Submission to the Joint Parliamentary Inquiry into Immigration Detention

SCALES Community Legal Centre with the assistance of students from the Murdoch University School of Law

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Summary of Recommendations

Recommendation One

Amend the *Migration Act 1958* to include a section which states

"in all decision made under this Act, the decision maker must consider all of Australia's international human rights obligations contained in the international instruments to which we are a signatory."

Recommendation Two

That Australia signs and ratifies the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Recommendation Three

Mandatory immigration detention be abolished

Recommendation Four

Further and detailed guidelines needs to be provided as to the meaning of "unacceptable risk to the community" and there should be an opportunity for immediate judicial review of such an assessment

Recommendation Five

NIVA needs to establish processes which ensure transparency and natural justice

Recommendation Six

Establish an independent body, experienced in the health care of culturally diverse clients, to oversee the provision of health care to detainees

Recommendation Seven

All detention personnel, specifically health care providers, receive specialized training in the areas of health care of refugees, including torture trauma and cultural sensitivity.

Recommendation Eight

The psychiatric assessment be readily available for all detainees, undertaken by an independent professional and not dependant on referral from the Department

Recommendation Nine

Australia signs the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Recommendation Ten

Repeal Part 8 of the *Migration Act 1958* and, in its place, enact legislation which ensures full rights to the judicial review of migration decisions

Recommendation Eleven

That the *Migration Act 1958* be amended to stipulate that detention can only be ordered by the Federal Magistrates Court on application by the Department

Recommendation Twelve

A presumption against the detention of children for immigration purposes embedded into Australia legislation.[1] Section 4AA should read '... a minor must not be detained in any detention centres or facilities with similar conditions to detention centres under *any* circumstances'

Recommendation Thirteen

That there be a comprehensive review of the Migration Act 1958 and the Migration Regulations 1994 in respect of the treatment and status of children

Recommendation Fourteen

Oversight of the treatment of children in the immigration system be give to the current state Commissioners for Children or alternatively that there be established a Commonwealth Commissioner for Children with such powers.

Recommendation Fifteen

That the Migration Amendment (Excision from Migration Zone) Act 2001 be repealed in its entirety

Recommendation Sixteen

Australia should recognise and implement such instruments as the *Body of Principles* and the *SMR* as a minimum standard. In order to effect such a position s193(2) and s256 need to be amended to require immigration officers to advise detainees of their right to and the availability of independent legal advice in a timely manner and without the need for a request by the detainee themselves.

Recommendation Seventeen

Free legal assistance should be available to all detainees needing assistance on a migration issue.

Recommendation Eighteen

Legal advice and assistance for detainees should be funded through the current legal aid and community legal centre scheme administered by the Federal Attorney-General.

Recommendation Nineteen

Funding for legal assistance provides separate funds for disbursements such as interpreting and expert reports and funding for providing representation and assistance after any refusal by the Refugee Review Tribunal including the cost of assisting with submissions to the Minister for Immigration and Citizenship

Introduction

SCALES Community Legal Centre is a generalist centre servicing the communities of Rockingham and Kwinana south of Perth. It is also a clinical legal education program giving law student from Murdoch University the opportunity to learn and develop their legal skills while providing legal services to those most in need.

SCALES has a long standing and well respected[1] practice in the area of human rights and more specifically in assisting refugees and those seeking asylum. SCALES has been providing advice and representation under the IAAAS scheme since 1999. It is from this perspective that SCALES, ably assisted by students from Murdoch University School of Law make this submission.

In order to allow student involvement in the preparation of this submission, we sought an extension and therefore we have had the benefit of reading and considering the many reforms proposed by the Australian government on the 29th of July 2008. We support and applaud these reforms as a large and very important step towards addressing past wrongs and bringing Australian law into line with our international obligations.

We would, however, like to make some further submissions. SCALES recognises that Australia, as an international State, has a right to protect its sovereignty. However, as Australia is an island State our emphasis on territorial security can surely be distinguished from that of other States who share a common border.

SCALES is mindful that the present government has inherited an immigration system that is in need of sensitive reform. The Rudd government's consideration and preparedness to further embrace the principles espoused in international human rights law is applauded and supported. SCALES acknowledges the recent changes in policy however; Australia cannot rest on this alone. SCALES submits that legislative change is required to ensure that what has happened in the past can never happen again. It is essential that international human rights are recognised and embedded in our domestic legal system. Concomitant with this is that effective measures are also developed and applied to our immigration (detention) system that supports Australia to meet its human rights obligations.

Legislative Protection

This legislative framework in the area of migration law is unusual in that much of the substance is contained in the regulations rather than the legislation. This means that changes can be effected quickly through introduction of new regulations which are subject to less parliamentary scrutiny than amendments to legislation. It also means that the area is complex and relies heavily on policy and the practice of those within the Department, while at the same time being subject to weak oversight mechanisms. This has become very clear through the findings of both the Palmer and Comrie reports and much has been done to improve through cultural change. However, we submit that cultural change is of limited use if there is not clear legislative protection of the human rights of all those that come within the power of Australia's immigration laws.

Many of the recommendation throughout this submission focus on legislative changes that are necessary. More importantly, this submission points out that our *existing* international

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[1] SCALES was the recipient of the HREOC's National Human Rights award for the Law category in 2002.

obligations serve as a comprehensive framework which can be used to ensure that our immigration detention system is humane and responsible. As an overarching principle we suggest that the Migration Act needs to explicitly refer to our international obligations as the basis for interpretation of it numerous provisions. In addition, there are some outstanding international human rights instruments to which Australia should commit to further strengthen the human rights framework underpinning the immigration detention regime.

