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**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

Submission by the Office of the United Nations High Commissioner for Refugees  
to the Joint Standing Committee on Migration  
Inquiry into Immigration Detention in Australia  
September 2008

**I. SUMMARY OF RECOMMENDATIONS**

1. UNHCR suggests that all decisions to detain an asylum-seeker should be based on an individualized (case-by-case) basis, and limited solely to the purpose of establishing whether an individual poses a demonstrable risk to the security of the community or for the purposes of establishing the identity of the individual. In all cases, reasons should be given in writing to record the basis of the detention, including any periodic reviews for its ongoing necessity. (Para. 40)
2. UNHCR suggests that any detention of asylum-seekers, refugees or stateless persons be subject to an effective judicial or 'arms-length' administrative review, independent of the original detaining authorities, to ensure that detention is necessary and based upon demonstrable risks arising from a detainee's identity or security risks associated thereto. (Para. 41)
3. Given the significant legal and human rights character of these main policy changes it would be prudent for them to take a legislative or regulatory form to ensure clarity and transparency. (Para. 42)
4. To remove any doubt as to the geographical scope of the new policy, UNHCR suggests that it be made clear that the policy developments will apply throughout the Commonwealth of Australia, including any territories for the time being excised from the 'migration zone'. (Para. 43)
5. Given the negative effects of detention on the psychological well-being of those detained, UNHCR suggests that the Committee recommend that all possible alternatives to detention are explored before any decision is made to detain, including available community care arrangements. Particular care should be provided for vulnerable asylum-seekers, including women at risk, children, unaccompanied elderly persons, survivors of torture or trauma, and/or persons with a mental or physical disability. (Para. 44)
6. Where the detaining authority determines that some form of detention is required, the least restrictive option for the detained person should be selected, provided it still addresses the risk on which the detention was based. (Para. 45)
7. That the Government promulgate public guidelines under which any isolation or segregation on the basis of health risks posed by individual asylum-seekers beyond initial screening should be in an appropriate medical facility and that all actions to isolate them be proportional to the health risk posed. A clear distinction should be maintained between individuals detained on the basis of security risk and those who need to be isolated or segregated on the basis of health risks posed. (Para. 48)

8. To ensure clarity and certainty and accountability, UNHCR recommends that procedural guarantees in relation to immigration detention and oversight by entities independent of the detaining authority be prescribed in legislative or regulatory form. (Para. 54)
9. UNHCR encourages the Government to establish an independent mechanism for the regular and transparent review of all places of detention with regard to the appropriateness of both the accommodation and the services provided. (Para. 59)
10. UNHCR recommends that the Government conduct a study of best practices in Australia and in other domestic jurisdictions to maximize the use and quality of alternatives to detention. (Para. 65)
11. UNHCR proposes that, where alternatives to detention are feasible, and in order to make them sustainable, asylum-seekers who retain their liberty should receive appropriate accompanying support in the form of employment, education, and access to basic health care to ensure self-sufficiency and dignity while their claims to refugee status are being assessed. (Para. 66)

**CHRISTMAS ISLAND:**

12. In addition to Recommendation 4 hereof, UNHCR recommends the introduction of indicative timeframes for the process to determine refugee status, similar to those established 'onshore', and that persons held in detention receive priority assessments of their claims. This will ensure that asylum-seekers who have to be detained are only held for the shortest period of time and linked to a legitimate and defined purpose. (Para. 72)
13. UNHCR supports the use of existing 'low security' detention and community-based reception facilities which will need some refurbishment and regular upkeep to meet the exigencies of any future arrivals. In its present form, the Immigration Detention Centre at the end of the island is not an appropriate facility to detain asylum-seekers unless they pose a demonstrable security risk to the local island community. (Para. 78)
14. UNHCR recommends that a mechanism be put in place to ensure regular consultation and confidence-building measures with the local community to ensure cooperative relations between government agencies working on the island, asylum-seekers and the local population. (Para. 14)

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## II. INTRODUCTION

15. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Joint Standing Committee on Migration (JSCOM) in its *Inquiry into Immigration Detention in Australia*.
16. UNHCR's submission addresses its comments only to issues that affect asylum-seekers, refugees and stateless persons. It takes into account the recent policy announcements with regard to immigration detention made on 29 July 2008 by the Minister for Immigration and Citizenship.

