Human Rights and Equal Opportunity Commission
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Submission of the

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC)

to the

Joint Standing Committee on Migration

Inquiry into Immigration Detention in Australia

4 August 2008

Human Rights and Equal Opportunity Commission

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Introduction

1. The Human Rights and Equal Opportunity Commission ('HREOC') welcomes the opportunity to make a submission to the Joint Standing Committee Inquiry into Immigration Detention in Australia.

2. HREOC is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). HREOC is Australia's national human rights institution.

3. This submission draws on extensive work HREOC has conducted in the area of immigration detention, including:

   - submissions to parliamentary inquiries
   - national inquiries into immigration detention, in particular *A last resort: National Inquiry into Children in Immigration Detention* (2004) ('*A last resort?*') and *Those who've come across the seas: Detention of unauthorised arrivals* (1998) ('*Those who've come across the seas*')
   - annual inspections and reports on conditions of immigration detention
   - investigating complaints from individuals in immigration detention
   - examination of proposed legislation
   - commenting on policies and procedures relating to immigration detention
   - developing minimum standards for the protection of human rights in immigration detention.[1]

4. This submission provides information under headings which correspond to the Terms of Reference as much as possible.

Government's announcement of a new direction in immigration detention policy

5. HREOC welcomes the announcement on 29 July 2008 by the Minister for Immigration and Citizenship, Chris Evans, of a new direction in immigration

[1] All HREOC publications relating to this work are available at www.humanrights.gov.au/human_rights.

detention policy.[2] HREOC understands that this new direction provides for a fundamental shift in immigration detention policy, away from the requirement that all unlawful non-citizens be detained, towards a presumption that detention will occur as a last resort and for the shortest practicable period.

6. The new direction will be guided by a set of seven immigration detention values:
    1. Mandatory detention is an essential component of strong border control.
    2. To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
        a. all unauthorised arrivals, for management of health, identity and security risks to the community
        b. unlawful non-citizens who present unacceptable risks to the community
        c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
    3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).
    4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
    5. Detention in Immigration Detention Centres is only to be used as a last resort and for the shortest practicable time.
    6. People in detention will be treated fairly and reasonably within the law.
    7. Conditions of detention will ensure the inherent dignity of the human person.

7. HREOC notes that the new direction appears to incorporate some of the features of recommendations raised previously by HREOC, and also referred to in this submission, in particular:
    - a move towards the presumption that detention is an exception not the norm (Recommendation 1)

[2] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008.

- a limited set of circumstances where detention can take place (in the case of unauthorised arrivals, for the purposes of establishing identity, health and security) (Recommendation 1)
- legal safeguards for asylum seekers arriving in excised offshore places (Recommendation 3)
- periodic and regular reviews of the need to detain with opportunity for independent review after a maximum time limit (Recommendation 9).

8. However, HREOC has not received further detail on the practical implementation of the new approach, in particular how such changes will be enforced or guaranteed.

9. While HREOC welcomes the government's intention to prevent long term and indefinite detention (expressed in value no 4), we are concerned that without legislative change these intentions may not be sufficient to create a system that guarantees freedom from arbitrary detention, among other human rights.

10. HREOC welcomes the government's stated intention to consult with community interest groups, HREOC and the Commonwealth Ombudsman on the implementation plan to give effect to these values. We hope that this submission can highlight some of the means of implementing the changes, and also some of the concerns which HREOC may continue to have regarding the immigration detention system.

Summary

11. Australia's system of mandatory detention has led to prolonged and indefinite detention for many people. HREOC has consistently called for an end to this policy because it places Australia in breach of its obligations under the *International Covenant on Civil and Political Rights* ('ICCPR') and the *Convention on the Rights of the Child* ('CRC') to ensure that no one is arbitrarily detained. It has also led to fundamental breaches of a child's right to be detained only as a matter of last resort and for the shortest appropriate period of time.

12. The operation of the *Migration Act 1958* (Cth) ('Migration Act') has also led to the prolonged detention of long term residents whose visas have been cancelled under s 501, and of those who may require protection from refoulement under the

Convention against Torture (‘CAT’), ICCPR and CRC. Asylum seekers who arrive on excised offshore places are also detained, but have even fewer safeguards to ensure their human rights.

13. While detention *may* be acceptable for a *short period* in order to conduct security, identity and health checks, currently, mandatory detention laws *require* detention for *more than these purposes*, for *unlimited periods of time* and *in the absence of independent review* of the need to detain.

14. The Migration Act should be amended so that detention takes place only when necessary. This should be the exception not the norm. Even then it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law.

15. Any decision to detain a person should be subject to judicial review and there should be clear legal limits on the period of time for which immigration detention is permitted.

16. Conditions in immigration detention should meet international human rights standards. While the private provider of detention services is contractually obliged to provide minimum standards of services, and there is some external scrutiny by several agencies, HREOC is concerned that these mechanisms are inadequate to safeguard the treatment of people in immigration detention.

17. HREOC welcomes the development of alternative forms of detention, in particular the ability to place detainees, especially children and families, on Residence Determinations. However, HREOC has continuing concerns about the physical environment and infrastructure of detention facilities, and the conditions of detainees in immigration detention.

