indefinite detention," Ms Branson said.
>
> "The Commission is seriously troubled by the deteriorating situation in immigration detention facilities on Christmas Island and across the mainland.[201]

281. The Commonwealth Ombudsman is also investigating such uses of force.[202]

282. The excessive use of force in detention facilities aggravates the authors' mental distress, which arises out of their protracted, indefinite and arbitrary detention.

Inadequate Mental and Physical Health Care Services

283. The Australian Human Rights Commission has expressed concern about the provision of physical health services for detainees. Centres were found to suffer from insufficient staffing, with impacts on the quality and timeliness of health care. [203] Access to health services was further limited by the remote location of the Lenora and Christmas Island centres, particularly in relation to dental care and specialists, even for those with visible serious injuries such as shrapnel wounds and disfigured limbs. [204]

284. Similar problems were found in the provision of mental health care. Concern was expressed regarding staffing, the limited scope of services (including an absence of outreach in the accommodation compounds),[205] and inadequate clinical governance (lacking oversight by a psychiatrist), considering the high number of detainees and complex caseload.[206] There was no local psychiatrist on Christmas Island.[207]

285. There was a high level of prescription of psychotropic medications at Villawood, including antipsychotics and antidepressants given as sedatives for sleeplessness, which is a 'poor pharmacological solution to an environmental problem'.[208]

286. Many detainees at Darwin and Christmas Island found the services provided to be inadequate as they could not address the cause of their distress, 'the fact that they were in

[201] Australian Human Rights Commission, 'Time to rethink our mandatory detention system', 17 March 2011.
[202] Commonwealth Ombudsman, 'Govt breaches its own care principles? Ombudsman investigates', 14 April 2011.
[203] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 18; Australian Human Rights Commission, *Immigration Detention in Darwin 2011,* 10; Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010,* 6.
[204] Australian Human Rights Commission, *Immigration Detention in Leonora 2011*, 10; Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010,* 49.
[205] Australian Human Rights Commission, *Immigration Detention at Villawood 2011,* 21: ''This means that IHMS staff are unable to gain an accurate appreciation of the psychological environment within the centre; may be unable to identify individuals at risk of psychiatric disorder and/or self-harm at an early stage; and cannot regularly monitor the mental state nor promote adherence to treatment of individuals who are under their care.'
[206] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010,* 10.
[207] Ibid, 50.
[208] Australian Human Rights Commission, *Immigration Detention at Villawood 2011,* 21.

detention for an uncertain period of time without knowing what would happen to them at the end of that period'.[209]

287. The Commission expressed particular concern about the 'separation' areas at Villawood, particularly Blaxland Annexe and the Murray Unit, which are utilised for people considered to be at risk of suicide or self-harm. This environment is 'extremely restrictive', with highly limited indoor or outdoor space, little natural sunlight, and almost no privacy.[210] Similar comments were made of the Management Support Unit on Christmas Island.[211] The Commission's consultant psychiatrist concluded that, at Villawood, the 'conditions for suicidality in Fowler compound were very high'.[212] The Commission stated:

> There appeared to be very high levels of distress and frustration, feelings of powerlessness and a pervasive sense of helplessness among people in that compound. In Blaxland and Hughes compounds, there appeared to be intense levels of frustration and anger, conditions which carried an associated risk of impulsive suicide attempts.[213]

288. The Commonwealth Ombudsman has also expressed concern at the provision of adequate mental health care services at Christmas Island.[214]

289. Arrangements for preventing or responding to self-harm were also inadequate at Villawood. The Commission was concerned that harm prevention and response policies had not been adequately implemented; staff were inadequately trained; staffing levels were inadequate; post-harm counselling was inadequate; the physical infrastructure of detention was not safe (including as regards dangerous 'hanging points'); and there is not 'a nationally consistent written policy or procedure for conducting a critical incident review after an event such as a death or near miss attempt in detention'.[215]

290. The inadequate mental health services in detention facilities aggravate the authors' mental distress, which arises out of their protracted, indefinite and arbitrary detention.

Summary of Violations of Articles 7 and/or 10(1)

291. The authors submit that the circumstances of their detention (not detention *per se*), are inflicting serious psychological harm or mental suffering upon them (including serious risks of self-harm or suicide), which is inhuman or degrading and contrary to articles 7 and/or 10(1) of the ICCPR.

292. Specifically, the authors submit that such harm is cumulatively caused by the protracted, indefinite and arbitrary character of their detention, and the inadequate conditions of their detention (which include: inadequate physical and mental health services; exposure to unrest and violence in detention, as well as punitive legal treatment; the risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others).