## III. STANDING OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

17. Australia has assumed responsibility to extend protection to asylum-seekers and refugees through accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the 1951 Refugee Convention).<sup>1</sup> UNHCR provides comment pursuant to the Preamble and Article 35 of the Refugee Convention as well as the Statute of the Office of the United Nations High Commissioner for Refugees (the Statute). UNHCR additionally has been given a specific and global mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976 as well as through subsequent resolutions.<sup>2</sup>
18. The supervisory role of UNHCR relating to the protection of refugees worldwide is complemented by the Conclusions developed annually by the Executive Committee of the High Commissioner's Programme (ExCom), comprised of States Parties to the 1951 Refugee Convention and its Protocol. The ExCom Conclusions are developed through a consensual process requiring the agreement of States, and set international protection standards. Australia takes an active role in the work of ExCom.
19. In addition, UNHCR develops guidelines drawing on the 1951 Refugee Convention, ExCom Conclusions, and general human rights treaties like the 1989 Convention on the Rights of the Child or the 1966 International Covenant on Civil and Political Rights. Thus, in February 1999, UNHCR issued revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers.<sup>3</sup> The Guidelines deal specifically with the detention of asylum-seekers, but also refer to stateless persons because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum-seekers and stateless persons.

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

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

<sup>3</sup> UNHCR, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999).

#### IV. SCOPE OF SUBMISSION

20. UNHCR's submission relates to the criteria for immigration detention of asylum-seekers; the treatment of asylum-seekers, refugees and stateless persons who are held in immigration detention; and alternatives to immigration detention for asylum-seekers.
21. UNHCR's submission applies to all asylum-seekers who are being considered for, or who are in, detention or detention-like situations,<sup>4</sup> defined to mean:

confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.
22. This definition is sufficiently broad to encompass most forms of detention recognized as such by international human rights law; and is applicable to situations where natural geography may be used to restrict freedom of movement.<sup>5</sup> Accordingly, this would apply equally to the reception of asylum-seekers and refugees within Australia's migration zone and excised offshore places, including Christmas Island.

#### V. INTERNATIONAL STANDARDS

23. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and regional human rights instruments<sup>6</sup> all specify, in more or less similar terms, that no one should be arbitrarily deprived of his or her liberty.
24. Article 31 of the 1951 Refugee Convention prescribes that:

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
25. This takes into account the fact that refugees may be forced to enter a country illegally in order to escape persecution. Article 31 also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country. The Article applies to

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<sup>4</sup> Ibid, Guideline 1.

<sup>5</sup> UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, POLAS/2006/03 (April 2006), p. 2.

<sup>6</sup> See the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights "Pact of San Jose", and the Cairo Declaration on Human Rights in Islam.

asylum-seekers pending determination of their status as recognition that refugee status does not make an individual a refugee but declares him or her to be one.<sup>7</sup>

26. UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers ("UNHCR's Guidelines on Detention") bring together important international law principles relating to detention and set out minimum standards for what might be considered acceptable state practice. They also seek to offer greater clarity regarding the circumstances in which restrictions may be warranted and the alternatives which could be considered. They are not binding, but represent UNHCR's reference point, drawing upon the 1951 Refugee Convention, relevant ExCom Conclusions,<sup>8</sup> and human rights law and standards. The Guidelines are attached in extenso (Annex A).
27. UNHCR's Guidelines on Detention state the principle that detention of asylum-seekers should be an exception, not the rule and should be for the shortest possible period.
28. The Guidelines reiterate the limited basis on which the detention of asylum-seekers may be permissible, if necessary and if prescribed by a national law which is in conformity with general norms and principles of international human rights law. The exceptional situations in which detention of asylum-seekers may be permitted are those agreed to by States in ExCom Conclusion No. 44 (XXXVII) of 1986 (attached in Annex B):<sup>9</sup>
  - (i) to verify identity;
  - (ii) to determine the elements on which the claim for refugee status or asylum is based;
  - (iii) to deal with cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
  - (iv) to protect national security or public order.
29. The Guidelines also propose a number of alternatives to the use of detention for asylum seekers, including the use of reporting and residency requirements, release on bail, sureties and allowing asylum-seekers to live in open centres where their presence can be monitored.

