



# UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

**Submission by the Office of the United Nations High Commissioner for Refugees  
*Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009***

**Senate Legal and Constitutional Affairs Committee  
5 August 2009**

**I. SUMMARY OF RECOMMENDATIONS**

- 1. It should be made clear that the Government's *New Directions in Detention* policy applies throughout the Commonwealth of Australia, including any territories excised from the 'migration zone'.**
- 2. The Government's Key Immigration Detention Values should be explicitly incorporated into Australia's legal framework, including clear guidelines for the reception of asylum-seekers on Christmas Island.**
- 3. All decisions to detain an asylum-seeker, refugee or stateless person should be based on an individualized (case-by-case) basis and the reasons should be limited to those authorized by international law and standards.**
- 4. All decisions to detain an asylum-seeker, refugee or stateless person should be subject to review in accordance with Article 9(4) of the 1966 ICCPR. In all cases, reasons should be given in writing to record the basis of the detention, and include periodic reviews for its ongoing necessity.**
- 5. Mechanisms established to provide review of the decision to detain should be prescribed in legislative form to ensure clarity, transparency and predictability.**
- 6. Specific criteria relating to the decision to detain, and the reasons for its ongoing necessity, in particular when a person presents an unacceptable risk to the community, should be established and prescribed in legislative rather than regulatory form.**

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## II. INTRODUCTION

7. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (“the Committee”) in its *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*.

## III. UNHCR’S STANDING TO COMMENT

8. Australia has assumed responsibility to extend protection to asylum-seekers and refugees through accession to the *1951 Convention and the 1967 Protocol relating to the Status of Refugees* (“the 1951 Refugee Convention”).<sup>1</sup> UNHCR provides comment pursuant to the Preamble and Article 35 of the 1951 Refugee Convention as well as the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* (“the Statute”). UNHCR additionally has been given a specific and global mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976 as well as through subsequent resolutions.<sup>2</sup>
9. UNHCR’s supervisory role is complemented by Conclusions of its Executive Committee (ExCom) on International Protection which are developed through a consensual process.<sup>3</sup> Although not formally binding, ExCom Conclusions on International Protection constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight. Australia takes an active role in the work of ExCom.
10. In addition, UNHCR develops guidelines drawing on the 1951 Refugee Convention, ExCom Conclusions, and general human rights treaties like the *1989 Convention on the Rights of the Child* or the *1966 International Covenant on Civil and Political Rights* (1966 ICCPR). Thus, in February 1999, UNHCR issued *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*.<sup>4</sup> The Guidelines deal specifically with the detention of asylum-seekers, but also refer to stateless persons because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum-seekers and stateless persons.

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<sup>1</sup> The term ‘1951 Refugee Convention’ is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

<sup>2</sup> UN General Assembly, Resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

<sup>3</sup> ExCom Members are elected by ECOSOC on the basis of their (a) demonstrated interest in and devotion to the solution of refugee problems; (b) widest possible geographical representation; and, (c) membership of the United Nations or its specialized agencies.

<sup>4</sup> UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999).

#### IV. SCOPE OF THE SUBMISSION

11. UNHCR's submission addresses issues in the Migration Amendment (Immigration Detention Reform) Bill 2009 insofar as they affect asylum-seekers, refugees and stateless persons, and focuses specifically on their consistency with relevant international law and standards.
12. UNHCR defines detention or detention-like situations<sup>5</sup> as:

confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.
13. This definition is sufficiently broad to encompass most forms of detention recognized as such by international human rights law; and is applicable to situations where natural geography may be used to restrict freedom of movement.<sup>6</sup> It applies equally to the detention of asylum-seekers, refugees and stateless persons within Australia's migration zone and excised offshore places, including Christmas Island.
14. While this definition does not per se include other forms of 'administrative' detention in Australia, UNHCR notes that Article 9(1) of the 1966 ICCPR, which inter alia requires that no one shall be subjected to arbitrary arrest or detention, applies to '*all deprivations of liberty*, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc'.<sup>7</sup>
15. In UNHCR's view, any form of detention or deprivation of liberty should be humane with respect shown for the inherent dignity of the person and should be prescribed by law.<sup>8</sup>

#### V. INTERNATIONAL STANDARDS

16. The *1948 Universal Declaration of Human Rights*, the 1966 ICCPR, and regional human rights instruments,<sup>9</sup> all specify – in more or less similar terms – that no one should be arbitrarily deprived of his or her liberty.

