THE UNIVERSITY OF
MELBOURNE

25th July 2008

Secretary of the Committee
Joint Standing Committee on Migration
Parliament of Australia
By email: jscm@aph.gov.au

Dear Sir/Madam

Inquiry into Immigration Detention in Australia

Thank you for the opportunity to put forward this submission on immigration detention in Australia. I would particularly like to focus my submission on the application of the mandatory detention policy to persons to whom Australia owes obligations under the 1951 *Convention Relating to the Status of Refugees* (the Refugee Convention); however many of the points I make are relevant to others held in detention centres throughout Australia.

Summary of Submission

Given the length of the submission, I set out the key points in summary form:

1. Australia's system of mandatory detention is in violation of Article 31 of the Refugee Convention and Articles 9(1) and (4) of the International Covenant on Civil and Political Rights.
2. In addition, the conditions in immigration detention can give rise to violations of other international law obligations such as Articles 7 and 10 of the ICCPR
3. Australia's system of imposing a debt for immigration detention cannot be justified at international law. It is out of line with international practice and must be abolished.
4. There are many workable alternatives to immigration detention as evidenced by the experience of other countries which have a far higher percentage of the world's asylum seekers than does Australia (both in absolute and relative terms). Further, such alternatives can effectively meet the purported objectives and perceived necessity for mandatory detention.

Supporting Analysis

1. Legality of Detention as a Matter of International Law

A. Refugee Convention

Article 31(1) of the Refugee Convention provides 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[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".

The purpose of this Article is to prevent states from penalizing refugees whom, the framers properly foreshadowed, would often of necessity arrive without prior authorisation[2]. Although the term 'refugees' is invoked, it is clear that this provision applies to asylum seekers who satisfy the definition of refugee set out in Article 1A(2) but have not yet been recognised as such by state authorities.[3] In effect this means that a state must comply with Article 31(1) in its treatment of *all* asylum seekers, prior to a determination having been made, or all appeals exhausted, regarding refugee status.

Article 31(2) carves out a narrow exception to Article 31(1) in providing (relevantly) that:

> "The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country".

This makes it clear that while restrictions on movement may be considered 'penalties' and thus *prima facie* prohibited by Art 31(1), such penalties will be permitted in very limited circumstances; in particular:

- Only until status is regularised; and
- Only where such restrictions are *necessary*

Both the *travaux preparatoires* and an interpretation of Article 31(2) in light of the Convention's context, object and purpose (as required by the *Vienna Convention on the Law of Treaties*) confirms that regularisation of status occurs when 'a refugee has met the host state's requirements to have his or her entitlement to protection evaluated'.[4] In other words, detention is permitted only where necessary **and** only until an asylum seeker has submitted a claim for protection.

This is confirmed by the UNHCR's views on the detention of asylum seekers. The UNHCR's Guidelines on Detention state that, consistent with Article 31(2) 'detention should only be resorted to in cases of necessity'.[5] The Guidelines state that, as a general principle, asylum seekers should not be detained, and that detention should be resorted to in exceptional circumstances only.[6] Further detention should 'only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose'.[7]

Indeed, the Executive Committee of the UNHCR, of which Australia is a member, has stated that:

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[1] It should be noted that the fact that an asylum seeker has passed through non-persecutory states on the way to Australia does not exclude them from the protection of Article 31(1): see James C. Hathaway, *The Rights of Refugees Under International Law,* CUP, 2005 at 405. See also UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999, para 4.

[2] See generally Hathaway *id.*

[3] 1979 UNHCR Handbook; See also UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999, para 3.

[4] Hathaway, ibid at 417.

[5] Ibid, at para 3

[6] Id.