Recommendations

Recommendation 1: The Migration Act should be amended so that detention occurs only when necessary. This should be the exception not the norm. It must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law (ExComm Conclusion 44). These limited grounds for detention should be clearly prescribed in the Migration Act.

Recommendation 2: The Migration Act should be amended so that the need to detain is subject to prompt review by a court, in accordance with international law.

Recommendation 3: The government should repeal the provisions of the Migration Act relating to excised offshore places.

Recommendation 4: The government should adopt the recommendations of *A last resort?* in full, including the independent review of detention at 72 hours.

Recommendation 5: The government should review the operation of s 501 as a matter of priority, with the aim of excluding long term permanent residents from the provision.

Recommendation 6: In order to ensure that Australia complies with its non-refoulement obligations under the ICCPR, CRC and CAT, the Parliament should introduce a system of complementary protection which incorporates the following features:

- clear criteria setting out when a person should be protected from non-refoulement under the ICCPR, CRC or CAT
- procedures that protect against errors in applying that criteria (due process)
- mechanisms to implement Australia's protection obligations for those who meet the criteria (visas).

Recommendation 7: That there should be greater efforts to promptly release people in immigration detention onto bridging visas.

Recommendation 8: Asylum seekers released from immigration detention and living in the community should be granted work rights and access to Medicare. Those who are unable to work should be granted access to financial and medical assistance.

Recommendation 9: The Migration Act should be amended to include periodic and regular reviews of the need to detain an individual and a system of maximum time limits for detention. If it is deemed necessary to detain a person beyond the maximum time limit, his or her case must be subject to independent review.

Recommendation 10: HREOC recommends that the Minister's powers under ss 417, 501 and 195A and 197AB should be reduced and measures put in place to provide for transparent, accountable decisions which are subject to review.

Recommendation 11: Australia's laws should codify the minimum standards of treatment in immigration detention facilities, with content guided by international human rights law.

Recommendation 12: HREOC urges the government to accede to the Optional Protocol to CAT which requires the establishment of an independent national scheme of inspection of all places of detention.

Recommendation 13: HREOC recommends that VIDC Stage 1 is demolished and replaced with a new facility as a matter of priority. This recommendation is made subject to there being a continuing need for such a secure facility at all.

Recommendation 14: PIDC should be promptly and substantially renovated to address the concerns raised by the Human Rights Commissioner in his 2007 report.

Recommendation 15: Immigration detainees should not be held on Christmas Island.

Recommendation 16: DIAC should fully utilise the IRH facilities.

Recommendation 17: DIAC should ensure that detainees in IRH have access to recreational and educational programs.

Recommendation 18: Children and their families should only be detained in IRH for a maximum period of four weeks. Unaccompanied children should only be detained in IRH for a maximum period of two weeks.

Recommendation 19: All people in immigration detention for three months or more should be able to apply for a Residence Determination.

Recommendation 20: The Minister or DIAC should have discretion to vary the conditions of Residence Determinations so that detainees can engage in meaningful activities such as further education and training leading to occupational qualifications, and work, if appropriate.

Recommendation 21: DIAC should allow long term detainees to enrol in substantive education courses at TAFE and other institutions, irrespective of whether it leads to a qualification. Enrolment could be by correspondence. DIAC should also consider permitting detainees to attend certain classes in person.

Recommendation 22: DIAC should ensure a regular and varied excursions program for all detainees in immigration detention facilities, including those in IRH. Detainees on s

501 visa cancellations should not be automatically barred from participating in excursions.

Recommendation 23: DIAC and GSL should increase their human rights training for all current and future employees.

Recommendation 24: DIAC should, where possible, ensure the availability of onsite interpreters when there is a large detainee population from a single language group. This is particularly relevant to VIDC which has a large population of Mandarin-speaking detainees.

Recommendation 25: DIAC should ensure that all official documents, including documents and notices about the operation of the centres, are provided in the main languages of the detainee population. Detainees should be able to request assistance in translating personal documents.

The criteria for detention

Mandatory detention policy and its impact

18. Since 1992, the *Migration Act 1958* (Cth) ('Migration Act') has made it mandatory, under s 189, for any person in Australia without a valid visa to be detained. Section 196 requires that, once detained, unlawful non-citizens must be kept in detention unless they are removed or deported from Australia, or granted a visa.

19. While there are some mechanisms in place to release people onto bridging visas, or into alternative forms of detention,[3] in practice most unlawful non-citizens are detained in immigration detention facilities for a significant period of time. For example:

[3] The Minister has the discretion to release people on visas. He or she also has the power to place detainees into community detention on Residence Determinations or into alternative detention arrangements.

a. In June 2008 the Commonwealth Ombudsman completed reviews of 72 people who had been held in detention for longer than two years.[4]

b. On 27 June 2008, of 390 people in immigration detention,[5] 129 had been in detention for longer than 12 months, 84 longer than 18 months, and 52 longer than two years. Two people were detained for over six years.[6]

20. While the Minister for Immigration and Citizenship ('the Minister') announced that he was acting to resolve the immigration status of many of these individuals immediately, either by granting visas or removing them from Australia,[7] it is an indication that a significant number of people continue to face prolonged detention.