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<sup>5</sup> Ibid, Guideline 1.

<sup>6</sup> UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, POLAS/2006/03 (April 2006), 2.

<sup>7</sup> 1966 ICCPR, Article 9(1); UN Human Rights Committee, 'General Comment No. 8: Right to liberty and security of persons (Article 9)', 16<sup>th</sup> sess, (30 June 1982), [1] (emphasis added).

<sup>8</sup> UNHCR Guidelines, above n 4, Guideline 10.

<sup>9</sup> See, eg, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights "Pact of San Jose", and the Cairo Declaration on Human Rights in Islam.

17. Article 31 of the 1951 Refugee Convention prescribes that:

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.

18. This takes into account the fact that refugees may be forced to enter a country illegally in order to escape persecution. Article 31 also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.

19. The Article applies to asylum-seekers as well as recognized refugees. Although not all asylum-seekers meet the refugee definition, a person is a refugee as soon as he or she does meet the refugee definition, even though formal determination and recognition of that status takes place later. An individual does not become a refugee because of recognition, but is recognized because he or she is a refugee.<sup>10</sup>

20. UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* ("UNHCR's Guidelines on Detention") bring together important international law principles relating to detention and set out minimum standards for what might be considered acceptable state practice. They also offer greater clarity regarding the circumstances in which restrictions may be warranted and the alternatives which could be considered. They are not binding, but represent UNHCR's authoritative views which draw upon the 1951 Refugee Convention, relevant ExCom Conclusions,<sup>11</sup> and binding human rights law and standards. The Guidelines are attached in extenso (Annex A).

21. UNHCR's Guidelines on Detention state the principle that detention of asylum-seekers should be an exception, not the rule and should be for the shortest possible period.

22. The Guidelines reiterate the limited basis on which the detention of asylum-seekers may be permissible, if necessary and if prescribed by a national law which is in conformity with general norms and principles of international human rights law. The exceptional situations in which detention of asylum-seekers may be permitted are those agreed to by States in ExCom Conclusion No. 44 (XXXVII) of 1986 (attached in Annex B):<sup>12</sup>

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<sup>10</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/Rev.2 (1 January 1992), [28].

<sup>11</sup> See, for example, UNHCR, ExCom Conclusions Nos. 44 (XXXVII) – 1986; 46 (XXXVIII) – 1987, [f]; 47 (XXXVIII) – 1987 [e]; 50 (XXXIX) – 1988 [i]; 65 (XLII) – 1991 [c] and [j]; 71 (XLIV) – 1993 [f]; 85 (XLIX) – 1998 [cc] and [ee]; and 89 (LI) – 2000.

<sup>12</sup> UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986 on Detention of Refugees and Asylum-Seekers.

- (i) to verify identity;
  - (ii) to determine the elements on which the claim for refugee status or asylum is based;<sup>13</sup>
  - (iii) to deal with cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
  - (iv) to protect national security or public order.
23. The Guidelines also propose a number of alternatives to the use of detention for asylum seekers, including the use of reporting and residency requirements, release on bail, sureties and allowing asylum-seekers to live in open centres where their presence can be monitored.