[7] Guideline 3

"If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or 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 to protect national security or public order."[8]

An example of a system that implements this approach is the Canadian immigration system under which an asylum seeker may only be detained in specific circumstances; namely where there are reasonable grounds for believing that the person is a flight risk or a danger to the public, or where it is necessary to detain until identity is established.[9]

Where detention is found to be necessary, the UNHCR Guidelines also set out the minimum procedural guarantees which must be afforded detainees, including to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities, and importantly, to be afforded regular periodic reviews of the necessity for the continuation of detention. This is also found in other systems. For example, in Canada, the decision to detain is subject to periodic review by the Immigration Division of the Immigration Review Board.[10] However, these options are not presently available for persons subjected to the mandatory detention regime in Australia, as will be explored further below. The UNHCR's recommendations for alternatives to detention will be discussed in Part 4 below.

B International Covenant on Civil and Political Rights

In addition to the Refugee Convention, which provides a specific regime of rights and entitlements to persons who meet the definition of 'refugee' in Art 1A(2), asylum seekers and refugees also enjoy protection under general international human rights treaties, such as the ICCPR.[11]

Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) relevantly provides that:

(1) "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures 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 that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

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[8] ExComm Conclusion 44

[9] Martin Jones and Sasha Baglay, *Refugee Law* (Irwin, 2007) at 304-7.

[10] Id at 298, 315-322.

[11] The ICCPR for example provides that: "...each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction' (Art. 2, para. 1, emphasis added). Thus, all rights "must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees." (HRC, General Comment 31, para 10)

Australia's policy of mandatory immigration detention has consistently been found to violate Article 9 by the Human Rights Committee (HRC)- the body vested with the authority to interpret the ICCPR. In *A v Australia* (560/1993) the HRC explained that:

- It is not *per se* arbitrary to detain individuals requesting asylum;
- However, "arbitrariness" includes "elements such as inappropriateness and injustice".
- Every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed;
- Detention should not continue beyond the period for which a State can offer justification. Eg "...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."
- Further, in order to comply with Art 9(4), a person in detention must have the right to challenge the lawfulness of detention on the basis of incompatibility with Art 9(1) (ie lawfulness as a matter of international, not just domestic, law).

This has been confirmed in a number of other communications to the HRC[12]. In *Baban v Australia* (1014/2001), the HRC reiterated the principles set out in *A v Australia*, and in particular noted that Australia "has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions." The Committee also noted that the applicant was not able to challenge detention in court. In that case, "the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review...Accordingly the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated."

Most recently, in *Shafiq v Australia* (1324/2004), the HRC found that the [asylum seeker] applicant's 'mandatory immigration detention, for a period of over seven years, was arbitrary within the meaning of article 9, paragraph 1'.[13] In that case, the Australian government had provided as justification for the author's detention 'its general experience that asylum seekers abscond if not retained in custody'.[14] However the HRC noted that this applicant had been moved from immigration detention to an 'open institution' (due to his mental illness which had been caused by prolonged detention) and had not attempted to abscond between July 2005 and October 2006 (the date of the judgment). Therefore this was not a sufficient justification in this particular case, underlining again the necessity for the state to make an individual determination (and to review that determination on an ongoing basis) as to whether detention is necessary in *each individual case*. This makes it clear that it is not legitimate to justify a system of mandatory detention on the basis that it is necessary to fulfil objectives such as general compliance with immigration law or even general deterrence. In other words, a blanket system of mandatory detention is inherently arbitrary.

The other issue litigated before the HRC in *Shafiq* was whether recent changes to the law and policy related to mandatory detention affected the HRC's findings in previous communications that

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[12] *C v Australia* (900/1999) the HRC found a violation of Art 9(1) and (4) in relation to mandatory detention for a period of 2 years. In *Bakhtiyari v Australia* (1069/2002), the HRC found violations of Art 9(1) and (4).
[13] Para 7.3
[14] Para 7.3

Australia's system of mandatory detention is in violation of Art 9(4) in that it fails to allow an opportunity for detainees to challenge their detention before a court. The Commonwealth relied specifically on the power in section 195A of the Migration Act for the Minister to grant a person in detention under s 189 a visa of a particular class (whether or not the person has applied for the visa). However the HRC noted that this is a non-delegable and non-compellable power and that it does not provide for judicial review of the 'grounds and circumstances of detention'.[15] As the HRC noted:

> 'Australian courts' control and power to order the release of an individual remain limited to a formal determination whether this individual is an unlawful non-citizen within the narrow confines of the Migration Act. If the criteria for such determination are met, the courts have no power to review any substantive grounds for the continued detention of an individual and to order his or her release. The Committee recalls that 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 formal compliance of the detention with domestic law governing the detention."