21. Despite efforts to improve the environment inside immigration detention facilities, the fundamental problems with immigration detention remain the same – namely, the length of detention and the uncertainty about how long that detention will last. The negative impact of immigration detention for an uncertain period of time on the mental health of detainees is well established.[8]

Detention as an exception not the norm

22. HREOC has consistently called for an end to the policy of mandatory immigration detention because it places Australia in breach of its obligations under the ICCPR and the CRC to ensure that no one is arbitrarily detained.[9] If detention is necessary in exceptional circumstances then it must be a proportionate means to achieve a legitimate aim and it must be for a minimal period. The detention regime under the Migration Act does not meet those requirements.

23. HREOC accepts that detention may be legitimate for a strictly limited period of time in order to get basic information about health, security and identity.

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[4] Commonwealth Ombudsman, Immigration Reports tabled in Parliament 4 June 2008, http://www.comb.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports_tabled_080604.

[5] This total figure includes those in alternative detention, community detention and immigration detention facilities. 310 of these were detained in immigration detention centres.

[6] Statistics provided to HREOC by DIAC, 6 June 2008.

[7] Senator Chris Evans, Media Release, 'Long-term detention review completed', 23 May 2008.

[8] See Chapter 9 on Mental Health in HREOC, *A last resort?: National Inquiry into Children in Immigration Detention*, 2004 ('*A last resor*t?') and submissions to that Inquiry at http://www.humanrights.gov.au/human_rights/children_detention/submissions/index.html.

[9] See *A last resort?; Those who've come across the seas*; Summary of Observations following Inspections of Mainland Immigration Detention Facilities 2006 and 2007 ('Summary of Observations') and various submissions to inquiries available on the HREOC website at www.humanrights.gov.au/legal/submissions.

However, currently the detention of unlawful non-citizens, often for prolonged periods of time, is the norm, not the exception.

24. The requirement to detain all unlawful non-citizens[10] needs to be replaced with a presumption that detention is the exception, not the norm. The need to detain an unlawful non-citizen should be assessed on a case by case basis, taking into consideration the unique circumstances of the individual concerned. The exceptional criteria that determine when detention can take place should be codified in the Migration Act.

25. The exceptional criteria must ensure that detention complies with Australia's human rights obligations. The Executive Committee of the United Nations High Commissioner for Refugees (ExComm) Conclusion 44 states that where the detention of asylum seekers is deemed necessary, it should only be used:

- to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum seekers have destroyed their travel and/or identification documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security or public order.[11]

26. *Those who've come across the seas* recommends that the grounds on which asylum seekers may be detained should be clearly prescribed in the Migration Act and be in conformity with international human rights law. The report stated that where detention of asylum seekers is necessary, it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the legitimate aims as discussed in ExComm Conclusion 44.

27. *Those who've come across the seas* provides an alternative detention model developed with a number of peak organisations in Australia. This model specifies criteria that must be met for release from detention to be denied.[12]

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[10] Migration Act, ss 189 and 196.
[11] UNHCR, Executive Committee Conclusion No. 44, *Detention of Refugees and Asylum Seekers* (1986) (ExComm Conclusion 44), UN Doc. A/AC.96/688, paragraph 128.

28. While both these sets of criteria were developed in reference to asylum seekers only, they provide a starting point for the development of a set of exceptional criteria for detention of other unlawful non-citizens, including visa overstayers and people whose visas have been cancelled.

29. **Recommendation 1:** The Migration Act should be amended so that detention occurs only when necessary. This should be the exception not the norm. It must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law (ExComm Conclusion 44). These limited grounds for detention should be clearly prescribed in the Migration Act.

Judicial review of immigration detention

30. Judicial oversight of all forms of detention is a fundamental guarantee of freedom and liberty from arbitrariness (ICCPR, article 9(4)). However, this right is not guaranteed under the Migration Act in respect of the right to judicial review of decisions to detain unlawful non-citizens under s 189.

31. The courts are precluded from authorising the release from detention of unlawful non-citizens detained under ss 189 and 196 of the Migration Act, unless their detention under these provisions contravenes domestic law.

32. The courts have no authority to order that a person be released from immigration detention on the grounds that the person's continued detention is arbitrary, in breach of article 9(1) of the ICCPR. This is because under Australian law it is not unlawful to detain a person (or refuse to release a person) in breach of article 9(1) of the ICCPR.

Limited grounds of review

33. In migration matters, the lack of legislative protection against arbitrary detention has been exacerbated by the efforts of the legislature to curtail the availability of judicial review on common law grounds for decisions made under the Migration Act.

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[12] *Those who've come across the seas,* Part 6 – An Alternative Model, pp245-256.

34. The *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) replaced Part 8 of the Migration Act[13] and introduced a privative clause. Section 474 of the Migration Act provides that, subject to specified exceptions, any decision of an administrative character made under the Migration Act or the Migration Regulations is a 'privative clause decision' and 'must not be challenged, appealed against, reviewed, quashed or called into question in any court'; or 'subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'.