## VI. AUSTRALIAN STANDARDS

### A. *New Directions in Detention policy: Key Immigration Detention Values*

24. UNHCR welcomes the *New Directions in Detention* policy announced by the Minister for Immigration and Citizenship on 29 July 2008.<sup>14</sup> This policy seeks to amend the broad policy parameters of immigration detention in Australia and to implement the Government's commitment to 'fundamentally change the premise underlying detention policy', particularly the commitment to seven Key Immigration Detention Values, which are intended to inform all aspects of the Department of Immigration and Citizenship (DIAC) Detention Services.
25. In this regard, UNHCR particularly welcomes the Government of Australia's commitment to:
- (i) use immigration detention centres only as a last resort;
  - (ii) detain in immigration detention centres for the shortest practicable time;
  - (iii) not detain children at all in immigration detention centres and, elsewhere, only as a measure of last resort;
  - (iv) create a presumption against detention and introduce an individualized assessment, where the onus rests on the detaining authority to detain only on specific and limited grounds;
  - (v) ensure that the length and conditions of detention are subject to regular review; and,
  - (vi) treat people in detention fairly and reasonably consistent with the inherent dignity of the human person.

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<sup>13</sup> UNHCR elaborates that 'the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim ... and would not extend to a determination of the merits or otherwise of the claim'; UNHCR Guidelines, above n 4, 4; UNHCR, ExCom Conclusion No. 44 (XXXVII), above n 12.

<sup>14</sup> Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, Seminar – Centre for International and Public Law, The Australian National University, 29 July 2008.

26. UNHCR also welcomes the publication of the first and second reports of the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, respectively titled “Immigration Detention in Australia: A new beginning – Criteria for release from detention” (December 2008), and “Immigration Detention in Australia: Community-based alternatives to detention” (May 2009), and looks forward to the publication of the third (and final) report of the *Inquiry*.
27. Copies of UNHCR’s submission to the Joint Standing Committee on Migration on the *Inquiry into Immigration Detention in Australia* (September 2008) are available at: <http://www.unhcr.org.au/pdfs/ImmigrationDetention2008.pdf>

## VII. MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL 2009

### A. *Application in territories excised from the Migration Zone*

28. The Explanatory Memorandum of the Migration Amendment (Immigration Detention Reform) Bill 2009 (the “Migration Bill”) states that the Bill’s purpose is to amend the *Migration Act 1958* (the “Migration Act”) ‘to support the implementation of the Government’s *New Directions in Detention* policy, announced by the Government on 29 July 2008’.<sup>15</sup>
29. UNHCR understands from the Minister for Immigration and Citizenship’s media release of 25 June 2009 that the Migration Bill intends to embed in legislation the Government’s *New Directions in Detention* policy.<sup>16</sup> The Minister acknowledged the unanimous endorsement of the new detention policy by the Joint Standing Committee on Migration, and specifically identified the Migration Bill as fulfilling Recommendation 12 of the Committee’s December Report, whereby:

The Committee recommends that, as a priority, the Australian Government introduce amendments to the Migration Act 1958 to enshrine in legislation the reforms to immigration detention policy announced by the Minister for Immigration and Citizenship.<sup>17</sup>

30. UNHCR welcomes the willingness of the Government of Australia to adopt and implement the recommendations of the Joint Standing Committee on Migration. However, it recalls that Recommendation 9 of the same December Report stated:

The Committee recommends that the Australian Government apply the immigration detention values announced on 29 July 2008 and the risk-based approach to detention to *territories excised from the migration zone*.<sup>18</sup>

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<sup>15</sup> Explanatory Memorandum, Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), 2.

<sup>16</sup> Senator Chris Evans, ‘Detention values to be enshrined in law’ (Media release, 25 June 2009).

<sup>17</sup> Ibid; Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Immigration Detention in Australia, Immigration Detention in Australia: A new beginning – Criteria for release from detention* (2008) [4.87].

<sup>18</sup> Joint Standing Committee on Migration, above n 17, 60 (emphasis added).