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[209] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 50.
[210] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 16-17.
[211] Australian Human Rights Commission, *Immigration Detention at Christmas Island 2010*, 39.
[212] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 21-23.
[213] Ibid.
[214] Commonwealth Ombudsman, *Christmas Island Immigration Detention Facilities*, February 2011, 4, 15.
[215] Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, 21-23.

E. Articles 17(1), 23(1) & 24(1) – Denial of Family & Children's Rights

293. In respect of at least six authors, Australia has violated its obligations to protect the family and children under Articles 17(1), 23(1) and 24(1) of the ICCPR.

294. Five of the authors are a family unit in detention at Villawood, comprising two adults and their three minor children (case numbers 13-17).

295. Another author is a husband and father separated by detention at Villawood from his wife and minor child, who are living in the community in Sydney (case number 20).

296. The Australian Human Rights Commission recently drew attention to the plight of these two groups of authors as follows:

> … the Commission is concerned about the indefinite detention of people who have received adverse security assessments from ASIO. At the time of the Commission's visit there were six people in immigration detention at Villawood in this situation, including a man who had been separated from his wife and child and a couple with three young children. The Commission has urged the Australian Government to ensure that durable solutions are provided for such individuals, and for them to be removed from immigration detention facilities as soon as possible.[216]

297. These six authors invoke the following ICCPR articles in this regard:

> **Article 17(1):** 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'
>
> **Article 23(1):** 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'
>
> **Article 24(1):** 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

298. The six authors submit that because their protracted detention is arbitrary and unlawful under article 9 and incompatible with articles 7 and/or 10(1) (as argued in Parts A-D above), the interference in their family life caused by detention is unlawful. Specifically:

(a) Arbitrary detention constitutes an arbitrary interference in family life, contrary to article 17(1);

(b) Arbitrary detention is not compatible with Australia's obligation to protect the family under article 23(1); and

(c) Arbitrary detention is not compatible with Australia's obligation to protect children under article 24(1).

[216] Ibid, 25.

Five Authors – A Detained Family

299. The five authors of one family are housed in a separate facility at Villawood, the Sydney Immigration Residential Housing (IRH). Three of the authors have been detained since December 2009 (one year and eight months), another since July 2009 (2 years and one month), and another was born in detention (detained for the child's whole life of 11 months) (as at August 2011).

300. As noted earlier in this communication, the detention of these authors is unlawful under the ICCPR because the necessity of their individual detention has not been assessed, their detention is not subject to effective judicial review, and the conditions of their detention are inhumane. The detention of the three minor child authors deserves special consideration in this context. The Australian Human Rights Commission observes that:

> Child asylum seekers continue to be subjected to mandatory detention. This breaches Australia's obligations under the *Convention on the Rights of the Child* (CRC), which require that a child should only be detained as a measure of last resort and for the shortest appropriate period of time.[217]

301. Australia has not utilised less restrictive alternatives to detention of children, such as release into the community.[218] There are no exceptional circumstances which can justify the detention of the minor children in the present case. Given the ages of the children (1, 4 and 7 years old), there can be no serious argument that they pose any security, health or absconding risks.

302. There is also no effective judicial review available of the detention of children, as the Australian Human Rights Commission observes:

> The immigration detention of children is still not subject to judicial oversight, despite Australia being obliged under the CRC to provide for child detainees to challenge their detention before a court or another independent authority. The Commission has raised concerns about this for many years, and continues to recommend legislative changes to ensure that if a child is detained, it is for the shortest appropriate period of time and subject to independent and judicial review mechanisms.[219]

303. The child authors' detention has been protracted and carries risk of serious mental and developmental harm. As the Australian Human Rights Commission explains:

> Many children are spending long periods of time in immigration detention facilities. At the time of the Commission's visit to Sydney IRH, all of the eight children there had been in detention for longer than three months. Seven had been in detention for longer than six months, and three had been in detention for more than a year. The Commission has for many years raised serious concerns about the impacts of prolonged detention on children. In the report of its National Inquiry into Children in Immigration Detention, the Commission found that children in detention for long periods were at high risk of serious mental harm.[220]

304. While residency 'residential housing facility' at Villawood is preferable to the main Villawood detention compound, it is 'still a closed detention facility from which children and their families are not free to come and go'.[221] The Commission explains:

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[217] Ibid, 31.
[218] Ibid, 24 [footnotes omitted].
[219] Ibid, 32.
[220] Ibid, 31.
[221] Ibid, 24.