35. The privative clause limits the availability of judicial review of migration decisions, including those decisions which impact upon a person's fundamental human rights, such as whether to grant a protection visa.

36. In *Plaintiff S157 of 2002 v Commonwealth* (*'Plaintiff S157')*[14] the High Court upheld the constitutional validity of s 474. However, the High Court construed s 474 narrowly and found it did not exclude the jurisdiction of the High Court because it did not apply to decisions infected by jurisdictional error.

37. As a result of the High Court's decision, migration decisions that are infected by jurisdictional error are still subject to review so courts can review decisions that are infected by an error of law such that the decision is not a valid exercise of power.[15]

38. The Australian *Constitution* provides some limitations on the ability of the legislature to curtail the scope of judicial review. However, the *Constitution* does not give the courts the authority to order a person's release from immigration detention on the grounds that their detention breaches article 9(1) of the ICCPR. This was confirmed in 2004 when the High Court held that indefinite detention is in fact permissible under the *Constitution* and the terms of the Migration Act.[16]

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[13] The *Migration Reform Act 1992* (Cth) sought to limit the grounds of judicial review that applied to migration decisions to those set out in Part 8 of the Migration Act (as opposed to the grounds provided under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the common law).
[14] (2003) 211 CLR 476.
[15] Review for jurisdiction error can encompass cases where there is alleged to be a denial of procedural fairness, failure to comply with statutory procedures, error of law, the inflexible application of policy, consideration of irrelevant material and failure to consider relevant material.
[16] *Al Kateb v Godwin* (2004) 78 ALJR 1099 (McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting).

39. **Recommendation 2:** The Migration Act should be amended so that the need to detain is subject to prompt review by a court, in accordance with international law.

Asylum seekers processed offshore cannot seek judicial review

40. In January 2008 the Government ended the policy of sending asylum seekers to Nauru. HREOC welcomed the Australian Labor Party (ALP) government's decision to end the policy of sending asylum seekers who arrive in 'excised offshore places' to offshore processing centres such as Nauru and Manus Island.[17] However, the Migration Act still permits the detention of an 'offshore entry person' in a declared country.[18]

41. An 'excised offshore place' includes Christmas Island, the Cocos Islands and the Ashmore Reef.

42. The Minister, Chris Evans, has stated '[t]he Rudd Government is committed to processing the asylum claims of future unauthorised boat arrivals on Christmas Island'.[19]

43. People who arrive in excised offshore places are unable to make a valid visa application under the Migration Act unless the Minister exercises his discretion under s 46A.[20] They have also been unable to access the same legal assistance as those who arrive on mainland Australia and their cases cannot be reviewed by the Refugee Review Tribunal or the courts.[21]

44. HREOC has repeatedly raised concerns that the practice of offshore processing denies asylum seekers their rights under article 9(4) of the ICCPR.[22] This lack of legal safeguards increases the risk of a person genuinely in need of Australia's protection being returned to a place of persecution. It also leads to a breach of CRC rights:

    a. article 2(1), on non-discrimination; and

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[17] HREOC Media Release, 'HREOC welcomes end of 'Pacific Solution', 5 February 2008.
[18] The Migration Act, s 198A.
[19] ABC online, Government launches immigration detention inquiry', 10 June 2008, http://www.abc.net.au/news/stories/2008/06/10/2270415.htm?section=justin
[20] Migration Act, s 46A.
[21] Migration Act, s 494AA.
[22] Concerns with this policy have been raised by HREOC in HREOC's Submission to the Senate Legal and Constitutional Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 and *A last resort?*, Chapter 7.

b. article 22(1), on the right of child asylum seekers and refugees to protection and assistance.[23]

45. **Recommendation 3:** The government should repeal the provisions of the Migration Act relating to excised offshore places.

Children should only be detained as a last resort

46. In *A last resort?* , HREOC found that Australia's mandatory detention policy breaches a child's right to be detained as a matter of last resort and for the shortest appropriate period of time. In addition, long term detention significantly undermines a child's ability to enjoy other basic rights, including the right to enjoy the highest attainable standard of physical health.

47. In 2005, the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) introduced s 4AA(1) into the Migration Act to 'affirm' the principle that children only be detained in immigration detention centres as a measure of last resort.[24] It also gave the Minister new powers to make a Residence Determination specifying alternative residence arrangements for a person in immigration detention.[25]

48. Following these amendments, DIAC has made greater efforts to utilise mechanisms to release children and their families on bridging visas and provide them with alternative detention in the community on Residence Determinations. As a result, most children and families are no longer placed in facility-based detention.

49. The conditions of Residence Determinations are discussed in more detail in the section 'Current alternatives to immigration detention facilities in this submission' (see [169]-[181]).

50. However, HREOC is concerned that there continues to be insufficient protection against breaches of children's rights.

51. Section 4AA of the Migration Act is a statement of principle only and does not create legally enforceable rights.

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[23] *A last resort?*, Chapter 7.
[24] Migration Act, s 4AA.
[25] Migration Act, s 197AB.

52. Further, the principle in s 4AA(1) is qualified by s 4AA(2) which states 'for the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a Residence Determination'.