31. Despite the Government of Australia's assurances that the Key Immigration Detention Values will apply to territories excised from the migration zone, the Minister's Second Reading Speech states that '[u]nlawful non-citizens, including offshore entry persons, in excised offshore places will continue to be subject to the existing detention and visa arrangements of the excision policy'.<sup>19</sup> This is a regrettable dichotomy which discriminates between the classes of entrants, solely on the basis of method and place of entry to Australia and is not derived from the broader 'risk-based' determination that lies at the heart of the new detention values.
32. While noting the more discretionary nature of the power to detain in an excised offshore place under current legislation,<sup>20</sup> UNHCR is concerned that positive changes to detention arrangements also extend explicitly and by law to asylum-seekers, refugees and stateless persons on Christmas Island. Otherwise, the situation of detention in excised territories is left in a legislative vacuum, which is a significant lacuna in the overall legal framework within which the Government seeks to implement its new policy.

**Recommendation 1:**

33. **It should be made clear that the Government's *New Directions in Detention* policy applies throughout the Commonwealth of Australia, including any territories excised from the 'migration zone'.**

**Recommendation 2:**

34. **The Government's Key Immigration Detention Values should be explicitly incorporated into Australia's legal framework, including clear guidelines for the reception of asylum-seekers on Christmas Island.**

**B. *Mandatory detention***

35. As is well-known, UNHCR's view is that the detention of asylum-seekers is inherently undesirable and the applicable criteria for determining when it may be necessary to detain asylum-seekers are exhaustively prescribed by UNHCR's Guidelines on Detention: Guideline 3 and ExCom Conclusion No. 44.<sup>21</sup> Furthermore, in assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved.
36. UNHCR understands that the Government's Key Immigration Detention Value (No. 2) operates to limit the mandatory detention of 'unauthorised arrivals' to the minimum period required to assess the health, identity and security risks; or, in the case of 'unlawful non-citizens', where an individual either presents unacceptable risks to the community or has repeatedly refused to comply with visa conditions.

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<sup>19</sup> Second Reading Speech – Senate, Migration Amendment (Immigration Detention Reform) Bill 2009, 12.

<sup>20</sup> Migration Act, ss 189 (3) and (4).

<sup>21</sup> UNHCR, ExCom Conclusion No. 44 (XXXVII), above n 12.



37. UNHCR welcomes the intended amendments by Item 9 of Schedule 1, which seeks to implement Key Immigration Detention Value (No. 2) by limiting the category of persons to whom mandatory detention applies by imposing additional qualifying criteria beyond the mere fact of a non-citizen's unlawfulness.<sup>22</sup> UNHCR nevertheless has a number of concerns with regard to this provision, as outlined below

**C. *Criteria for detention***

38. Where a person is subject to mandatory detention, other than for reason of presenting an unacceptable risk to the Australian community, the Migration Bill provides that the officer must make reasonable efforts to (a) ascertain the person's identity; (b) identify whether the person is of character concern; (c) ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and (d) resolve the person's immigration status.<sup>23</sup>

39. UNHCR further notes the amendment provided by Item 1 of Schedule 1, by which 'Parliament affirms as a principle that the purpose of detaining a non-citizen is to (a) manage the risks to the Australian community of the non-citizen entering or remaining in Australia; and (b) to resolve the non-citizen's immigration status'.<sup>24</sup>

40. UNHCR recalls the Minister's announcement of 29 July 2008, in which he stated that:

Labor believes that the retention of mandatory detention on arrival of unauthorised arrivals for the purpose of health, identity and security checks is a sound and responsible public policy. *Once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.*<sup>25</sup>

41. UNHCR is of the view that, in the case of 'unauthorised arrivals', once identity and security risks have been resolved, the purpose of detention has been achieved and the person should be released from detention. Efforts to resolve the substantive elements of the person's immigration status, namely their need for international refugee protection, may be pursued while the person is in the community (see also paragraph 21, above) and ought to be de-linked from the assessment of risk associated with detention.

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<sup>22</sup> (1) An officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that:

(a) the person is an unlawful non-citizen; and

(b) any of the following applies:

(i) the person presents an unacceptable risk to the Australian community;

(ii) the person has bypassed immigration clearance;

(iii) the person has been refused immigration clearance;

<sup>23</sup> Migration Amendment (Immigration Detention Reform) Bill 2009, Item 9, s 1B.