> Children might be escorted to an external school during the day or they might take part in supervised excursions, but during the remainder of their time they are restricted to the detention facility.[222]

305. The Commission has been particularly concerned about the prolonged detention of families with children, and highlighted the 'difficulties of trying to maintain a "normal family life" in a detention environment for such long periods'.[223] The Commission has highlighted the adverse mental harm to children and families in particular:

> Despite the preferable physical conditions, people at the IRH may still suffer significant psychological impacts as a result of the deprivation of their liberty. The Commission met with a number of individuals and families during its visit who spoke about these impacts.[224]

306. The Commission has also criticised child welfare arrangements in detention because of inadequate policies and procedures in relation to child protection arrangements with state government authorities.[225]

307. Mental health professionals summarised the adverse mental health effects of Australian immigration detention on children as follows:

> Current practices of detention of infants and children are having immediate, and are likely to have longer-term, effects on their development and their psychological and emotional health. Children in these situations are exposed to multiple stressors including:
>
> • behavioural and psychological distress in adults,
> • dislocation from protective social groups and structures,
> • witnessing violence and self-harm, and
> • separation from attachment figures.
>
> These stressors, in combination with prior exposure to conflict and community breakdown, immediately place these children at risk for the development of Post-Traumatic Stress Disorder (PTSD) and its longer-term consequences. In young children, disruptions of attachment relationships, such as removal from a primary carer or multiple changes of carer, are severe stressors and may produce immediate symptoms of distress and behavioural disturbance.
>
> Maintenance of attachment relationships and enabling adults to support traumatised children have been found to protect children from development of chronic PTSD. Children currently held in detention centres have been exposed to the serious psychological distress suffered by adults and by adult self-harming behaviours, and have experienced cultural dislocation and personal and community trauma. It is likely that many will develop chronic PTSD with effects on development. Any additional loss of adult support and attachment disruption is likely to increase symptom severity and contribute to ongoing psychopathology.
>
> The length of time in an institution and the quality of institutional care have major impacts on the potential for the long term recovery of children. The longer the length of time in institutional care, the less likely children are to recover from trauma. The fact that children are likely to be kept in detention for long periods of time if their parents' application for refugee status is rejected at any of the primary stages, and an appeal is lodged, adds to their major health risks.[226]

[222] Ibid, 24 [footnotes omitted].
[223] Ibid, 17.
[224] Ibid, 17.
[225] Ibid, 25.
[226] Alliance of Health Professionals concerned about the Health of Asylum Seekers and their Children, Submission to the Human Rights and Equal Opportunity Commission, May 2002, vii.

The family's experience in detention

308. The five authors were extensively assessed by a consultant psychiatrist, Geoffrey Bradshaw FRANZCP FAChAM, in a report of 1 November 2010, and which was provided to the Minister for Immigration and Citizenship. The Report first documents the adverse impacts on their family life and children's lives as a result of their protracted detention:

> **E Experience of the family on Christmas Island**
> Mr [redacted] described a number of negative aspects of the family's life on Christmas Island. He said that the other Tamil families were moved to the mainland and that his family was the only Tamil family remaining on Christmas Island. He said that his family felt alone, and that his children were upset, particularly because there were no other Tamils to talk to. This had been the situation for three months prior to the family leaving Christmas Island so that Mrs [redacted] could have her baby. He told me that his daughter was sometimes the only child in the school. He told me that the family lived in three rooms, with a bathroom but no kitchen. He said that there was one kitchen to 40 rooms. He said that activities were very limited. For instance, sport was only possible between 3pm and 5pm. He also spoke of his concerns about health care arrangements on Christmas Island. He mentioned that there was no dentist, and that when he recently arrived in Sydney it was found that two of his teeth were "rotten." He mentioned not being able to eat hard foods. He also said that responses to medical requests on Christmas Island were slow, and sometimes it took one or two weeks, even to get simple things such as Panadol. Mrs [redacted] said that for the first three and a half months at Christmas Island they were not allowed to talk to other people, and the children were not allowed to go to the park or to go swimming. She said that they did not know why these restrictions were in place. After three and a half months, in about April 2010, a submission from their lawyer, Mr Stephen Blanks, resulted in DIAC allowing them to go to the park and to talk to others. She also spoke of the difficulties she experienced during her recent pregnancy, including nausea and vomiting, and difficulty finding food that she could tolerate. Like her husband, she emphasized the difficulty in the last two or three months on Christmas Island, once there were no other Tamil families there, particularly for the children. She said that there had been no other children there for the last two months. She said that any new children who came to Christmas Island were transferred away from there quickly. She said that her daughter was very upset and sad because she had no friends to talk or play with. She expressed her concern about schooling arrangements saying that there was "no regular school. .. only play and languages." She said that her daughter "repeated the same syllabus again and again." Mrs [redacted] also spoke of the lack of dental care, stating that both she and her daughter had had dental problems.[227]
>
> **F Experience of the Family at Villawood Immigration Detention Centre**
> Mr [redacted] reported mixed feelings about the family's situation at Villawood. He was concerned that there were few activities for the two children. He also said that it was better than Christmas Island and that the children were a bit happier at Villawood, because they were living in a house that was like a normal house and where the family could cook. He told me that there were two guards about the house all the time. Mrs [redacted] said that only in the bedroom did she feel she had some privacy. She said that the situation at Villawood was "no good for children." She was particularly concerned about her three year old son, [redacted]. She said that for two years he has only known life in camps or detention. She said that "he does not know normal life ... such as going to a park or walking along a road or going shopping." She said that they have to ask the detention centre officers for everything. She said that her son does not have the opportunity to play with other children or go to a "playschool," and that he is "very sad ... he doesn't see the world." She added that he was not eating properly, could not drink milk, was crying often, and was often lonely, for instance when his sister went to school. She said that her daughter [redacted], aged six, was happier than at Christmas Island and enjoyed going to a normal school. She expressed distress that her daughter cannot go to school with her parents like other children, but "only with officers." Sometimes her daughter was distressed at school, when she was not permitted to do things that the other children at school did, such as going to "swimming school." She said that other parents can buy stuff for their children, such as an ice cream, but this kind of thing was not possible for them. She spoke with much distress, and tearfulness, about the predicament of her

[227] Expert Psychiatric Report of Geoffrey Bradshaw FRANZCP FAChAM, contained in Letter to the Minister for Immigration and Citizenship, 1 November 2010, 6-7.

children, saying that they were “missing out.” She said that her children have a “jail life.” She said that they have even considered the possibility of getting their children adopted so they do not have to go back to Christmas Island.

Mrs [redacted] said, with concern, that her husband was sometimes very upset about the situation. Similarly, Mr [redacted] expressed great concern about his wife. He said that she cries a lot, and that she wakes crying in the night. He said “I cannot console her” and that he feared her becoming a “chronic psychiatric case.”

Both Mr and Mrs [redacted] reported distress about the strict limitations about contacting people outside of Villawood. Mrs [redacted] mentioned at both interviews that she was not permitted to contact her two sisters in Sri Lanka. There are a number of relatives of both mother and father living in Sydney, and a complex set of restrictions about contact, and I am not sure I understood these arrangements precisely. Mrs [redacted] said that her mother and brother are living in nearby Auburn in Sydney, and they are the only ones who can visit her or speak to her. It appears that her husband is somewhat less restricted in whom he can speak to. He is permitted to speak to his two brothers and his uncle, who are also living in Sydney. These three, along with Mrs [redacted]'s mother and brother, are the only five people with whom they are permitted to have phone contact. Mrs [redacted] said that she is not permitted to speak with her husband's two brothers, and that none of the family is permitted any contact with the children of her husband's brothers.[228]

The family’s psychiatric assessment

309. The Report then provides Dr Bradshaw’s expert psychiatric assessment of the adverse impacts of detention on the authors, as follows:

Examination and Assessment
… The second child [redacted] appeared to be small in stature for his age, and noticeably anxious and timid when I saw him briefly. At the first meeting he appeared to be clinging or staying close to either his mother or his father. At the second meeting he appeared to be watching television inside the house all the time. …

At the first interview with Mrs [redacted] she appeared to be extremely distressed, and recurrently tearful. At both interviews she presented as a gentle, quiet and sad person. She spoke in a very soft voice. Without being questioned specifically, she spoke of how distressed she was about the family's situation saying “three years ... no good life,” and expressing concern particularly about the restrictions on her daughter at school. She appeared very tired, and reported interrupted sleep and headaches. She said that thinking about the past brought on headaches, particularly when she remembered being aboard the boat and being at Christmas Island. She felt that she could not respond to her daughter properly. She reported difficulty or incapacity in regard to feeding her infant son. She reported experiencing no pleasure in her life. She spoke slowly and hesitantly, and appeared to show psychomotor retardation. I did not persist for long with this first interview.