53. Although the stated purpose of Residence Determinations is to enable the Minister to allow families with children to reside in the community in a specified place,[26] the power of the Minister to make a Residence Determination sits uneasily with Australia's international obligation to detain children only as a measure of last resort because Residence Determinations do not offer alternatives *to* detention, but rather alternative *forms of* detention. People on Residence Determinations reside in the community; however, they must abide by certain conditions, which may include residence at a specified place.

54. Child detainees are still unable to challenge the lawfulness of their detention. The limitations on the power of the courts to effectively review the legality of detention which contravenes Australia's human rights obligations also applies to cases concerning the detention of children. The constitutional validity of holding children in immigration detention was unsuccessfully challenged in the High Court in *Woolley, Re; Ex parte Applicants M276/2003 (by their next friend GS).*[27]

55. In *A last resort?* HREOC recognised that although it may be necessary to briefly detain children for identity, health and security checks, international law imposes a presumption against any detention of children even for these purposes. Therefore to comply with article 37(b) of the CRC, HREOC found that the need for, and period of, detention of children must be closely supervised by an independent body.

56. *A last resort?* recommended that Australia's laws should require independent assessment of the need to detain children within 72 hours of any initial detention.

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[26] Explanatory Memorandum, *Migration Amendment (Detention Arrangement) Bill 2005* (Cth), 10.

[27] This case involved an application for the release from immigration detention of children who had been detained for over 3 years. The High Court rejected the argument that ss 189 and 196 of the Migration Act were invalid to the extent that they would authorize the detention of children. Arguments that the effects of administrative detention were punitive and therefore the power to detain could only be exercised by the judiciary were unsuccessful. See *Woolley, Re; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 80 ALD 1. It is also noted that in *Minister for Immigration and Multicultural Affairs v B Minister for Immigration and Multicultural Affairs v B* (2004) 219 CLR 365, the High Court unanimously held that the Family Court had no jurisdiction (pursuant to the exercise of its welfare power) to release children from immigration detention.

Similar to bail application procedures in the juvenile justice system, if DIAC has been unable to complete its security checks within 72 hours, it might ask a tribunal or court to order continuing detention of the particular children and their parents until those checks are completed.[28]

57. In addition to a prompt individualised assessment of the need to detain in the first place, article 37(b) of the CRC requires that there be an opportunity to seek review of any decision to detain in 'a court or other competent, independent and impartial authority'. Such review is most appropriately provided by a court.

58. The major recommendations of *A last resort?* are provided in Appendix Two of this submission.

59. **Recommendation 4:** The government should adopt the recommendations of *A last resort?* in full, including the independent review of detention at 72 hours.

Long term permanent residents with criminal convictions

60. Under s 501 of the Migration Act, both DIAC and the Minister have the power to cancel or refuse a visa on character grounds. The person then becomes an unlawful citizen[29] and is subject to mandatory detention[30] and removal from Australia.[31]

61. Some people who have had their visas cancelled under s 501 are permanent residents who have been found guilty of a crime in Australia and served their prison sentence. At the end of their prison sentence, their visa has been cancelled and the person is taken directly from prison to the detention centre to be deported.

62. Prior to the introduction of s 501 in 1998, the deportation of non-citizens who had committed criminal offences was covered by ss 200-201 of the Migration Act. Under these sections, the Minister could only deport a non-citizen who had been convicted of a crime punishable by imprisonment for one year or more, if they had been resident in Australia for less than ten years.

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[28] *A last resort?*, pp862-864.
[29] Migration Act, s 15.
[30] Migration Act, s 189.
[31] Migration Act, s 198.

63. The Commonwealth Ombudsman has observed it is unclear whether s 501 was meant to supersede ss 200-201, with its limitations on cancellations.[32] Nonetheless, since 1998, s 501 has operated to cancel the visas of residents of more than ten years.

64. During his inspections of immigration detention facilities, the Human Rights Commissioner has observed that an increasing number of immigration detainees, especially long term detainees, are people whose visa has been cancelled because of a criminal conviction, despite the fact that they have served their sentence.[33] HREOC has also received complaints from long term permanent residents whose visas have been cancelled on completion of their prison sentences, and who have been detained for many months prior to deportation.[34]

65. Many of the long term detainees that the Human Rights Commissioner has interviewed during inspections have lost all contact with their country of origin. Some cannot speak the language of the country they are being deported to. Many of them have no social or familial connection to that country. Some have children, family and friends in Australia.

66. Statistics provided by the Minister to the Senate show that, as at 7 May 2008, of the 25 people in immigration detention whose visas had been cancelled due to their criminal convictions, all but one person had been in Australia for over 11 years, and two had been in Australia for over 40 years. All 25 individuals have been in immigration detention for over 100 days. One person has been detained for over 1000 days. As many as 15 of them had arrived in Australia for the first time when they were under 15 years of age. [35]

67. The Commonwealth Ombudsman has recommended improving aspects of administration of s 501 of the Migration Act.[36] The Ombudsman has also suggested reviewing the application of s 501 to long term permanent residents