## VI. AUSTRALIAN STANDARDS

30. Australia's current legislation, insofar as it imposes mandatory detention for all 'unauthorized arrivals' in or outside the migration zone (if the person seeks to enter the migration zone) until their entitlement to a visa can be determined,<sup>10</sup> may not be consistent with the general principle that asylum-seekers should only be detained on exceptional grounds and that there should be a presumption against detention, unless

<sup>7</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.2 (1 January 1992), [28].

<sup>8</sup> See, for example, ExCom Conclusions Nos. 44 (XXXVII) – 1986, 46 (XXXVIII) – 1987 para f, 47 (XXXVIII) – 1987 para e), 50 (XXXIX) – 1988 para i), 65 (XLII) – 1991 para c) and j), 71 (XLIV) – 1993 para f), 85 (XLIX) – 1998 para cc) and ee), and 89 (LI) – 2000.

<sup>9</sup> ExCom Conclusion on Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) – 1986.

<sup>10</sup> *Migration Act 1958* (Cth), ss 5, 189(1), (2), (3) and (4).

shown to be necessary according to prescribed criteria relating to the risks posed by an individual.

31. Notwithstanding, UNHCR welcomes the announcement by the Minister for Immigration and Citizenship on 29 July 2008, to amend the broad policy parameters of immigration detention in Australia and the Government's commitment to 'fundamentally change the premise underlying detention policy'<sup>11</sup>, particularly the policy that now places an onus on the detaining authority to establish that detention is required following an individualized assessment of health, identity and security risks.
32. This is a significant and welcome change from previous policy whereby persons could be detained solely on the basis of their method of arrival which, in UNHCR's view, has given rise to earlier concerns about the mandatory and arbitrary nature of detention.
33. In this context, UNHCR understands that 'mandatory detention of 'unauthorised arrivals' will be limited to the minimum period required to assess the health, identity and security risks or, in the case of 'unlawful non-citizens', where an individual either presents unacceptable risks to the community or has repeatedly refused to comply with visa conditions.
34. Overall, UNHCR welcomes the changes which will create a presumption against detention and allow asylum-seekers, who pose no demonstrable threat, to remain in the community while their claims to refugee status are resolved. These changes would be further reinforced through the provision of a prompt and periodic administrative or judicial review of all decisions that affect the liberty and freedom of movement of asylum-seekers.

## VII. SUBMISSIONS ON SPECIFIC TERMS OF REFERENCE OF COMMITTEE

<p><b>A. <i>The criteria to be applied in determining when and how long a person should be held in immigration detention</i></b></p>
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### ***Security risk criterion***

35. Although the detention of asylum-seekers may be deemed necessary 'to protect national security and public order', it is UNHCR's view that the decision to detain an asylum-seeker on security grounds should be based on specific and individualized risk assessment of each person. Decisions based solely on the general characterization of a person's country of origin would be arbitrary and contrary to international human rights law.

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<sup>11</sup> Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, Seminar – Centre for International and Public Law, The Australian National University, 29 July 2008, p.8.