Recommendation One

Amend the *Migration Act 1958* to include a section which states

"in all decision made under this Act, the decision maker must consider all of Australia's international human rights obligations contained in the international instruments to which we are a signatory."

Optional Protocol to the Convention against Torture

A complementary component of the international human rights obligations framework is the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). This protocol establishes both domestic and international preventative mechanism. These mechanisms then engage in a system of periodic investigative and follow-up visits. OPCAT recognises that a comprehensive system of inspection and investigation is required in addition to a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty. This is particularly relevant for those in immigration detention as their past experiences of authorities in their own countries may mean they will not make complaints, even when their rights are being seriously breached.

There are currently detention review bodies operating in Australia, including that of the Western Australian Office of the Inspector of Custodial Services, to which the Australian Government could draw upon in the creation of a new domestic preventative mechanism as envisaged by OPCAT. Such an independent monitoring body would then be responsible for overseeing and investigating the conditions and length of detention, thereby creating a system of accountability and transparency. With the proposed move to a community based system of immigration processing, the independent monitoring body could oversee and monitor community release conditions and arrangements, security and administrative concerns.[2]

Recommendation Two

That Australia signs and ratifies the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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[2] In a similar model to the Representative Assessment Panel proposed in Justice for Asylum Seekers Alliance, *Alternative approaches to asylum seekers: Reception and Transitional Processing System* (June 2002) <http://www.safecom.org.au/mitchell.htm> 16 July 2008.

Mandatory Detention

We note that mandatory detention remains one of the core values underpinning the new proposed changes. Detention in any circumstance is a drastic measure. Our legal system has along history of ensuring that individuals have protection from arbitrary or unlawful detention. For example, the writ of Habeas Corpus dates back to 1305[3], clearly demonstrating the long understanding we have had that you can not take away a persons liberty with out due process and good reason.

This understanding has been reinforced by international human rights law, article 9 of the International Covenant of Civil and Political Rights (ICCPR)[4], sets out the right to liberty of the person. This article has been addressed by the Human Rights Committee with regard to Australia's policy of mandatory detention, and the finding has repeatedly been that we are in breach of our international obligations[5].

The Human Rights Committee has found that, although immigration detention for administrative purposes is not arbitrary *per se*, detention for such purposes may be arbitrary where it continues 'beyond the period for which a State party can provide appropriate justification'[6]. This is consistent with those principles of our own legal system, which demand that when a person is subjected to such a limitation on their right to liberty, particularly by the state, that limitation is justified, in that it is shown to be both necessary and proportionate.

In *General Comment 31*, the HRC stated that, where limitations or restrictions are made,

> States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[7]

This is further set out in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.*[8] According to these principles a limitation on an individual's human rights are only permissible if the limit is necessary to pursue a specific aim, is proportionate and are consistent with the essence of the particular right concerned.

We respectfully submit that Mandatory Detention does not meet this standard. One purported aim which is often articulated is for border security, or to act as a deterrent, yet there is no evidence that it is effective in achieving either of these aims. It is also difficult to see how detention would be considered necessary or justified in the global context given Australia's wealth and the relatively small numbers of asylum-seekers that arrive at its shores. In accordance with the statements of the HRC above and the Siracusa Principles, the Australian Government must demonstrate the necessity of detention in these circumstances.

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[3] This is recorded in Blcakstone's commentarys
[4] Article 9 of the ICCPR.
[5] Shams & Ors v Australia, HRC, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007),. A v Australia, HRC, UN Doc CCPR/C/59/D/560/1993 (30 April 1997)
[6] *D and E v Australia*, HRC, Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (25 July 2006)
[7] HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6]
[8] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the* International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985).

Furthermore, given that the right to liberty is a fundamental human right (and one that our own legal system has long recognised) we submit that detention in these circumstances is not proportionate. There are many other less intrusive ways of maintaining border security and keeping track of those who have entered without the necessary paperwork. Particularly in a country that has no land borders and a comprehensive system of tax file numbers and national databases making living and working outside of this system increasingly difficult.

Finally, the practice of immigration detention is contrary to the essence of many of the rights contained in the ICCPR. Obviously most importantly it is contrary to the right to liberty[9], but it also fundamentally offends the right to equality before the law[10], to privacy and family life[11] and the right to be treated with dignity[12]. In fact, given what we now know about the conditions that some detainees have suffered, it may also amount to inhumane or degrading treatment[13]. It is also an interference with the right to participate, of peaceful assemble and freedom of movement[14]. We submit that this practice breaches so many articles of the ICCPR; it is contrary to the essence of the convention itself and is therefore an unacceptable limitation.

Recommendation Three

Mandatory immigration detention be abolished

Unacceptable risk to the community

Of those that will continue to be detained under the recently announced reforms are those deemed to be an 'unacceptable risk to the community'. The Minister for Immigration's recent comments[15] suggest that those in immigration detention awaiting deportation due to a cancellation of their visa under s501 of the *Migration Act 1958* would fall into this group. We would like to point out that all of those subject to s501 visa cancellation have served the sentence they received for the crimes they committed. They have been found eligible for release into the Australian community by state-based parole boards and departments of corrections; bodies that are very experienced in determining if a person is a risk to the community.

We submit that considering them a risk to the community is unfounded and continuing to detain them in this way could constitute a heavier penalty and as such is a breach of article 15 of the ICCPR. This is of particular concern in the cases of those whose deportation is delayed due to the reticence of the receiving country.

Case study

A young man remains in detention in Perth IDC because his visa has been cancelled under s501, however the country of his birth, Vietnam, will not allow him to return. He says the hardest thing about his detention, and what makes it much worse than being in prison, is that he does not know when (or if) it will end.