<sup>24</sup> Ibid, Item 1, s 4AAA(1).

<sup>25</sup> Senator Evans, above n 14, 9 (emphasis added).

42. In circumstances where the purpose of detention is no longer achievable within a reasonable period, notably in the case of stateless persons, UNHCR is of the view that the detainee must be released (by granting some form of visa concomitant with their legal status), or else the continued detention may become arbitrary and indefinite. This would be consistent with the specific incorporation of the principle that detention is ‘a measure of last resort’ and should be for the ‘shortest practicable time’.<sup>26</sup>
43. Insofar as the requirement to identify whether a person is of ‘character concern’,<sup>27</sup> UNHCR is of the view that this is too broad and thus inconsistent with UNHCR Guidelines on Detention. UNHCR Guidelines limit the reasons for detention, where necessary, to cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead authorities, or the protection of national security or public order.
44. With regard to detention for the purpose of ascertaining health risks to the Australian community, UNHCR reiterates its view that any isolation or segregation on the basis of health risks posed by individual asylum-seekers beyond initial screening should be in an appropriate medical facility and that all actions to isolate them are proportional to the health risks posed. A clear distinction should be maintained between individuals detained on the basis of security risk and those who need to be isolated or segregated on the basis of health risks posed.<sup>28</sup>

### **Recommendation 3:**

45. **All decisions to detain an asylum-seeker, refugee or stateless person should be based on an individualized (case-by-case) basis and the reasons should be limited to those authorized by international law and standards.**

#### **D. *Review of the decision to detain***

46. UNHCR welcomes the introduction of additional procedural safeguards in accordance with the Government’s *New Directions in Detention* policy. In particular, it is UNHCR’s view that the requirement for regular periodic review of all detention cases by a senior departmental official (at least every three months), in close consultation with the Commonwealth Ombudsman’s Office, which will review cases every six months, will improve the transparency and accountability of procedures relating to immigration detention.
47. However, judicial review, independent of the determining authority, provides greater oversight and accountability. The 1966 ICCPR provides the relevant international legal standards in respect of detention of persons. Article 9 provides that:

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<sup>26</sup> Migration Amendment (Immigration Detention Reform) Bill 2009, Item 1, s 4AAA(2).

<sup>27</sup> Ibid, Item 9, s 1B(b).

<sup>28</sup> Submission to Joint Standing Committee on Migration (UNHCR), above n 17, [46]-[48] <<http://www.unhcr.org.au/pdfs/ImmigrationDetention2008.pdf>> at 4 August 2009.

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- ...
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

48. The Report of the Working Group on Arbitrary Detention (“the Working Group”) on its visit to Australia in 2002 noted its concern with ‘the lack of sufficient judicial review of the detention. Under international law anyone deprived of his/her liberty shall be entitled to take proceedings before an independent court in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is unlawful’.<sup>29</sup> The Human Rights Committee observed 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 individual, 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.<sup>30</sup>

49. The Working Group acknowledges that the general (common) law right of habeas corpus would be available to challenge the lawfulness of immigration detention where, for example, the detainee contests that he/she is an unlawful non-citizen.<sup>31</sup> However, because detention on the basis of ‘unlawful arrival’ is authorized by law, habeas corpus is not available to secure the release from detention. The Human Rights Committee has reasoned that:

If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee’s opinion, 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

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<sup>29</sup> Commission on Human Rights, ‘*Civil and Political Rights including the Question of Torture and Detention*’, 59<sup>th</sup> sess, Annex: Report of the Working Group on Arbitrary Detention on its visit to Australia (24 May-6 June 2002), [19], UN Doc E/CN.4/2003/8/Add.2 (2002).

<sup>30</sup> *A v Australia*, CCPR Communication No 560/1993, [9.4.], UN Doc CCPR/C/59/D/560/1993 (1997).