The Committee thus found Australia also to be in violation of Article 9(4) of the ICCPR.

Although not presently relevant in Australia, it is worth reminding the Joint Standing Committee that the HRC has found the detention of children, in addition to violating Art 9 of the ICCPR, also to constitute a violation of Art 24 of the ICCPR (children's rights to such measures of protection as is required by their status as minors)[16]. Moreover, mandatory detention of children is inconsistent with Art 37(b) of the *Convention on the Rights of the Child* (CRC):

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

In General Comment No. 6 (2005) (Treatment of unaccompanied and separated children outside their country of origin), the Committee on the Rights of the Child emphasised, "In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained."

Consideration should therefore be given to legislative change which would prohibit children from ever being held in immigration detention in Australia.

2. The Conditions of Immigration Detention

It is also important to emphasise that not only is mandatory detention itself in violation of Australia's international obligations, but the conditions of detention may also implicate international law. The impact of immigration detention on the mental health of asylum seekers (and indeed other detainees) is well documented in Australia.[17] It has been shown that immigration detention can result in 'depression, suicidality, post-traumatic stress disorder (PTSD) and a general deterioration in

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[15] Para 7.4

[16] *Bakhtiyari v Australia* (1069/2002),

[17] See for example, Patricia Austin, Derrick Silove and Zachary Steel, "The impact of immigration detention on the mental health of asylum seekers' in Lusher and Haslam (eds), *Yearning to Breathe Free: Seeking Asylum in Australia*, Federation Press, 2007, 100.

emotional, behavioural and social well-being'[18]. Deterioration in the mental health of detainees has been attributed to 'several interrelated factors: prolonged and indeterminate confinement, conditions in detention centres, and inadequate or inaccessible health, psychological and psychosocial support services'.[19]

Such consequences of immigration detention have put Australia in violation of international law. For example, in *C v Australia* (900/1999), the HRC found that not only was the applicant's detention of two years a violation of Articles 9(1) and (4), but that "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." ["No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..."].

In addition, Article 10 of the ICCPR provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. In *Madafferi v Australia* (1011/2001) the HRC found that returning Mr Madafferi (a person whose visa had been cancelled on character grounds pursuant to s 501 of the Migration Act) to Maribyrnong Immigration Detention Centre when this form of detention 'was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr Madafferi's mental health'[20] violated Article 10(1) of the ICCPR.

Not only can these factors lead to violations of international law, but prolonged detention clearly has the propensity to produce life-long consequences for persons who, in many cases, have suffered severe human rights violations, including torture, prior to arrival in Australia. Even if a person has no mental health issues prior to detention, prolonged detention is likely to produce problems that will then be incumbent upon the Australian health system to address once the person is found to qualify for a protection visa and released into the community. Thus, apart from the overriding human rights concerns, these costs must be factored into an economic assessment of the detention regime.

Finally, it is important to emphasise that the fact that the Australian government currently contracts out the administration of detention centres to a private company in no way obviates its international responsibility for the above violations of international law. Any private company is clearly acting as an agent of the state and thus the state remains responsible at international law.