At the second interview she was able to talk to me more fluently and extensively. She became tearful and distressed at many points of the history, particularly in regard to what her children had to go through when they fled their home in Sri Lanka and when they were on Christmas Island, and in regard to their present situation – for instance when speaking, as reported above, about her three year old son never having had a normal life, or her daughter being often sad on Christmas Island, or restricted in her current activities at school.

She said that she felt very sad, especially about her children, and that often became upset. She said that she felt that they had “no future.” She said that she sometimes had death wishes. There was no indication that she had suicidal plans. She expressed distress about her isolation and not being able to speak to her family and sisters. She said that she felt no interest or pleasure in anything. She said that at Villawood there was” no occupation ... no hobby,” and that watching TV was the only option for activity.

[228] Ibid, 7-10.

Like her husband she expressed complete puzzlement about the negative ASIO assessment. he said she had asked about this, and received no explanation. She referred to believing that the ASIO assessment must have been based on a false belief that they were involved in politics or involved with the Tamil Tigers. She stressed that they had not been interested in politics and had not been involved with the Tamil Tigers. She stressed that the court she had worked in was a civil court which dealt with no political cases and with no Sri Lankan Army soldiers.

There were no psychotic features, and she did not appear to be cognitively impaired, apart from being somewhat tired and slowed down. She certainly appeared to be severely depressed and demoralized about the family's situation.

The recurrent theme in her talk was her concern for her children and how distressed they were. She said "we want to have a normal life ... we don't want to be treated as criminals." She said she wished to be able to go to a Hindu temple, because this was very important for her, and "prayer is good for me."[229]

Assessment
My assessment regarding Mrs [redacted] is that she is seriously depressed and would fulfil standard criteria for Major Depressive Disorder. She also has some features of Post Traumatic Stress Disorder.

The second family member I am most concerned about is [redacted], the three year old son. The history and brief observation of him indicate that he may be abnormally sad and anxious and could be malnourished. I am certainly concerned that his normal development has been seriously disrupted and continues to be.

I am also concerned for the six year old daughter [redacted]. She appears to be functioning well enough at present, but there must be serious concerns about her future development if she continues to live in detention (albeit in residential housing), with restraints on friendships when she is not at school, on contact with extended family and on extra-curricular activities at school.

These serious concerns apply to the future development of all three children, should they continue to live in a detention centre.

Overall the [redacted] family appear to be a normal family, with normal and caring relations between each other, who have been very adversely affected by the environments in which they have been living for the last two years, and continue to be so. Neither Mr nor Mrs [redacted] have any significant personality disturbance. The attitude of both appeared to be sadness, puzzlement and helplessness, with an absence of anger or resentment. Mrs [redacted] is seriously depressed at present, but her premorbid functioning, prior to the last two and a half years, was good, and there was no history of previous depressive or other psychiatric illness. Her depressive state can be appropriately understood in terms of the severe stressors she and her family have been experiencing during the last two and a half years, and the major uncertainty about what will happen to them.[230]

310. The expert psychiatrist recommended release from detention into the community as the most effective treatment for these adverse mental health conditions:

5. By far the most effective treatment or intervention for Mrs [redacted]/s depression would be for her and her family to be living in their own house (or other dwelling) in the community, or for her to have the prospect and expectation that this will occur without any long delay.

6. The environment of living in an Immigration Detention Centre is also a very adverse one for the [redacted] children, even if it is located on the mainland. The [redacted]s told me of their concerns for their children at Villawood, as detailed above - lack of activities, not permitted to go to a park or go swimming or go elsewhere, little or no contact with extended family, lack of other children to play with, and so forth, and their concerns are valid. "No good for children" was Mrs [redacted]'s succinct and appropriate way of putting it. Again I note that this accords with the AHRC's view on the

[229] Ibid, 8-10.
[230] Ibid, 10-11 [underlined emphasis added].

harmfulness of immigration detention on children, as expressed in its recent report and its earlier one 'A last resort?'

7. My opinion therefore is that the [redacted] family should be moved to community detention, for the mental health, and health generally, of both mother and children, and to minimise the damage to the children's development, and to begin repairing the considerable damage that has already been done. It is important to remember that this family has suffered great dislocation and trauma in the last two and a half years. The father appears, at least outwardly, to be managing in a stoic way; but his welfare would of course also benefit with community detention, and in any case he is a central figure in the family and he would need to go wherever they go. From a psychiatric perspective, moves towards community detention should be started as soon as practicable.[231] …

311. The expert psychiatrist also commented incidentally on the lack of any perceived security risk posed by the family, stating that 'the idea of either Mrs or Mr [redacted] being a security threat in any way is not believable':

8. I am aware of the adverse ASIO assessment that hinders the [redacted]s from being resettled in the community, or being moved to community detention. I am also aware that it is not my area of expertise to assess security concerns. However in this case I feel I should make some comment, particularly as I have spent some five hours carefully interviewing the [redacted]s, and assessing their history and personalities, as well as their current state and circumstances. My opinion is that the idea of either Mrs or Mr [redacted] being a security threat in any way is not believable.