36. In UNHCR's view, deterrence and punishment are not relevant consideration in the detaining authority's assessment or decision to detain. The grounds prescribed by ExCom Conclusion No. 44<sup>12</sup> and UNHCR's Guidelines set out the appropriate criteria for determining when asylum-seekers may be detained namely:

- to verify identity; to determine the elements on which the claim for refugee status or asylum is based;
- to deal with cases where asylum-seekers have destroyed their travel and/or identity document;
- or to protect national security and public order - and that it should be for as short a period as possible.<sup>13</sup>

37. In this regard, UNHCR welcomes the Government's commitment to:

- (i) introduce an individualized assessment, where the onus rests on the detaining authority, of whether an individual poses a danger to the security of the community and is likely to comply with the immigration process or abscond;
- (ii) create a presumption against detention and to use immigration detention centres only as a last resort and for the shortest practicable time;
- (iii) ensure that the length and conditions of detention are subject to regular review, including the appropriateness of both the accommodation and the services provided;
- (iv) to treat people in detention fairly and reasonably and that conditions of detention will ensure the inherent dignity of the human person;
- (v) to consider detention only after a full consideration of all possible alternatives, including community care;
- (vi) not to detain children in immigration detention centres;

38. In UNHCR's experience it may be prudent for these main policy changes to take a legislative or regulatory form to ensure clarity and transparency. In addition, appropriate judicial or independent administrative oversight should be maintained for any decisions affecting the liberty of asylum-seekers.

39. To remove any doubt as to the geographical scope of the new policy, UNHCR suggests that it be made clear that the policy developments will apply throughout the Commonwealth of Australia, regardless of any excision from the 'migration zone'.

#### **Recommendation 1:**

**40. UNHCR suggests that all decisions to detain an asylum-seeker should be based on an individualized (case-by-case) basis, and limited solely to the purpose of establishing whether an individual poses a demonstrable risk to the security of the community or for the purposes of establishing the identity of the individual. In all case, reasons should be given in writing to record the basis of the detention, including any periodic reviews for its ongoing necessity;**<sup>14</sup>

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<sup>12</sup> UNHCR, ExCom Conclusion No. 44 (XXXVII), above n 14.

<sup>13</sup> Op cit, Guideline 3.

<sup>14</sup> Op cit, Guideline 3.



**Recommendation 2:**

41. UNHCR suggests that any detention of asylum-seekers, refugees or stateless persons be subject to an effective judicial or 'arms-length' administrative review, independent of the original detaining authorities, to ensure that detention is necessary and based upon demonstrable risks arising from a detainee's identity or security risks associated thereto.<sup>15</sup>

**Recommendation 3:**

42. Given the significant legal and human rights character of these main policy changes it would be prudent for them to take a legislative or regulatory form to ensure clarity and transparency.

**Recommendation 4:**

43. To remove any doubt as to the geographical scope of the new policy, UNHCR suggests that it be made clear that the policy developments will apply throughout the Commonwealth of Australia, including any territories for the time being excised from the 'migration zone'.

**Recommendation 5:**

44. Given the negative effects of detention on the psychological well-being of those detained, UNHCR suggests that the Committee recommend that all possible alternatives to detention are explored before any decision is made to detain, including available community care arrangements. Particular care should be provided for vulnerable asylum-seekers, including women at risk, children, unaccompanied elderly persons, survivors of torture or trauma, and/or persons with a mental or physical disability.<sup>16</sup>

**Recommendation 6:**

45. Where the detaining authority determines that some form of detention is required, the least restrictive option for the detained person should be selected, provided it still addresses the risk on which the detention was based.

**B.** *The criteria to be applied in determining when a person should be released from immigration detention following preliminary health checks*

***Health criterion***

46. A recent UNHCR-commissioned study notes that 'the screening and isolation of individuals with serious communicable diseases such as active tuberculosis, which may

<sup>15</sup> Op cit, para. 5.

<sup>16</sup> Op cit, Guidelines 6 and 7.

be transmitted via casual contacts and close proximity over a certain period – for example, in a communal reception centre for asylum-seekers, may be appropriate in limited circumstances. Any isolation or segregation beyond initial screening would require transfer to an appropriate non-detention medical facility which is proportional to the health-risk.<sup>17</sup> UNHCR does not support any restrictions being placed on freedom of movement for the purpose of screening an individual's actual or potential HIV/AIDS status.<sup>18</sup>

47. UNHCR considers the detention of asylum-seekers and/or refugees, for the purposes of conducting health or quarantine assessments, may be inconsistent with international human rights standards. The Office recommends that any decision to isolate, segregate or quarantine a person because of possible health risks be separate and distinct from a decision to detain on the basis of security risk, as the two criteria are of a different character altogether.