[9] Article 9 of the ICCPR
[10] Article 16 of the ICCPR
[11] Article 17 of the ICCPR
[12] Article 10 of the ICCPR
[13] Article 7 of the ICCPR
[14] Articles 21, 22 and 25 of the ICCPR
[15] *New Directions in Detention*, Seminar at the Centre for International and Public Law, ANU, 29 July 2008.

We submit that further clarification of what is meant by a risk to the community needs to be provided and it should not include those who have had their visas cancelled under s501.

The Minister commented that those with criminal or terrorist links and those whose *identity is unknown* may also be categorised as an unacceptable risk to the community. We respectfully submit that including this last group of people will lead to unnecessary periods of detention unless the mechanisms with the Department are improved.

Case Study

A young man from Liberia arrived on a false passport and was detained, he admitted to the false passport and immediately told the authorities that he was from Liberia and who he was. However, it has taken three years for the Department of Immigration to accept this man's identity and for that three years he has been in immigration detention.

Some of these issues have been addressed by the establishment of the National Identification Verification Agency (NIVA), however we have serious concerns about the way in which NIVA approaches its task. Currently, the NIVA process runs parallel to the protection application or other migration processes. NIVA often puts questions to detainees without access to their legal representatives, without any explanation about why they are seeking the information and without any opportunity for the detainees to consider the questions or respond more fully with the legal or interpreter's assistance[16]. It is unclear when NIVA's involvement is triggered and what information they are relying on.

The processes used by NIVA are particularly important when dealing with refugees, these detainees may not have documentation which can verify their identity, they may also have spent large periods of their life in refugee camps outside of their home country, sometimes leaving their own country when they were children. This may result in them having limited knowledge of their home and even speaking with the accent of the country that hosted them as a refugee.

Case study

In one case a man from Sudan arrived in Australia and claimed asylum. He had spent many years in Kenya having fled his country as a child. Upon his arrival, DIAC arranged for someone from the Sudanese Embassy to visit him for the purposes of identifying him. This in itself is breach of our international obligations as Sudan is the very country from which he sought protection.

The Sudanese official having spent a short time with him, concluded that he "was not Sudanese" due to his accent

[16] This is often done through the DIAC staff at the detention centres

There needs to be absolute transparency including access to all documents they are relying on and the ability to know and address any material which is inconsistent with the detainees account.

Recommendation Four

Further and detailed guidelines needs to be provided as to the meaning of "unacceptable risk to the community" and there should be an opportunity for immediate judicial review of such an assessment

Recommendation Five

NIVA needs to establish processes which ensure transparency and natural justice

Conditions of Detention

One of the seven key immigration values is that detention conditions will ensure the inherent dignity of the human person. We applaud this statement of the fundamental human rights of all those within the immigration detention system and we look forward to further details on how this would be achieved. Ensuring that the conditions within detention centres live up to this standard is crucial; the appalling conditions that have existed in the past are well documented. The impact on those detained cannot be under estimated and the ongoing consequences for the whole community are yet to be fully understood.

Furthermore, as set out above, international law requires that any limitation on rights be justified in terms of balancing the purpose for which it is intended with nature and importance of the right. In considering whether immigration detention is justified, we must take into consideration the traumatising effect it had on those that were subject to it. In doing so the justification for detention weakens significantly. We would like to point out some of the fundamental (and structural) difficulties that exist under the current system and which must be addressed.

Health care

In the past the delivery of health care in detention has been privately contracted; currently to Global Solutions Ltd (GSL) since 2004. One of the problems with this arrangement is that the contract between GSL and the Commonwealth cannot be enforced by any third parties, including detainees.[17] This has been shown in the case of *Behrooz v Secretary, DIMIA*[18]. This has meant that ensuring a standard of healthcare has been left to the Department which has a conflict of interest.

[17] Guy Coffey, 'Locked up Without Guilt or Sin: The Ethics of Mental Health Service Delivery in Immigration Detention' (2006) 13 *Psychiatry, Psychology and Law* 70

[18] (2004) 208 ALR 271

Case study

A young boy detained with his parents in Port Hedland contracted an infection in his eye. Despite constant requests for treatment by the boy, his family and advocates -his condition deteriorated. There was a long delay in treatment, prescribed medicines were often not provided and there were many delays in flying him to Perth for necessary treatment. The boy lost a substantial amount of his sight.

When SCALES tried to intervene, the Department of Immigration refused to speak with us until we could show we had the client's authority. However the Department officers in Port Hedland also refused to pass to the boy the necessary documents giving authority, arguing that he was underage.

Following on from the improvements made through the Detention Health Framework in 2007, we recommend that an independent body experienced in the health care of a culturally diverse population group be established. This body must oversee the delivery of adequate health care in immigration detention centres. This will also ensure that health care providers are supported in placing their obligation under their professional code of ethics above any contractual conflicts or perceived obligations to their employers.[19]

Recommendation Six

Establish an independent body, experienced in the health care of culturally diverse clients, to oversee the provision of health care to detainees

As a practical issue, any detention in the area of immigration needs to envisage the presence of those suffering from torture trauma. Article 10(1) of the Convention Against Torture (CAT) says that each

> State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training or ...medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

The United Nations High Commissioner for Refugees, Mr Lubbers acknowledged that detention has the potential to add to the trauma suffered from the asylum seekers countries of origin.[20] Detainees with torture and trauma experiences have a greater risk of developing depression, post traumatic disorder and other mental health problems whilst in detention. This combined with a lack of support or assistance in understanding the immigration process heightens anxiety problems. Australia has an obligation to ensure that appropriate training on torture in immigration detentions are included for all personnel working with detainees.