My opinion is that they are normal decent people, who care for their children in a normal heart-felt way, who have primarily wanted to have a happy family life, supported by honest work, and who have had the misfortune to have been caught up, along with their children, in fierce civil war and consequent major dislocation. My hope is that the negative security assessment, and the information on which it is based, is carefully reviewed by ASIO or by the Inspector-General or other agency overseeing ASIO, so that the [redacted]s can start to resume some kind of normal family life in a normal living situation.

9. The alternative to community detention, or community resettlement, is living in an immigration detention centre long-term or indefinitely. This would be very harmful for Mrs [redacted]'s mental health, and for the mental health of all family members, including for the healthy mental development of the children. My opinion is that this is not acceptable.[232]

312. The expert psychiatric evidence is corroborated by an academic visitor to the family in detention, who observed as follows in late August 2011:

The two older children, 4 years and 7 years old are increasingly aware of their circumstances and the meaning it has on their lives. I believe that the almost 2 year detention has seriously affected these children's lives, and is seriously jeopardising protective factors children need to build resilience. This family, especially the children, already traumatised by war are being damaged further by continued detention.

Mum has told me that for the last 2 weeks the older child have withdrawn behaviour, lack of appetite, sad and quiet, she has not wanted to go to school. She has lost friends continually moving in and out of the detention centre neighbouring units and she has a sense of grief and loss and hopelessness. She is questioning daily practices of electronic screening her parents are subjected to and is aware that they are seen as "bad" people.

The 4 year old for the last 3 months is wetting the bed even when asleep during the day. He has recently started 2 days of preschool after almost 2 years of serious social isolation.[233]

[231] Ibid, 11-14 [underlined emphasis added].
[232] Ibid, 11-14.
[233] Correspondence with counsel from Saraswathi Griffiths-Chandran, Lecturer in Education, Faculty of Education, Health and Science, Charles Darwin University, and advisor to DIAC's Northern immigration detention community engagement committee 23 August 2011 [on file with counsel].

The violations of family and children's rights

313. The five authors contend that detention is ipso facto an 'interference' in family life, because it disrupts the ordinary family interactions, freedoms and relationships which are guaranteed in a democratic society. Interference in a family may occur not only by reason of the physical separation of family members (as in deportation or removal cases), but also by interference in the normal life of the family itself, including its ability to determine its own place of residence, living conditions, choice of co-habitants, family activities outside the home, relationships in the community, and so on. All of these aspects of family life are severely curtailed by detention.

314. The question is whether such interference is lawfully justified. Interference by reason of detention will only be justified where the detention itself is not arbitrary or unlawful, and where the conditions of detention meet minimum international standards.

315. The five authors contend that the interference in their family life is not justified by any legitimate aim, because their protracted detention is: arbitrary and unlawful under article 9(1) of the ICCPR, as not being necessary or the least invasive means for meeting any security concerns; not subject to effective judicial review as required by article 9(4); and inhumane and contrary to articles 7 and/or 10(1) of the ICCPR. All of these grounds are established earlier in this communication and reiterated here.

316. For the same reasons, the five authors additionally submit that their detention, and the failure to release them into the community, violates Australia's obligation to take measures to protect the family under article 23(1), and to protect children specifically under article 24(1). The State is required to take positive measures to protect the family from serious harm, including harm inflicted by way of protracted, arbitrary detention, in circumstances where no grounds have been established to justify detention and where detention is not reviewable. In these circumstances, those measures of protection include a requirement on Australia to release the family into the community, so as to avoid the harm inflicted by detention.

317. As regards a breach of article 24(1), the Committee has previously determined, in *Bakhtiyari v Australia*, that protracted arbitrary detention, causing harm to detained children, may violate a State Party's obligations to protect the best interests of children under article 24(1) of the ICCPR specifically:

> Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.[234]

[234] *Bakhtiyari v Australia* (UNHRC 1069/2002), 29 October 2003, para. 9.7 [underlining emphasis added].

318. The same considerations are applicable in this communication for the reasons given by the Committee immediately above.