#### **Recommendation 7:**

- 48. That the Government promulgate public guidelines under which any isolation or segregation on the basis of health risks posed by individual asylum-seekers beyond initial screening should be in an appropriate medical facility and that all actions to isolate them are proportional to the health risk posed. A clear distinction should be maintained between individuals detained on the basis of security risk and those who need to be isolated or segregated on the basis of health risks posed.**

<p><i>C. Options improve the transparency, accountability and the management of immigration detention centres</i></p>
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49. In accordance with UNHCR's Guidelines, asylum-seekers, if detained, should be entitled to the following minimum procedural guarantees:<sup>19</sup>
- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and in terms they understand;
  - (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
  - (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention at which the asylum-seekers or his representative would have the right to attend;
  - (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made.

<sup>17</sup> UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, above n 5, [44].

<sup>18</sup> UNHCR, *10 Key Points on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern*, 12 April 2006 <<http://www.unhcr.org/refworld/docid/45b4acae2.html>> at 15 August 2008.

<sup>19</sup> Op cit, Guideline 5.

Such a right should extend to all aspects of the case and not simply the executive discretion to detain;

- (v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

50. UNHCR considers the introduction of additional procedural safeguards, particularly the requirement for regular periodic review of all detention cases by a senior departmental official (at least every three months), in close consultation with the Commonwealth Ombudsman's Office, which will review cases every six months, will improve the transparency and accountability of procedures relating to immigration detention. However, the Office also considers that a review, independent of the determining authority, provides greater oversight and accountability.

51. The oversight and scrutiny of Australia's immigration detention facilities, such as that exercised by the Australian Human Rights and Equal Opportunities Commission (HREOC), the Commonwealth Ombudsman, the Immigration Detention Advisory Group (IDAG), the Detention Health Advisory Group (DeHAG), community consultation groups and detainee consultative committees, are important to ensure that reception standards of treatment (including minimum procedural guarantees for asylum-seekers in detention), comply with international best practices.

52. To ensure clarity and certainty and accountability, UNHCR recommends that the various minimum procedural guarantees identified in paras. 34 to 36 be prescribed in legislative or regulatory form.

53. Clear guidelines might be required to define the precise role, responsibilities and duties of these various bodies to ensure coherence and accountability. In this regard, UNHCR welcomes the continuation of its own unrestricted access to Australia's immigration detention centres.

**Recommendation 8:**

**54. To ensure clarity and certainty and accountability, UNHCR recommends that procedural guarantees in relation to immigration detention and oversight by entities independent of the detaining authority be prescribed in legislative or regulatory form.**

*D. and E. The preferred infrastructure options for contemporary immigration detention and options for the provision of detention services across the range of current detention facilities and community detention*

55. As a general principle, all reception standards should respect the inherent dignity of the person, and promote self-sufficiency and the continuation of a normal life to the greatest extent possible, including the provision of appropriate health services and educational

opportunities.<sup>20</sup> UNHCR notes with concern reports of detainees in Australian immigration detention facilities engaging in self-harm (including voluntary starvation),<sup>21</sup> mental health issues (especially survivors of torture and trauma), and general living conditions.<sup>22</sup> Some of the incidents are clearly attributable to the ‘detention’ environment and to protracted periods of incarceration involved.

56. UNHCR therefore welcomes the remodelling on Australia’s onshore immigration detention facilities, especially the announced redevelopment of Villawood IDC – Stage 1, and the Minister for Immigration’s recent review of all long-term detainee cases. These developments are consistent with UNHCR’s position against using police or correctional facilities to detain asylum-seekers. However, there are residual concerns in respect of the non-segregated detention of Section 501 character cancellations and asylum-seekers who are detained only because of their illegal entry or presence in the country of asylum.