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[19] The Refugee Conference-*Where to From Here?* (Paper presented at the University of New South Wales, 6th to 9th December, 2001) < http://www.crr.unsw.edu.au/documents/Refugee_Conference_Report_final.pdf> at 20 July 2008

[20] Unknown Author 'Mandatory Detention: Protection or Punishment?' (2002) 9 *Australian Nursing Journal* 27

Recommendation Seven

All detention personnel, specifically health care providers, receive specialized training in the areas of health care of refugees, including torture trauma and cultural sensitivity.

Mental Health

For many years, those who have worked for refugees or worked in detention centres reported on the systemic failure to provide adequate mental health services to detainees being held in Australia's centres. According to the ICESCR Article 12, humans have the right to the "highest attainable standard of mental health." Further, the High Court has recognised that the Minister for Immigration owes a duty of care to non-citizens in immigration detention, and that the duty of care extends to ensuring the mental wellness of a detainee.[21]

Immigration detention conditions in Australia have created a prevalence of mental health issues amongst detainees. A report compiled in 2002, showed that:

- Suicide rates up to 10 times that of the general Australian population, and 3 times that of young adult men, the age and sex group at highest
- Self-harm and suicide attempts, which are endemic in IDC's, involving children and young people.
- Serious methods such as hanging, throat-slashing, deep wrist cutting, and drinking shampoo being used
- Protest, despair and imitation being important motivations for self-harm in IDC's[22]

Some of the other prevalent mental health issues present amongst long-term detainees include despair, hopelessness, paranoia, chronic rage, and self-harming behaviour. In one sample of 33 asylum seekers detained for over 9 months (with an average period of detention of 2.1 years), all but one displayed symptoms of psychological distress at some time during their period of detention.[23]

Australia may face another more immediate issue if it does not continue to improve conditions, both in regard to appropriate treatment for mentally ill detainees as well as the creation of mental illness by conditions in detention: an increasing number of asylum seekers are resorting to the tort of negligence to claim compensation for mental and physical harm suffered in immigration detention. "Recent cases involving former detainees before the courts suggest that the Australian government does have a duty of care for people in immigration detention and the duty owed by the commonwealth is 'non delegable.'"[24]

Many of the measures already announced will help to alleviate the prevalence of mental health issues during and after detention. Most significantly reducing the time spent in detention, any improvement in detention conditions and the elimination of "indefinite" detention will serve to decrease the number of individuals suffering from mental illness

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[21] *S v Secretary DIMIA* (2005) 216 ALR 252.

[22] *The Mental Health Effects of Immigration Detention Centres on Children and Young People Summary* for Dr. Bhagwati and Matthias Behnke, Office of the High Commissioner for Human Rights, at http://www.chilout.org/files/HarmsDoneToChildrenInDetention.pdf

[23] Sultan A, O'Sullivan K. "Psychological disturbances in asylum seekers held in long term detention: a participant-observer account." *Medical Journal of Australia*, 2001; 175, 593-596

[24] "Tort liability and the Pacific Solution," Azadeh Dastyari, paper presented at the Compensation, Torts and Immigration Detention Conference, Monash University (30 March 2007).

brought on by the detention itself. Further, we recommend that individuals exhibiting signs of mental illness be given impartial assessments by a psychiatric professional not employed by the Department, and that those deemed to be unfit for detention be released to the appropriate health care to receive treatment for their condition. This process should be able to be triggered by the detainee, others in detention, the detainees advocate or staff at the centre. It should not rely on a referral from the Department of Immigration.

Recommendation Eight

The psychiatric assessment be readily available for all detainees, undertaken by an independent professional and not dependant on referral from the Department.

The legacy of damage done by the previous government's detention policies must also be addressed. We recommend the development and implementation of programs to serve individuals now lawfully residing in Australia who suffered psychological effects from long-term detention in the past. This will fulfil the duty of care owed to these individuals by the Minister as well as reduce any security issues that would be presented to the public at large if these individuals remain untreated.

Abuse

In 2006, a prominent psychiatrist published a report claiming that there was widespread sexual abuse amongst detainees in the immigration detention facilities. As of June 2006, there was an investigation underway into claims of sexual abuse by guards and male detainees at the Villawood centre. Another psychiatrist pointed out in particular the Baxter centre in South Australia as a site with "a culture of abuse and voyeurism within the system."[25] That psychiatrist, a Dr. Newman, pointed to a number of instances she was aware of where detainees were sexually harassed at Baxter, one involving a teenage girl. Further, she felt (at the time, June of 2006) that allegations of abuse were not properly investigated and controlled. She also felt that there were much more widespread instances of abuse, both of male and female detainees, which were not reported.

In 2005, another of only the handful of incidents that become known to the public came to light. Allegedly, a man tried to rape a female Iranian refugee at the Curtin Detention Centre in Western Australia, while her 9-year-old daughter watched on[26]. The HREOC investigated the matter and reported that the Immigration Department breached its duty of care by not providing a safe place of detention. When the matter was reported to ABC News, it was already 3 years after the fact, and there are no formal finalized reports on the incident.

We would like to reiterate recommendation two, that Australia sign the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This will ensure that detection and action in cases such as the one above does not rely only on an individual complaints mechanism, which has clearly failed many in detention in the past. Further, we suggest that the rights of women in detention deserve the very best protection mechanisms as they are often more vulnerable than their male

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[25] Sexual Abuse Widespread in Detention Centres, Doctor Says, ABC News, June 13, 2007 (at http://www.abc.net.au/news/stories/2006/06/13/1661330.htm).