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[32] Commonwealth Ombudsman, *Administration of Section 501 of the Migration Act as it applies to Long-Term Residents* , 2006.
[33] Summary of Observations 2006 and 2007.
[34] For example, HREOC, No. 13 Report of an Inquiry into a Complaint of indefinite nature of detention in Prison (2001) Kiet & Ors v. Department of Immigration and Multicultural Affairs http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_13.html.
[35] Question No.423, Question to Senate from Senator Allison, reply by Senator Chris Evans, 17 June 2008.
[36] HREOC understands that DIAC is working to implement some of these recommendations which should improve the reasonableness and fairness of the cancellation process.

and, in particular, if the threshold for cancellation under s 501 should be raised in relation to long term permanent residents. The Ombudsman suggested:

> One option that should be considered by DIMA in that review is whether visa holders who came to Australia as minors and have lived here for more than ten years before committing an offence should not be considered for cancellation under s 501 unless either:
>
> - the severity of the offences committed is so grave as to warrant consideration for visa cancellation, or
> - the threat to the Australian community is exceptional and regarded as sufficiently serious to warrant consideration for visa cancellation.[37]

68. **Recommendation 5:** The government should review the operation of s 501 as a matter of priority, with the aim of excluding long term permanent residents from the provision.

The need for a system of complementary protection

69. HREOC repeats its recommendations to introduce a system of complementary protection.[38] As outlined in Appendix One, Australia has an obligation to protect people who do not fall within the definition of refugee under the *Refugee Convention* but nonetheless must be protected from refoulement under CAT, ICCPR and CRC.

70. A number of countries now provide protection to these people either by creating separate visa categories (complementary or subsidiary protection), or by expanding the definition of refugees who are owed protection.[39]

71. However, Australia currently has no effective system of protection for these asylum seekers. Instead, their claims can only be considered after they have been rejected at each stage of the refugee determination process and then seek a personal intervention by the Minister under s 417 of the Migration Act. Although the Minister may consider Australia's obligations under other treaties, his or her decisions in these cases are non-compellable and non-reviewable. The Minister is

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[37] Commonwealth Ombudsman, *Administration of Section 501 of the Migration Act as it applies to Long-Term Residents*, 200), Recommendation 7.

[38] See HREOC, submission to the 2004 Senate Select Committee on Ministerial Discretion in Migration, available at: http://www.humanrights.gov.au/human_rights/migration_matters.html.

[39] Europe, Canada, and the USA all make some provisions for complementary protection. New Zealand has a Bill before Parliament to introduce complementary protection. For more details on complementary protection systems, see Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press, 2007; A Just Australia and Oxfam, June 2008.

also not obliged to give reasons for his or her decisions, which means that the decisions lack transparency and accountability, and consistency.

72. One of the effects of the current system of Ministerial discretion in these cases is the possibility of prolonged detention in breach of article 9(1) of the ICCPR. To get to the stage at which exercise of the s 417 may be considered, asylum seekers must first make an application for a refugee protection visa and apply for review of that decision. It is not until they have exhausted that process that they can be considered by the Minister under s 417. Once they reach the s 417 stage, the process can take months. Overall, the process can take years.

73. In January 2008, the *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenships Acts and Migration Regulation* recommended that the government give consideration to the introduction of a system of complementary protection.[40]

74. In May 2008, the UN Committee against Torture repeated its recommendation that Australia introduce a system of complementary protection to ensure that Australia no longer relies on the Minister's discretionary powers to meet its non-refoulement obligations under CAT.[41]

75. **Recommendation 6:** In order to ensure that Australia complies with its non-refoulement obligations under the ICCPR, CRC and CAT, the Parliament should introduce a system of complementary protection which incorporates the following features:

- clear criteria setting out when a person should be protected from non-refoulement under the ICCPR, CRC or CAT
- procedures that protect against errors in applying that criteria (due process)

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[40] Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenships Acts and Migration Regulation*, 31 January 2008, Recommendation 19 ('Proust Report').

[41] *Concluding Observations of the Committee Against Torture: Australia*, (Advance unedited version) 40th session, 28 April -16 May2008, CAT/C/AUS/CO/115 May 2008; *Concluding Observations of the Committee Against Torture: Australia*, 25th session, 13-24 November 2000, CAT A/56/44/2001; See also *Report of Senate Select Committee on Ministerial Discretion in Migration*, 2004, [8.82]. HREOC notes that an earlier report in 2000 by the Senate Legal and Constitutional References Committee recommended that the Attorney-General's Department, in conjunction with the then Department of Immigration and Multicultural Affairs (DIMA), consider amending Australia's laws to explicitly incorporate the non-refoulement obligations of CAT and the CRC into domestic law.

- mechanisms to implement Australia's protection obligations for those who meet the criteria (visas).

The criteria for release from detention

76. As discussed above, HREOC submits that the Migration Act should be amended so that detention is the exception, rather than the norm (see above [22]-[29]). Unlawful non-citizens should only be detained according to criteria in conformity with international law.

77. If an unlawful non-citizen does not meet the criteria for detention, then they should be released on bridging visas. If they do meet the criteria for detention, consideration should be given to detaining the person in the most appropriate form of detention for that individual.