319. As regards the breach of article 23(1), the authors submit that a similar analysis applies to the Committee's approach in *Bakhtiyari* regarding article 24(1). Namely, protracted, arbitrary detention contrary to article 9, which inflicts harm on family members, also constitutes a failure by the State Party to provide adequate 'protection' to the family. Specifically, Australia has a duty to protect the family by providing safe living conditions which do not inflict serious harm upon the family unit. Protracted detention of a family in Australia's detention facilities does not meet the minimum standard of protection owed by Australia.

320. Even if it is accepted that security concerns establish a prima facie case for their authors' detention, and thus for the interference in their family (under article 17) or qualification of the protective measures owed to the family or the children (under articles 23 and 24), then their continuing detention is nonetheless excessive and disproportionate in the circumstances. The serious adverse mental health effects of protracted detention on the family, particularly on the three innocent minor children, must be regarded as clearly outweighing any unspecified and indeterminate security risks posed by the two adult parents.

One Author – A Detained Husband and Father

321. By his detention, another author (case number 20) is separated from his wife and minor child, who live in the community in Sydney. He has been in detention for a total period of 2 years and 1 month (as at August 2011).

322. The separation of close family members by the detention of one member self-evidently amounts to 'interference' in family life under article 17.[235] A central feature of family life is the right to live together so that family relationships may 'develop normally'[236] and so that family members can 'enjoy each other's company'.[237]

323. According to the author, his wife, and his migration agent, their separation is causing serious stress and anxiety for the family, including because of the chronic uncertainty about the prospects of family reunification, in circumstances where detention is indefinite and non-reviewable. Such harmful interference to the family cannot be adequately mitigated by periodic visitation of the author by his family.

324. The author, his wife and their child lived as a very close, traditional family unit in Sri Lanka and then in detention in Australia. The wife now finds herself alone and a single mother in a foreign country. She is finding it extremely difficult integrating into the

[235] The Committee observed in *Bakhtiyari v Australia* that 'to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant': *Bakhtiyari v Australia* (UNHRC 1069/2002), 29 October 2003, para. 9.6. That case involved the removal from Australia of a mother and child, separating them from a lawfully resident husband and father, pending final determination of the father's status.

[236] *Marckx v Belgium*, A. 31 (1979), 2 EHHR 330, para. 31 PC (concerning the protection against arbitrary interference in family life under article 8 of the *European Convention on Human Rights*).

[237] *Olsson v Sweden*, A. 130 (1988), 11 EHRR 259, para. 59 PC (as above).

Australian community without her husband, and suffers ongoing stress related health problems as a result. While integration assistance is being provided, the wife speaks of her isolation and loneliness. In her letter to the Minister for Immigration and Citizenship of 11 March 2011, she wrote as follows of the adverse impact of family separation:

> Sir, we took a dangerous sea journey to come to your country because we could not live peacefully, safely and happily in our country. We did not want to separate from each other - that is the reason we took this dangerous journey together. The boat journey was really dangerous. But because we wanted to live peacefully as a family we made this journey to your country. But now you have separated our family. We do not have any relations or friends here. We only had each other. But now you have separated one of us. I can't live without my husband. My son can't live without his father. Please let my family be together.
>
> We will not be a bother or a danger to your country. We made the journey to come to your country taking a lot of risk. Your country has given us life. Why will we even think of doing anything bad to your country? I pray and beg you to let us live as a family in your country.
>
> We have been very patient over these last 19 months, hoping the three of us would receive good news. But the decision we got has left me in darkness. I was happier when I was in detention because my family was together. I am not happy getting this visa that has separated my family. Please join my son and me with my husband. Please give us our family life back.[238]

325. The separation of the family has had particularly distressing effects on the author's minor child, as the mother explains in her letter to the Minister:

> I feel very upset to see my son so sad. He is always calling for his dad. When I try to feed him he asks for his dad. Even in the middle of the night in his dreams he calls his dad, asking him to come home and then starts to cry. I wake him up by wiping his face with a wet towel. He wakes up and starts crying again saying "I love my dad, I want him, come we will go to him". In the day time he will go to the door and will call me saying mum, dad is here. My son used to eat with his dad, play with him and wanted his dad to bathe him. My husband used to do everything for my son. My son understands things now. I am feeling very scared that this may affect him mentally. Please give me back my son and my husband to me. My son is getting scared very easily now. Even for a small noise he hides in a corner and says mum I am scared. Before when I go to have a bath, he used to play with his dad. Now there is no one so he sits outside the bathroom door and keeps calling me to come out. At night, if he hears a noise he is too scared to cry out loud. He will be closing his mouth and tears would be running down from his eyes. I don't think any mother, father or son should be in this situation.
>
> When we go to visit my husband at the detention centre and when it's time to leave, my son will want to take his dad back home with him. At times, he has told the officer there "I take my father my home". He will be very upset on our way back home wanting to bring his dad back with him. I know parents should not lie to their children, but I keep telling my son lies about why his father is not living with us. I do not know what sin I did to suffer this pain of not living with my husband and seeing my son suffering by not being with his father. There can't be a bigger punishment than this. We do not deserve this punishment.
>
> Please sir, join our family back together. Please give us our life back. I beg you to let us live as a family. Please.[239]