[26] Allegations of Sexual Abuse at Curtin Detention Centre in W.A., ABC News Online (at http://www.abc.net.au/worldtoday/content/2005/s1417664.htm)

counterparts. These protective mechanisms should include an ability to take individual complaints under the convention which directly address the rights of women.

Recommendation Nine

Australia signs the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Access to Judicial Review

At various times in the history of Australian governance, commentators and politicians alike have argued that the judiciary should play no role with regard to the oversight of decisions made by parliaments and governments. Nowhere is this view more problematic than in cases relating cases relating to 'the resolutions of migration status, especially refugee status, affect[ing] fundamental human rights'.[27] The framers of the Australian Constitution sought to establish a division of power between the legislature to make law, the executive to administer the law and the judiciary to act as interpreters of the law.[28] As well as challenging the aim of the Constitution, the Howard Government's attempts to exclude judicial review of migration decisions by inserting a privative clause into the Migration Act breaches a range of international obligations.[29]

The Migration Act, in its current form, places the following significant restrictions upon the rights of asylum seekers to judicial review:

- section 474 of the Migration Act makes administrative decisions relating to the ability of asylum seekers to enter and remain in Australia 'privative clause decisions' and provides that such decisions must not be challenged, appealed against, reviewed, quashed or called in question in any court;[30]
- there has been a narrowing of the grounds which give rise to an application for judicial review in respect of a Migration Act decision (most notably the removal of the ability to seek judicial review in circumstances where there is an error of law);[31] and
- whilst not affecting the original jurisdiction of the High Court to review Migration Act decisions, restrictions were also introduced to prevent the remittal of migration cases from the High Court to the Federal Court.[32]

The affect of Part 8 of the Migration Act breaches Australia's obligations under international human rights law in that it discriminates against asylum seekers in breach of Article 16 of the Convention Relating to the Status of Refugees 1951 and Articles 14(1) and 26 of the *International Convention on Civil and Political Rights 1976.*

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[27] Hilary Penfold QC, 'Submission by The Human Rights And Equal Opportunity Commission To The Migration Litigation Review' (Human Rights and Equal Opportunity Commission, 2003) 14.
[28] Gabriël Moens and John Lumb, 'The constitution of the Commonwealth of Australia' annotated (first published 1974, 7th ed, 2007) 14. see section 75 in which The judiciary's interpretative function in the form of judicial review of administrative action is enshrined.
[29] Article 2(3) and 14(1) of the International Covenant on Civil and Political Rights.
[30] The privative clause was inserted when Part 8 of the Migration Act was amended by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth); s474(1) of the Migration Act.
[31] In this respect, the former section 476(1)(e) is no longer found in the Migration Act. Section 476(1)(e) of the Migration Act provided for judicial review in circumstances where the Tribunal makes an error of law.
[32] s476A and s476B of the Migration Act.

SCALES recognises that there is a need for the migration system in Australia to have in place mechanisms which disallow unmeritorious claims, allow the migration system to operate with economic efficiency and process asylum claims in a timely manner. In this respect we note the comments of Justice Wilcox in *Muaby v Minister for Immigration & Multicultural Affairs* (1998) FCA 1093:

> The solution is not to deny a right of judicial review. .....In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and legal advice. If that were done, the number of applications for judicial review would substantially decrease.

If Australia continues to impose legislative restrictions on the right to a fair hearing and to the right to review, we continue to breach of our human rights obligations. This combined with the ineffectiveness of the clause[33] as highlighted by *Plaintiff S157/2002 v Commonwealth of Australia* and *Re Minister for Immigration and Multicultural and Indigenous Affairs* means that the clause has most certainly outlived any usefulness it may have once had.

Recommendation Ten

Repeal Part 8 of the *Migration Act 1958* and, in its place, enact legislation which ensures full rights to the judicial review of migration decisions

Review of Detention

In addition to re-instating full judicial review of migration decisions, there is also a need for judicial review of the decision ***to*** detain, or to continue to detain. We note the Minister's comments that any 'in the future the Department will have to justify why a person should be detained" the question we ask is; to whom? If the Departmental officers are answerable only to the Department itself there is a risk of descending once again into a culture that does not properly protect the rights of individual detainees. Given the above comments concerning the intention of the framers of our Constitution, not to mention the seriousness of subjecting anyone to a denial of their right to liberty, we suggest that detention should only be permitted on the order of a Court. Once the detention has been so ordered, it should also be reviewable by the court at any time upon the application of the detainee. This would mean that the justification to detain would have to be presented to the court, with supporting evidence and the court would make the decision as to whether it is necessary in each case.

Recommendation Eleven

That the *Migration Act 1958* be amended to stipulate that detention can only be ordered by the Federal Magistrates Court on application by the Department

[33] John Basten QC, 'S157 and Protection of Human Rights' (Working Paper No 2003/2, Australian Human Rights Centre (AHRC), 2003) 5.

Detention of Children

SCALES welcomes the recent announcement by the Minister for Immigration and Citizenship that the third of the seven key values of immigration relating to detention is the following:

> Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC);

We believe that this value is an extension on section 4AA of the Migration Act 1958 (Cth) which states that "minors shall only be detained as a measure of last resort".

Recommendation Twelve

A presumption against the detention of children for immigration purposes embedded into Australia legislation.[1] Section 4AA should read '... a minor must not be detained in any detention centres or facilities with similar conditions to detention centres under *any* circumstances'

The existence of such a presumption will ultimately support our international obligations and domestic laws by ensuring the best interest of the child is a primary consideration and we comply with Article 6 (2) of the Convention of the Rights of the Child Article 6 (2) which states: "State Parties shall ensure to the maximum extent possible the survival and development of the child".