78. Currently there are some alternative forms of detention available to some unlawful non-citizens. Although these may be preferable to immigration detention facilities, they are still detention under the Migration Act. As such, transfer of detainees to these alternatives does not constitute release from detention (see above [53] and the discussion of 'Current alternatives to immigration detention facilities' [150]-[181]).

Access to bridging visas

79. HREOC submits that there should be greater efforts to promptly release unlawful non-citizens from detention on bridging visas.[42]

80. HREOC is concerned that bridging visas are not used as often as they could be. For example, in *A last resort?* HREOC found that although bridging visas, as specified under s 72 of the Migration Act, were the most obvious tool for releasing children from immigration detention, this was almost never used to secure the release of unauthorised arrival children.[43]

81. The *Migration (Detention Arrangements) Act 2005* (Cth) also gives the Minister a non-compellable, non-reviewable power to grant a visa to someone in detention when it is in the public interest to do so.[44]

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[42] Summary of Observations 2007, Recommendation 1.
[43] *A last resort?*, Section 6.7.4.
[44] Migration Act, s 195A.

82. HREOC supports the recommendation of Elizabeth Proust that DIAC take steps to overcome the problems surrounding the current process for granting bridging visas, including delays in processing, applicants not knowing whether they should apply for a bridging visa and applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the Minister.[45]

83. **Recommendation 7**: That there should be greater efforts to promptly release people in immigration detention onto bridging visas.

Conditions on bridging visas

84. HREOC is aware that bridging visas in their current form can pose some difficulties for unlawful non-citizens, especially asylum seekers. The conditions and restrictions attached to some bridging visas may significantly impact on the ability of asylum seekers and refugees to exercise their basic human rights, including the right to work, the right to social security, the right to an adequate standard of living and the right to the highest attainable standard of health.[46]

85. As a result of these restrictions, many asylum seekers and refugees face poverty and homelessness.[47] Without the ability to support themselves through work or social security, they are entirely dependent on community services for their basic subsistence. Research has also shown that these pressures can have negative effects on the physical and social well-being of asylum seekers, including anxiety, depression, mental health issues and family breakdown.[48]

86. **Recommendation 8:** Asylum seekers released from immigration detention and living in the community should be granted work rights and access to Medicare. Those who are unable to work should be granted access to financial and medical assistance.

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[45] Proust Report, Recommendation 9.
[46] ICCPR, articles 6; ICESCR, articles 9, 11, 12; CRC, articles 22, 24, 26, 27; CERD, article 5(e).
[47] See HREOC Submission to the Green Paper on Homelessness – Which Way Home? and Factsheet on the Impact of Bridging Visa restrictions on Human Rights at http://www.humanrights.gov.au/human_rights/immigration/bridging_visas_factsheet.html.
[48] Network of Asylum Seeker Agencies Victoria, *Seeking Safety, Not Charity: A report in support of work-rights for asylum-seekers living in the community on Bridging Visa E*, 2005, pp27-30.

Periodic reviews of detention and independent oversight

87. Even if DIAC is required to take a case by case approach to the need to detain, based on a set of criteria in conformity with international law, the ongoing detention of individuals may still lead to prolonged and indefinite detention.

88. Those who are subject to prolonged detention can include those who have no prospect of return. For example, those who cannot be returned to their country of origin as they are stateless, or have a need for protection which is not covered by the *Refugee Convention*. Those in need of protection may also have their visas cancelled due to criminal convictions. These people may effectively be locked in limbo, without resolution of their case.

89. A system of periodic reviews, independent oversight, and access to judicial review, would ensure that the ongoing detention of an individual does not become arbitrary in breach of international law.

90. In 1996, HREOC and a number of peak organisations developed an alternative model of detention for asylum seekers arriving unauthorised to Australia, which was submitted to the then Minister. The model proposed a legislative and regulatory framework for a more flexible and appropriate detention regime in keeping with our international human rights obligations. Although designed with asylum seekers in mind, the model demonstrates how the immigration detention system may be restructured to provide a more humane framework for dealing with people without visas.

91. The model proposes that asylum seekers are released from detention after 30 days maximum, although this may be extended for 30 days on no more than two occasions if additional time is needed to consider grounds for possible denial of release. However, the maximum period which can precede release from detention is 90 days. At 90 days, an independent review tribunal must review the detention status of the applicant, and can grant a bridging visa to the applicant.

92. *A last resort?* indicates that in the case of children, international law specifies an extra presumption against detention. Shorter maximum time limits on detention may need to be set in the case of children and families (see [55]-[57]).

93. **Recommendation 9:** The Migration Act should be amended to include periodic and regular reviews of the need to detain an individual and a system of maximum

time limits for detention. If it is deemed necessary to detain a person beyond the maximum time limit, his or her case must be subject to independent review.

Ministerial discretion and immigration detention

94. HREOC welcomes the findings of the Proust Report to the Minister, and the Minister's consideration of the recommendations on the appropriate use of the Minister's Powers under the Migration Act.[49]

95. Several of the Minister's intervention powers have a direct impact on whether an unlawful non-citizen will be detained or not, the type of detention under which he or she will be held, the length of detention and the prospects of release from detention.

96. For those in immigration detention, the prospect of receiving a Residence Determination or being released into the community following the grant of a visa are dependent on the exercise of a non-reviewable, non-compellable personal discretion by the Minister.