57. UNHCR encourages additional remodelling of the immigration facilities to give effect to ExCom Conclusion No. 85 (XLIX), which provides that the detention of asylum-seekers with others who have been detained as common criminals ‘is undesirable and must be avoided whenever possible’.<sup>23</sup>

58. As outlined, UNHCR’s Guidelines provide considerable guidance on the conditions of detention for asylum-seekers. UNHCR is also of the view that all custodial staff should receive training related to the special situation and needs of asylum-seekers.<sup>24</sup>

#### **Recommendation 9:**

**59. UNHCR encourages the Government to establish an independent mechanism for the regular and transparent review of all places of detention with regard to the appropriateness of both the accommodation and the services provided.**

#### **F. *Options for additional community-based alternatives to immigration detention***

60. The choice of an alternative detention arrangement should be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.

61. UNHCR’s Guidelines identify four non-exhaustive categories of alternatives to detention which may be considered, including:

- (i) monitoring (reporting and residency) requirements;

<sup>20</sup> Op cit, Guideline 10.

<sup>21</sup> Commonwealth of Australia, *Proof Committee Hansard – Senate: Standing Committee on Legal and Constitutional Affairs, Budget Estimates*, Thursday 29 May 2008, Canberra, L&CA5.

<sup>22</sup> Commonwealth and Immigration Ombudsman, *Immigration reports tabled in Parliament* <[http://www.comb.gov.au/commonwealth/publish.nsf/Content/publications\\_immigrationreports](http://www.comb.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports)> at 20 June 2008.

<sup>23</sup> UNHCR, ExCom Conclusion No. 85 (XLIX) 1998.

<sup>24</sup> ExCom Standing Committee, *Detention of Asylum-Seekers and Refugees: the framework, the problem and recommended practice*, EC/49/SC/CRP.13 (4 June 1999), para. 26(k).

- (ii) provision of a guarantor/surety;
- (iii) release on bail; and
- (iv) open centres.<sup>25</sup>

62. In a study commissioned by UNHCR pursuant to the Agenda for Protection, which urged 'States more concertedly to explore alternative approaches to the detention of asylum seekers and refugees', an extensive survey of thirty-four States to provide information and analysis on existing alternatives to detention was completed.<sup>26</sup>
63. The study identified alternatives to detention of varying degree of restriction, including bail, bond or surety;<sup>27</sup> reporting requirements;<sup>28</sup> open centres, semi-open centres, directed residence, dispersal and restrictions to a district;<sup>29</sup> registration and documentation;<sup>30</sup> release to nongovernmental supervision;<sup>31</sup> electronic monitoring and home curfew;<sup>32</sup> alternatives for children;<sup>33</sup> and alternatives for other vulnerable persons.<sup>34</sup>
64. Where alternatives to detention are feasible, asylum-seekers who retain their liberty often require appropriate accompanying support and package of rights/entitlements in the form of employment, education, and access to basic health care. From an international perspective, it has been widely accepted that dependence on the State is reduced when asylum-seekers are working. UNHCR's Executive Committee has recognised that reception arrangements can be mutually beneficial where they are premised on the understanding that many asylum-seekers can attain a certain degree of self-reliance, if provided with the requisite opportunities to do so. Access to the labour market furthermore removes incentives for informal or even illegal employment.<sup>35</sup>

**Recommendation 10:**

- 65. UNHCR recommends that the Government conduct a study of best practices in Australia and in other domestic jurisdictions to maximize the use and quality of alternatives to detention.**

**Recommendation 11:**

- 66. UNHCR proposes that, where alternatives to detention are feasible, and in order to make them sustainable, asylum-seekers who retain their liberty should receive appropriate accompanying support in the form of employment, education, and**

<sup>25</sup> Op cit, Guideline 4.

<sup>26</sup> UNHCR Agenda for Protection, A/AC.96/965/Add.1 (June 2002), p.8.

<sup>27</sup> UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, above n 5, [92]-[101]; applied in Canada, United Kingdom, Japan and United States.

<sup>28</sup> Ibid, [102]-[106]; applied in the United Kingdom, France, Luxembourg, South Africa, Thailand, Japan, Canada, the United States, and Ireland.