<sup>31</sup> Commission on Human Rights, above n 29, [21].

order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.<sup>32</sup>

50. In accordance with UNHCR's Guidelines, asylum-seekers, if detained, should be entitled to the following minimum procedural guarantees:<sup>33</sup>
- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and in terms they understand;
  - (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
  - (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention at which the asylum-seeker or his representative would have the right to attend;
  - (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;
  - (v) to contact and be contacted by the local UNHCR office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.
51. The Migration Bill does not codify in legislative or regulatory form the procedural safeguards identified in the Government's *New Directions in Detention* policy, nor does it specify the criteria for the release from immigration detention. The onus on the Department to release, unless there are good reasons not to do so, is not reflected in the draft Migration Bill.<sup>34</sup> Pursuant to the proposed Item 9, section 189(1A)(d), the precise circumstances will be prescribed by regulation. Given the central importance of this issue, it would improve consistency and transparency if the criteria were to be prescribed in legislative form.

#### **Recommendation 4:**

52. **All decisions to detain an asylum-seeker, refugee or stateless person should be subject to review in accordance with Article 9(4) of the 1966 ICCPR. In all cases, reasons should be given in writing to record the basis of the detention, and include periodic reviews for its ongoing necessity.**<sup>35</sup>

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<sup>32</sup> *A v Australia*, above n 30, [9.5.].

<sup>33</sup> UNHCR, *Guidelines on Detention*, above n 4, Guideline 5.

<sup>34</sup> Senator Evans, above n 14.

<sup>35</sup> UNHCR, *Guidelines on Detention*, above n 4, Guideline 3.

### **Recommendation 5:**

**53. Mechanisms established to provide review of the decision to detain should be prescribed in legislative form to ensure clarity, transparency and predictability.**

#### **E. Regulatory reforms**

54. The Minister advises in his Second Reading Speech that, '[i]n addition to the legislative amendments, the Department is currently developing significant accompanying regulatory reform to give effect to the New Directions in Detention policy'.<sup>36</sup> Regulatory reforms will be particularly relevant in elaborating upon, in particular, the additional qualifying criteria detailed in the Migration Bill.

55. UNHCR recommends, inter alia, consistent with Recommendation 6 of the Joint Standing Committee on Migration, that 'the Department of Immigration and Citizenship develop and publish the criteria for assessing whether a person in immigration detention poses an unacceptable risk to the community'.<sup>37</sup>

### **Recommendation 6:**

**56. Specific criteria relating to the decision to detain, and the reasons for its ongoing necessity, in particular when a person presents an unacceptable risk to the community, should be established and prescribed in legislative rather than regulatory form.**

## **VIII. CONCLUSION**

57. UNHCR welcomes many aspects of the Migration Bill, especially with regard to ensuring that children will not be detained in immigration detention centres and that for all other asylum-seekers, refugees and stateless persons, detention in immigration detention centres will be a last resort and will need to be justified on specified grounds.

58. UNHCR's main ongoing concerns relate to:

- (i) the lack of clear application of the new Key Immigration Detention Values to excised territories of Australia;
- (ii) the need to ensure that all decisions to detain an asylum-seeker, refugee or stateless person are subject to review in accordance with Article 9(4) of the 1966 ICCPR; and
- (iii) the need to prescribe criteria for ongoing detention in legislative rather than regulatory form.

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<sup>36</sup> Second Reading Speech – Senate, above n 19, 17.

<sup>37</sup> Joint Standing Committee on Migration, above n 17, 54.

59. UNHCR appreciates the opportunity to comment on the Migration Amendment (Immigration Detention Reform) Bill 2009 and looks forward to the opportunity for further consultations with the Senate Legal and Constitutional Affairs Committee as these matters evolve and regulations are developed.

*UNHCR Regional Representation for Australia,  
New Zealand, Papua New Guinea and the Pacific*

*5 August 2009  
Canberra*