The status of children in Migration Law

While the sentiments of the current government regarding children are laudable the government must also address the place of children within the broader immigration system. The detention of children along with their families has been as direct result of not treating children as rights bearers in their own right. In Australia, the immigration status of a child is whatever classification their parents are given.[34] Therefore, in the past where the parents are classified as unlawful non-citizens and subject to detention, so are their children. However, in certain cases, the status of the child may vary and differ from their parents. This makes it extremely important for circumstances of each child to be considered separately and independently of their parents.[35]

Between 2002–2005 the Commonwealth Ombudsman found that the Department of Immigration made mistakes in reference to the legal status of 8 out of 10 cases involving children which resulted in them being detained.[36] Such unlawful detention of children is a clear breach of Article 37(b) of the Convention on the Rights of the Child.[37] The Ombudsman was of the view that the Department of Immigration had not given proper consideration to the immigration status of each child. The Commonwealth Ombudsman recommended that there

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[34] Crock, Kenny, Allison, "Children and Immigration and Citizenship" in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (2008) 240 – 243.
[35] Above, n 14, 241.
[36] Commonwealth Ombudsman, Report into referred immigration cases: Children in detention, Canberra, Commonwealth Ombudsman, December 2006, 6.
[37] "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 the last resort and for the shortest appropriate period of time".

be a dedicated policy document that deals comprehensively with all relevant issues concerning the detention, removal or other compliance activity involving children.[38]

It is our view that unless the position of children in the immigration process is seriously rethought their rights will continue to not be recognised.

Recommendation Thirteen

That there be a comprehensive review of the Migration Act 1958 and the Migration Regulations 1994 in respect of the treatment and status of children

In addition to this review we would also like to see the involvement of an independent specialist child rights organisation be involved in providing oversight of the treatment of children in the immigration system. Such a function could perhaps be devolved to a Commissioner for Children.

Recommendation Fourteen

Oversight of the treatment of children in the immigration system be give to the current state Commissioners for Children or alternatively that there be established a Commonwealth Commissioner for Children with such powers.

Excision Zone

The Minister for Immigration has commented on the damage the previous government's policies have done to our international reputation. The most important aspect of that policy which continues to cause enormous damage to our international standing is that of the excised zone. At the time the excision zone was introduced the UNHCR said

> Under international law, UNHCR considers that there is no such thing as self-proclaimed excised territory, and therefore we do consider that any person, any asylum seekers reaching Australia, whether the mainland or excised islands, fully engages Australia's responsibility under the convention.

It is hard to understand any justification for this policy; it is clearly designed to avoid our obligations under the Refugee Convention, a clear breach of international law. The purported justifications on the grounds of border security and deterring people smugglers do not hold up in international law for the following reasons. First, as mentioned above, a limitation on a rights contained in a convention cannot run contrary to the essence of the convention or the right involved. In this case the excision zone clearly does as it subjects those fleeing persecution to a technical hurdle of which actual landmass they must reach before they can engage Australia's obligations under the Refugee Convention.

Secondly, given the global context, to suggest that Australia is in a special position and needs to reduce the amount of 'shore' that is open to refugees arriving is ridiculous. Many other countries are coping with the influx of migrants, many of them asylum seekers across land borders which are far easier to access. In countries with coastlines such as Spain and Italy

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[38] Above, 6.

the influx of asylum-seekers is more than a hundred times that of Australia. Excising zones to reduce the obligation Australia has to the very small numbers of asylum seekers reaching our shores must be seen as petty and selfish and until the practice has ended will be a source of international embarrassment.

SCALES has other major concerns about the way in which the Christmas Island process will proceed. While we welcome the announcement that all asylum-seekers detained on Christmas Island will have access to legal advice, we question their exclusion from the full review process. The suggested establishment of an independent person to review the Department's decisions seems superfluous in the light of the availability of the experienced and functioning Refugee Review Tribunal. It is interesting to note that, despite excision, those processed on Christmas Island would have available the legal remedies contained in the original jurisdiction of the High Court. In the same way that the imposition of the privative clause may have actually broadened the possible grounds of review, the exclusion of Christmas Island from the usual judicial review opportunities may result in more cases being taken to the High Court under section 75 of the Constitution. This would be a very undesirable outcome, and an expensive and complex way of seeking what these individuals are already guaranteed at international law.

Recommendation Fifteen

That the Migration Amendment (Excision from Migration Zone) Act 2001 be repealed in its entirety

Access to legal assistance and IAAAS

First we note that evidence critical of the barriers faced by many visa applicants, particularly those in detention, in gaining appropriate legal advice and representation has been presented to the Senate Legal and Constitutional Committee in several recent enquiries.[39]

Those detained pursuant to the *Migration Act 1958* that do not have access to competent and timely legal assistance may not get an opportunity to have their case considered properly. Migration law sets tight and inflexible time limits when persons are detained. The consequences of failing to act promptly and properly are extremely serious – an individual may continue to remain in detention; be removed or deported and consequently face a ban from returning to Australia; lose any rights to permanent residence and be torn away from their families. In the worst situation they may face persecution on return to their home country.

Relevant international human rights standards

An assessment of the provision legal assistance given to people held within Australian detention centres is required to ensure that Australia is fulfilling its international obligations with regards to ensuring the realisation of the rights recognised within the Covenants Australia is a party to. Of particular concern, with regards to immigration detention is Article 10(1) of the *International Covenant on Civil and Political Rights (ICCPR)*.