<sup>29</sup> Ibid, [107]-[122]; applied in Europe and New Zealand.

<sup>30</sup> Ibid, [123]-[125]; applied in most European, and some African countries.

<sup>31</sup> Ibid, [126]; applied in the United States, Mexico and the Philippines.

<sup>32</sup> Ibid, [127]-[134], trialed in Western Europe and the United States.

<sup>33</sup> Ibid, [135]-[139]; applied in Germany, Italy, Norway, the Netherlands, Australia and the United Kingdom.

<sup>34</sup> Ibid, [140]-[141]; not applied.

<sup>35</sup> UNHCR, ExCom Conclusion No. 93 (LIII), (b)(vii).

access to basic health care to ensure self-sufficiency and dignity while their claims to refugee status are being assessed.

#### VIII. IMMIGRATION DETENTION ON CHRISTMAS ISLAND

67. The Minister for Immigration and Citizenship recently confirmed that an “architecture of excision of offshore islands and non-statutory processing of persons who arrive unauthorised at an excised place will remain” and that such persons will be “processed” on Christmas Island.<sup>36</sup>

#### *Linkages between detention and offshore processing of refugee claims*

68. In the context of the Government’s decision to retain ‘excision’ and ‘non-statutory’ processing, UNHCR supports the recent policy initiatives aimed at improving the transparency and efficiency of offshore refugee status determination processing to ensure that ‘offshore entry persons’ receive:

- (i) publicly funded advice and assistance;
- (ii) access to independent review of unfavourable decisions; and
- (iii) external scrutiny by the Commonwealth Immigration Ombudsman.

69. The linkage between the refugee processing system (and the timeframe within which decisions are taken) and the regime for the detention of asylum-seekers must be carefully assessed. Where refugee assessments are likely to take a prolonged period to resolve finally, this would militate against detention and in favour of community-based options.

70. In respect to the detention of asylum-seekers at excised offshore places, UNHCR also supports the introduction of indicative timeframes for the determination of refugee status, similar to those established onshore. This would improve transparency and accountability of processing and ensure that asylum-seekers who have to be detained are only held for the shortest period of time and linked to a legitimate and defined purpose.

71. UNHCR understands that the Government’s Immigration Detention Values and other detention policies will apply equally to unauthorized arrivals at excised offshore places, including Christmas Island. It also anticipates that immigration detention on Christmas Island will be subject to the same procedural and legal safeguards as those on the mainland. In UNHCR’s view, any differential treatment of asylum-seekers ‘onshore’ and ‘offshore’ in an excised territory in respect of the decision to detain may be discriminatory. In this regard, UNHCR refers to and reiterates Recommendation 4.

#### **Recommendation 12:**

**72. In addition to Recommendation 4 hereof, UNHCR recommends the introduction of indicative timeframes for the process to determine refugee status, similar to those established ‘onshore’ and that persons held in detention receive priority assessments of their claims. This will ensure that asylum-seekers who have to be**

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<sup>36</sup> Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia’s Immigration System*, above n 11, p. 4