326. The author's wife and child are housed a significant distance from the facilities where the author is detained, making their daily visits to him onerous, time consuming and expensive. Due to his mother's health problems and their daily visits to his father, the child rarely has the opportunity to socialise with other children and frequently expresses

[238] Letter from the author's wife, [redacted], to the Minister for Immigration and Citizenship, dated 11 March 2011, on file with counsel.
[239] Ibid.

his confusion and grief about the loss of his father from his life. The author's wife pleads for her and her son to be reunited with the author and talks of her preference to be in detention with her husband.

327. The question is whether such interference can be justified by a legitimate aim. This communication established above that the protracted, arbitrary detention of the author is unlawful under article 9 of the ICCPR. Where the author's detention is unlawful, there is no lawful justification for the interference in family life caused by it, and Australia is responsible for violating article 17 in respect of this author.

328. By separating close family members through the author's unlawful detention, Australia has also violated its obligation to take measures to protect the family under article 23(1), and to specifically protect the author's minor child under article 24(1). Again, for the reasons given above, there is no lawful justification for Australia's failure to provide protection.

REMEDIES SOUGHT

329. The authors respectfully request the following remedies:

Article 9(1)

For the violation of article 9(1), Australia should:

(a) Acknowledge that it arbitrarily detained the authors;

(b) Immediately release the authors from arbitrary detention;

(c) Apologise to the authors for their arbitrary detention; and

(d) Provide adequate compensation for their unlawful detention.

Where Australia believes it is necessary to detain the authors in future, Australia must:

(a) Provide an individual assessment of the necessity of detaining each author;

(b) Consider less invasive alternative to detention as part of such assessment; and

(c) Provide a procedure for the periodic independent review of the necessity of continuing to detain any author.

Article 9(2)

For the violation of article 9(2), Australia should:

(a) Acknowledge that it failed to provide reasons for their detention to the authors; and

(b) Apologise to the authors for such failure.

Where Australia believes it is necessary to detain the authors in future, Australia must reasonably inform the authors of the substantive reasons for their detention, beyond a purely formal assertion that they fall within the terms of a particular legal category.

Article 9(4)

For the violation of article 9(4), Australia should:

(a) Acknowledge that it failed to provide effective judicial review of the authors' detention, including of the substantive grounds purportedly justifying it; and

(b) Apologise to the authors for such failure.

Where Australia believes it is necessary to detain the authors in future, Australia must provide for the effective judicial review of the necessity of such detention, in terms compatible with the requirements of article 9(4).

Article 7 and/or 10(1)

For the violation of articles 7 and/or 10(1), Australia should:

(a) Acknowledge that the circumstances of the authors detention were inhumane or degrading;

(b) Apologise to the authors for their inhumane or degrading treatment; and

(c) Provide adequate compensation for their inhumane treatment, including for the mental distress and psychological suffering experienced by them.

Articles 17(1), 23(1) and 24(1)

For the violations of articles 17(1), 23(1) and 24(1), Australia should:

(a) Acknowledge that it unlawfully interfered with, and failed to protect, the six authors' families and children;

(b) Apologise to the authors for injuring their family and children's rights; and

(c) Immediately release the authors from detention.

Guarantees of Non-repetition

As regards violations of all of the above ICCPR rights, Australia should also provide assurances of non-repetition of violations to the authors.

The authors submit that such assurances should include enactment of the necessary legislative and policy changes to safeguard against the repetition of such violations in future. Specifically, Australian law should be amended to:

(a) Eliminate mandatory detention;

(b) Require an individual assessment of the necessity of detention;

(c) Inform detainees of the substantive reasons for their detention;

(d) Require periodic independent review of the necessity of detention;

(e) Require consideration of less invasive alternatives to detention;

(f) Provide for substantive and effective judicial review of detention;

(g) Provide for substantive and effective judicial review of adverse security assessments relied upon to detain a person pending removal; and

(h) Take measures for the more effective protection of family and children's rights.