Article 10 (1) states that:

[39] See Senate Legal and Constitutional Committee; Administration and Operation of the Migration Act 1958 in 2006; A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes in 2000; Legal Aid and Access to Justice in 2004

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person[40]

The interpretation of this article and the subsequent obligations which it imparts on State Parties is informed by other instruments; such as the *United Nations Standard Minimum Rules for the Treatment of Prisoners*[41] *(SMR)* and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[42] *(Body of Principles)*. These instruments, although not legally binding, have been adopted by the United Nations General Assembly and helped establish the *Standard Guidelines for Correctional Centres in Australia*[43] which is used as a guide by the legislatures in each state and territory for their own local laws regarding detention facilities. Though these standards are adhered to with regards to adult and juvenile criminal detention they are not applied to immigration detention facilities. The instruments adopted by the UN General Assembly serve as a guide to what is considered the "best practice" with regards to detention facilities and the treatment of detainees and should be the aim of all States who operate detention facilities.

Principle 17(1) of the *Body of Principles* states that:

> A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it[44].

This principle is derived from Article 14 of the *ICCPR* which ensures certain minimum guarantees for all those participating, willingly or unwillingly, in a judicial or administrative process.

Independent and competent legal assistance by qualified personnel is an important service that should be provided to all those detained by government authorities. The right to access such assistance is seen by international human rights law as a standard minimum requirement that all those detained should have as people deprived of their liberty for whatever reason become subject to the direct control of government authorities which "*makes them very vulnerable to various denials of rights*"[45].

Section 256 of the Migration Act 1958[46] provides for the right of immigration detainees to access legal assistance but only if they request such assistance. This requirement that s256 imposes on detainees, does not take into consideration that:

> many unauthorised arrivals come from countries in which the legal system functions very differently from the Australian legal system. Unauthorised arrivals from such countries may not realise that a lawyer could help them. They may not even know what a lawyer is. Likewise, unauthorised arrivals who are unaccompanied minors

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[40] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 71, art 10(1) (entered into force 23 March 1976).
[41] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, ESCOR Res 663C (XXIV) and 2076 (LXII), UN Doc A/CONF/611 (1955).
[42] *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, GA res 173, 76th plen mtg, UN Doc A/Res/43/173 (1988).
[43] Supreme Court: New South Wales, *Overview of Australian Justice and Prison Systems*, (2008) Lawlink NSW < http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_wood_0504> at 24 July 2008.
[44] *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, GA res 173, 76th plen mtg, UN Doc A/Res/43/173 (1988), Principle 17(1).
[45] Savitri Taylor, 'Should Unauthorised Arrivals in Australia have Free Access to Advice and Assistance?' (2000) 6(1) *Australian Journal of Human Rights* 34.
[46] *Migration Act 1958* (Cth) s256

cannot be assumed to have enough knowledge and understanding to request advice and assistance[47].

Section 193(2) of the Migration Act 1958[48] is contrary to the *Body of Principles* as it does not require immigration officers to advise, inform or allow detainees access to legal information which may be relevant to their situation. In the HREOC's *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre*[49] the HREOC found that s193(2) breached Article 10(1) of the ICCPR as it did not allow for the timely provision of legal assistance and application for refugee status. The HREOC in making this assessment took into account instruments adopted by the UN General Assembly which serve to inform the ICCPR. In doing so the HREOC also found that detainees were entitled to be advised by the detaining authorities that they could be provided with legal advice from an independent source as per Principle 17(1). In reply, the the Department of Immigration held that such a reading of the ICCPR represented "*a significant extension of the text of the Convention and went [goes] well beyond the ordinary meaning of its terms*"[50] which was "*inconsistent with the settled approach to the interpretation of the Convention, as provided for in the Vienna Convention on the Law of Treaties*".

Recommendation Sixteen

Australia should recognise and implement such instruments as the *Body of Principles* and the *SMR* as a minimum standard. In order to effect such a position s193(2) and s256 need to be amended to require immigration officers to advise detainees of their right to and the availability of independent legal advice in a timely manner and without the need for a request by the detainee themselves.

Access to free legal advice or assistance

All detainees should have access to IAAAS assistance

The *Body of Principles* states that access to legal assistance must be provided for by the detaining authorities without cost to detainees who are unable to pay (Principle 17(2)[51]). Currently the Department of Immigration funds the Immigration Advice and Application Assistance Scheme (IAAAS) which provides free legal assistance to detainees who are seeking to apply for a protection visa.[52]. Therefore if a detainee requests legal assistance and is not assessed to be eligible to access the IAAAS their access to legal assistance is limited to that which they can afford which in most cases is none at all.

It should also be noted that many detainees within the immigration detention centres are not seeking asylum. They could be detained because their visa has expired or has been cancelled. Finally people may be detained only on the basis of a reasonable suspicion that

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[47] Above 95
[48] *Migration Act 1958* (Cth) s256
[49] Human Rights and Equal Opportunity Commission *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre* (2006) <http://www.hreoc.gov.au/legal/HREOCA_reports/hrc_report_12_april.html> at July 17 2008.
[50] Ibid
[51] *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, GA res 173, 76th plen mtg, UN Doc A/Res/43/173 (1988), Principle 17(2).
[52] Australian Government: Department of Immigration and Australian Citizenship, *Australian Immigration Fact Sheet 63: Immigration Advice and Application Assistance Scheme* <http://www.immi.gov.au/media/fact-sheets/63advice.htm> at July 24 2008.

they are an "unlawful non-citizen" which occurred in the case of Cornelia Rau and Vivian Alverez. These detainees do not have access to IAAAS. Although not fleeing from persecution, are still in a similarly disadvantaged position as protection visa applicants with regards to the Australian legal system and therefore should be afforded access to legal advice ices.