3. Section 209 of the Migration Act: Recouping the Costs of Detention from Detainees

In light of the above analysis which establishes that the system of mandatory detention in Australia violates international law, it is difficult to conceive of a justification for the imposition of a debt upon those persons subjected to such unlawful detention. On the contrary, Article 2(3)(a) of the ICCPR provides that each state party is required to 'ensure that any person whose rights or freedom as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'. Accordingly, the HRC ordered in the recent case of *Shafiq* for example (discussed above), that Australia 'is under an obligation to provide the author with an effective remedy, including release and appropriate compensation'.[21] Thus, as a matter

[18] Id at 101
[19] Id at 103
[20] Para 9.3
[21] Para 9, emphasis added.

of international law it is the Commonwealth who must bear not only the costs of administering this unlawful system, but also the cost of compensating detainees for any physical, emotional and economic loss suffered as a result of this regime. Imposing a cost on the victim of this unlawful system cannot possibly be justified at international law.

The system of imposing debts on persons in immigration detention also implicates Australia's obligations of non-discrimination (Article 2(1) of the ICCPR) and equality before the law (Article 26 of the ICCPR) in light of the fact that such a debt is not generally imposed on prisoners in the mainstream prison population who are imprisoned following conviction of a criminal offence.

I am not aware of another country which imposes a debt on those held in immigration detention. In *Shahid Kamran Qureshi v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 11, a case involving an unsuccessful constitutional challenge to s 209 of the Migration Act, Justice Kenny of the Federal Court of Australia invited counsel for both the applicant and the Commonwealth 'to research the question whether any other countries impose a liability on a person for that person's detention.'[22] As her Honour noted in her judgment, the Commonwealth was not able to provide any examples of similar legislative provisions.[23] The applicant was not able to provide a current example, however found the following historical precedent:

> "In Nazi Germany the family of a person detained and executed in a concentration camp was billed for the person's detention and execution."[24]

This system is not capable of justification on any possible basis and I therefore urge the Committee to recommend its immediate abolition.

4. Alternatives to Immigration Detention

The Committee's Terms of Reference explicitly call for submissions concerning 'options for additional community-based alternatives to immigration detention' by inquiring into relevant international experience, considering the manner in which such alternatives may be utilised in Australia and comparing the cost effectiveness of these alternatives with current options. This is an urgent issue in Australia in light of the fact that, as discussed above, detention of asylum seekers should be considered a last resort.

Formulating the inquiry as being one which is concerned with 'alternatives to detention' presupposes that the default position is that some restriction on liberty/freedom of movement is necessary in the context of immigration detention. This is of course explicable in Australia since mandatory detention has been the default position for a considerable length of time. However, I would ask the Committee to consider whether, at least in the context of asylum seekers, it is more appropriate to consider that unconditional release into the community is a more appropriate default position, with the most minimal restrictions on freedom of movement imposed only where necessary. The first reason for this is that the Refugee Convention provides that once 'lawfully in' a state's territory, a refugee (which includes an asylum seeker who *de facto* meets the definition as discussed above), shall be accorded "the right to choose their place of residence and to move freely within [a state's] territory, subject to any regulations applicable to aliens generally in the same circumstances'. A refugee/asylum seeker is

[22] Paragraph 22
[23] Paragraph 37
[24] Paragraph 22

'lawfully in' once admitted to an asylum procedure.[25] Thus, in order to comply with the Refugee Convention, asylum seekers must be accorded the same right to freedom of movement as is granted other lawful non-citizens in Australia. In other words, restrictions on the freedom of movement, even those falling short of detention in a formal detention facility such as Immigration Residential Housing, may be inconsistent with Article 26 of the Refugee Convention once an asylum seeker has 'regularised' his/her stay by submitting a claim for protection.

Second, a major study conducted on behalf of the UNHCR in April 2006 advised that 'unconditional release' should be 'regarded as the normative starting point against which all other measures ought to be compared in order to asses their legality.[26] This recommendation was based not only on an analysis of international law, but also importantly on the basis of an empirical assessment of the effectiveness of various options which have been adopted internationally. As the report noted, one of the most commonly cited policy reasons given by States for detaining asylum seekers or imposing other restrictions on their freedom of movement is to prevent absconding and, correspondingly, to ensure compliance with asylum procedures.[27] Indeed, this has historically been one of the key justifications put forward by the Australian government in justifying its policy before the UN Human Rights Committee (as displayed above in the discussion of *Shafiq*). However the empirical evaluation undertaken in the UNHCR study:

> Confirms the rather common sense conclusion that compliance of asylum seekers prior to receipt of a final decision on their claim is not a significant problem in the world's major 'destination' countries. People go to extreme lengths to enter these territories and to access their asylum systems, and have no obvious reason to disregard or abandon such systems so long as they have any hope of gaining legal status or some right to remain. The evidence suggests that alternatives to detention, including unrestricted stay in the community, are likely to achieve high rates of success in 'destination' States, at least until the final pre-removal stage, if applicable'.[28]

The UNHCR Guidelines, referred to above, provide the following as possible alternatives to detention:

- Reporting requirements;
- Residency requirements;
- Provision of a guarantor/surety
- Release on Bail
- Open Centres ("specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.").

In the 2006 UNHCR study, the authors survey in depth the various alternatives currently in practice in other states and I commend this report to the Committee. Some of the alternatives to detention utilised in other countries which might be suitable for adoption in Australia, include:

- Release with an obligation to register one's place of residence with the relevant authorities and to notify them or to obtain their permission prior to changing that address;
- Release upon surrender of one's passport and/or other documents;

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[25] Hathaway id at 417. See also Art 12 of the ICCPR.
[26] Ophelia Field, Alternatives to Detention of Asylum Seekers and Refugees, UNHCR Division of International Protection Services, April 2006, POLAS/2006/03, available at (http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf) at p 22.
[27] Id at p 24
[28] Id at p 25

- Registration, with or without identity cards (sometimes electronic) or other documents;
- Release with the provision of a designated case worker, legal referral and an intensive support framework".[29]

It is encouraging that the Committee is willing to consider alternatives to detention. I urge the Committee, in considering 'compliance' measures which might be thought necessary, to adopt an evidence-based approach to alternative policies. As mentioned above, Australia has frequently put forward justifications such as the risk of asylum-seekers absconding, in defence of mandatory detention policy in international fora such as the UN Human Rights Committee. However this is simply not borne out by evidence from international practice. Rather, the 2006 UNHCR study found that the following factors were crucial in ensuring compliance:

The provision of competent legal assistance

The Report found that in several countries, the provision of competent legal counsel to asylum seekers was found to 'significantly increase rates of compliance and appearance'.[30] This is because this ensures that asylum seekers 'are not only informed of their rights and obligations but also that they understand them, including all conditions of their release and the consequences of failure to appear for a hearing'.[31] As they pointed out, lawyers are able to act as 'an intermediate point of contact with the authorities, to remind their client of appointments and explain the consequences of absconding'.[32]

Adequate material support and accommodation including the right to work

The UNHCR study found that adequate material support and accommodation during the asylum procedure was found to be 'critical to ensuring compliance'.[33] As the report noted, one effect of being able to work and thus support themselves adequately is that asylum seekers 'are more able to maintain a fixed address, which in turn makes communication with the authorities more reliable'.[34] The study found that alternative measures will not be effective if they are not properly policed and if asylum seekers are kept away from essential services or labour markets for extended period. As the report notes:

> Where people are kept under onerous restrictions for many years, it is inevitable that some may leave their designated address or district in order to reach urban centres and the companionship of members of their own ethnic community, or they may abscond in order to risk living and working illegally but with some degree of independence and the ability to better provide for themselves and/or their families.[35]

This suggests that changes to the mandatory detention system, which are urgently required in order to comply with out international obligations, must be accompanied by other reforms. Although some of these measures will require additional expenditure, 'it is widely acknowledged that almost any alternative measure will prove cheaper than detention'[36].

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[29] Id at pp 22-23
[30] Id at p 45
[31] Id
[32] Id
[33] Id at p 47
[34] Id
[35] Id
[36] Id at p 48

I thank you again for your consideration of this submission and look forward to reading the Committee's report at the conclusion of this inquiry.

Yours sincerely,

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