**detained are only held for the shortest period of time and linked to a legitimate and defined purpose.**

*Need for a medium security detention facility to accommodate asylum-seekers?*

73. Christmas Island, by virtue of its geographically remote and isolated location is already an environment where freedom of movement is naturally restricted and the risk of an asylum-seeker absconding is virtually non-existent. It is questionable, therefore, whether any additional measures beyond obligatory residence in community-based reception facilities on Christmas Island would be necessary or proportional to any security risk posed by asylum-seekers. The only relevance of the security or health risk criteria for detention would be where there was a threat to the local community on the island itself.<sup>37</sup> This, however, reinforces the importance of good community relations, dialogue and confidence-building measures between all the relevant parties, including any asylum-seekers on the island (see below).
74. In its present form, the new Immigration Detention Centre on Christmas Island has all the characteristics of a medium security prison. Without substantial remodelling, UNHCR does not believe it is an appropriate facility to accommodate asylum-seekers except, perhaps, for a very limited few persons whose presence in the future might pose a security threat to the local community.
75. In this context, UNHCR supports the use of existing community-based reception facilities which will need some refurbishment and regular upkeep to meet the exigencies of any future arrivals.
76. Important lessons can also be learned from the experience of detaining asylum-seekers for protracted periods on Nauru. UNHCR recalls that the detention of asylum-seekers and refugees on a similarly remote and isolated island had significant psychological impact on the short and long-term health and well-being of the detainees. Furthermore, their access to essential legal and social assistance, particularly those suffering from torture or trauma, was very restricted because of the geographical isolation. These concerns are equally applicable to Christmas Island, although the fact that Christmas Island is part of Australia and clearly within the jurisdiction of Australia represents a significant qualitative difference over 'offshore processing' in third countries.
77. In UNHCR's view alternative forms of low-security 'detention' arrangements, which already exist at Christmas Island, in addition to an expanded use of community-based alternatives, would be sufficient to achieve the purposes of detention as set out in the Government of Australia's policy framework and the Immigration Detention Values.

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<sup>37</sup> For an interesting analogy see a decision of the European Court of Human Rights which considered that obliging the applicant to reside at the island of Asinara, measuring 50 square kilometres with an area of compulsory residence limited to some 2.5 square kilometres, constituted a deprivation of liberty. It held that Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the right to liberty and security – had been violated. The Court found that in considering whether the applicant's liberty had been deprived, 'the starting point must be [the applicant's] concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question', *Guzzardi v Italy*, European Court of Human Rights, Series A, No. 39 (6 November 1980). Australia's obligations under the analogous provisions of the International Covenant on Civil and Political Rights, 1966, should be considered.

**Recommendation 13:**

**78. UNHCR supports the use of existing ‘low security’ detention and community-based reception facilities which will need some refurbishment and regular upkeep to meet the exigencies of any future arrivals. In its present form, the Immigration Detention Centre at the end of the island is not an appropriate facility to detain asylum-seekers unless they pose a demonstrable security risk to the local island community.**

*Importance of fostering good relations with Christmas Island community*

79. UNHCR’s participation in the 13 August 2008 Christmas Island Stakeholders Consultation provided the Office with a welcome opportunity to view the reception facilities and their implications for the local population.

80. Community leaders expressed their support for asylum-seekers to remain in proximity to the local community and identified the Phosphate Hill facilities as an appropriate place of accommodation. However, some community leaders noted the need for continued DIAC support, as most services were provided gratis by the community, especially in times of larger arrivals and in the event the caseload shifts to a non-Asian composition.

81. UNHCR emphasizes the importance of regular consultation and confidence-building measures with the local community to ensure cooperative relations between government agencies working on the island, asylum-seekers and the local population. The political and social perception of asylum-related issues by public opinion in general, and by local communities in particular, will play a significant role in the quality of life of reception conditions, and facilitate local integration.<sup>38</sup> They will also have a very significant bearing on the need, or otherwise, for the Government to use the IDC at the end of the island or whether flexible and community-based options can be employed. From the experience of Nauru, it clear that open reception-style accommodation is far preferable to any closed detention-like facility of the type presented in the IDC on Christmas Island.

**Recommendation 14:**

**82. That a mechanism be put in place to ensure regular consultation and confidence-building measures with the local community to ensure cooperative relations between government agencies working on the island, asylum-seekers and the local population.**

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<sup>38</sup> UNHCR, *UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*, July 2003 <<http://www.refworld.org/>> at 1 August 2008; UNHCR, ExCom Conclusion No. 93 (LIII) – 2002, (d).



## **IX. CONCLUSION**

83. UNHCR welcomes the broad consultation process that is taking place with key stakeholders and appreciates the opportunity to comment on Australia's immigration detention policies, practices and laws. UNHCR looks forward to the opportunity for further consultations with, including providing an oral submission to, the Joint Standing Committee on Migration as these matters evolve and are further refined.

*UNHCR Regional Representation for Australia,  
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*12 September 2008*