Funding should be provided to allow for regular face to face legal service at detention centres. This would allow detainees to obtain advice on a range of issues including wrongful detention, bridging visas, options for visa applications, criminal deportation and judicial review. We note in this respect that this was a recommendation by the Senate and Legal Constitutional Committee in 2006 which stated:

> The committee recommends that the Government institute and fund a duty solicitor scheme for all persons held in immigration detention (not solely protection visa applicants).[53]

The limitation of access to legal assistance due to the stringent requirements of the IAAAS is contrary to our obligations at international law as free legal assistance is not provided for all detainees who are unable to pay.

Recommendation Seventeen

Free legal assistance should be available to all detainees needing assistance on a migration issue.

Problems with the Tender process

The Department of Immigration awards IAAAS contracts based on a competitive tender process. According to the Department of Immigration it gives such repeat business to contractors who demonstrate understanding of the protection assessment process and an ability to respond quickly to high volume workloads. [54] In our view it is arguable that providing the Department of Immigration the responsibility for funding and overseeing the administration of IAAAS contracts creates a conflict of interest for both the contractor and the Department. The work done by contractors is often about directly challenging the decisions made by the Department.

> Some observers, even some migration agents, say that DIMA has developed too close a relationship with certain law firms, migration agent firms, or community legal centers that rely on DIMA for a significant portion of their business, causing agents to hesitate to criticize DIMA or to "make waves" while representing clients. Some migration agents, they say, lack creativity and aggressiveness in performing their work[55]

Recommendation Eighteen

Legal advice and assistance for detainees should be funded through the current legal aid and community legal centre scheme administered by the Federal Attorney-General.

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[53] See Recommendation 19, Senate Legal and Constitutional Committee; *Administration and Operation of the Migration Act 1958* (2006)
[54] US Committee for Refugees, Sea Change: Australia's New Approach to Asylum Seekers, February 2002, at page 19
[55] Ibid

The IAAAS contract only provides payment per person assisted at a flat rate. It is to cover not only the time taken to prepare the application but also all disbursements required. Disbursements such as interpreting and translation costs and medical reports are critical to the proper preparation of a case.

Providers are Migration Agents and/or lawyers and have professional standards and are bound to provide clients with full assistance to the best of their professional responsibilities. Conversely each time a communication is made with a client it eats into the funds provided, if a profit is sought there may be a temptation to keep communication and disbursements to a minimum in order to perform the job required.

The Translating and Interpreting Service (TIS) provides some free services for not-for-profit agencies[56] but this is only for permanent residents and citizens.[57] Interpreting services cost in the region of $100 per hour.[58] Preparation of a primary protection application takes generally a minimum of 6 hours. Preparation of a clients case may take longer. In cases where a client has experienced torture and trauma they may need a longer period to provide their story. Any pressure on the person to speed up their narrative because of issues with costs and time can lead to errors which can have consequences later upon their credibility.

TIS does not provide translations. It is the stated policy of DIAC and the RRT that they will not accept documents which are not in English or accompanied by a translation by an accredited translator. A NAATI qualified translator must be contracted to provide translations of documents which can cost in the region of $60 per page.

Many asylum seekers suffer from the physical and/or psychological effects of torture and trauma. These conditions often need to be confirmed by expert medical evidence to properly support the applicant's claims.

The fact that these disbursements are not covered by IAAAS means in practice for SCALES the fees for the services provided by the migration agent are sacrificed. Less reputable advisors may not commission such reports or will spend less time on a clients case in order to maximise their fees.

We note in this respect recommendations from the Senate Legal and Constitutional Committee in 2002 that a separate fund be established to cover the costs of translating and interpreting services and medical reports.[59]

In tendering for IAAAS funding it is noted that the Department will only fund assistance for the primary and review stage of a protection visa application. Once an RRT decision has been made there is no further funded assistance.

This means that there is currently no funding for migration agents to prepare submissions to the Minister for Immigration pursuant to s. 417 of the *Migration Act 1958.* It is only at this stage of the process can any consideration be made of other international obligations such as under the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961); Convention Against Torture; International Convention on Civil and Political Rights; Convention on the Rights of the Child etc.

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[56] Although it should be noted that there are a limited number of free "jobs" per day and have to be reserved well in advance.

[57] http://www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/free-services.htm

[58] http://www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/service-charges.htm

[59] See Recommendations 3.3 and 3.4, Senate Legal and Constitutional Committee, A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes, 2000

We note that the Minister for Immigration and the Department are shortly to conduct a public consultation about the need for a system of complementary protection. In this respect there has been recognition that the current system does not adequately take into account other international obligations outside of the Refugees Convention. A comprehensive submission to the Minister for Immigration addressing the guidelines is extremely time consuming for representatives and currently unfunded.

Recommendation Nineteen

Funding for legal assistance provides separate funds for disbursements such as interpreting and expert reports and funding for providing representation and assistance after any refusal by the Refugee Review Tribunal including the cost of assisting with submissions to the Minister for Immigration and Citizenship

Conclusion

The recommendations contained in this submission represent a 'pegging' of our immigration detention system to our international human rights obligations. SCALES believes that Australia has a unique opportunity over the next decade to repair the damage to our international reputation and to take our place as a leader within the international community. In order to do this, we must work to fully honour our existing obligations and embrace further opportunities to develop the protection of human rights both domestically and internationally. So many people have suffered through our immigration detention system. We must work to ensure that this does not continue and is never allowed to happen again.