97. Fundamental human rights should not be dependent on the exercise of a personal discretion. Decisions to deprive a person of their liberty or to restore that liberty to them should be made in accordance with clear criteria. Decisions must comply with Australia's human rights obligations and be subject to judicial review.

Ministerial discretion to release persons from detention or make a Residence Determination order

98. The *Migration Amendment (Detention Arrangements) Act 2005* (Cth) gave the Minister new powers to:

- Grant a visa to a person in immigration detention where the Minister is satisfied that it is in the public interest to do so.[50]
- Make a residence determination specifying alternative residence arrangements for a person in immigration detention.[51]

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[49] Senator Chris Evans, Media Release, 'Ministerial intervention powers under review', 9 July 2008.
[50] Migration Act, s 195A. The explanatory memorandum states that the new provision is intended to 'be used to release a person from detention where it is not in the public interest to continue to detain them'.
[51] Migration Act, s 197AB.

99. Both of these powers are non-reviewable[52] and non-compellable.[53] The Minister also has a non-reviewable, non-compellable power to vary or revoke a residence determination.[54]

100. The decision of the Minister not to exercise, or consider exercising, the powers in ss 195A, 197AB and 197AD is a privative clause decision.[55]

101. The non-reviewable and non-compellable character of ss 197AB and 195A means that:

- A decision of the Minister **not** to release a person from immigration detention (pursuant to the grant of a visa) or not to place that person in a less restrictive form of detention (pursuant to a Residence Determination) cannot be challenged in the Courts, even though the effect of that decision is that the person continues to be detained in breach of article 9(1) of the ICCPR.
- A person in immigration detention is unable to challenge the Minister's decision to refuse to exercise his or her powers to grant a visa to that person or to make a Residence Determination, even though the effect of that refusal is that a person continues to be detained in breach of article 9(1) of the ICCPR.

102. Guidelines in relation to the exercise of the power to make Residence Determinations are still to be finalised.

Ministerial discretion to grant visas under s 417

103. HREOC has expressed concerns about the Minister's powers under s 417 of the Migration Act. As discussed in [69]-[75], an application for Ministerial intervention under s 417 of the Act is the primary mechanism for Australia to fulfil its international human rights obligations not to refoule a person at risk of violations under ICCPR, CRC and CAT. However, the Minister's decisions in these cases are non-compellable and non-reviewable. The Minister is also not

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[52] Although, as a result of the High Court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) CLR 476 review is available for jurisdictional error.
[53] See further s195A(4) (in relation to the power to grant visas) and s 197AE (in relation to the making of residence determinations). Both state that the Minister 'does not have a duty to consider whether to exercise the power … whether he or she is requested to do so by any other person, or any other circumstance'.
[54] Migration Act, s 197AD.
[55] Explanatory Memorandum, *Migration Amendment (Detention Arrangement) Bill 2005* (Cth), 20.

obliged to give reasons for his or her decisions, which means that the decisions lack transparency and accountability, and consistency.

Ministerial discretion to cancel visas under s 501

104. HREOC also has some concerns with the operation of Ministerial powers with regard to cancellation of visas under s 501 of the Migration Act. The law allows for a visa to be cancelled by either the Minister or a delegate of the Minister if a person fails the character test. If the decision is made by a delegate – that is, a DIAC officer – the decision may be appealed and reviewed on its merit. However, if the Minister decides to cancel a visa, the decision is subject to only limited review.

105. Further, the Minister is not required to comply with the rules of natural justice under these personal powers, or the Direction issued under s 499 of the Migration Act which provides detailed guidance in respect of the refusal or cancellation of visas. HREOC further notes that what constitutes the 'national interest' as a ground for visa cancellation under these powers is left to the Minister's discretion.[56]

106. As discussed in [60]-[68] of this submission, the result of cancellation under s 501 is detention, prior to deportation. Some people whose visas have been cancelled under s 501 have been detained for years, or deported. This may also have a significant impact on the human rights of a person and their family, including rights of their children.

107. **Recommendation 10**: HREOC recommends that the Minister's powers under ss 417, 501 and 195A and 197AB should be reduced and measures put in place to provide for transparent, accountable decisions which are subject to review.

[56] Submission of HREOC to the Clarke Inquiry on the case of Dr Mohamed Haneef, May 2008, www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.

Transparency and accountability in immigration detention

Internal mechanisms to protect the human rights of immigration detainees

108. The Australian Government contracts a private provider, GSL (Australia), to run its immigration detention facilities. The contract between DIAC and GSL requires regular reporting on a range of service requirements, including the conditions for immigration detainees.[57]

109. While the Immigration Detention Standards (IDS) help ensure that people in immigration detention are treated with respect and dignity, they are not enshrined in legislation and do not provide people in immigration detention with access to effective remedies for alleged breaches of their human rights.

110. HREOC has previously expressed concerns that:

- Aspects of the IDS do not provide sufficient guidance on what service providers must do to ensure conditions in immigration detention comply with international human rights standards.
- The mechanisms for scrutinising whether or not the service provider complies with the IDS are inadequate. This is because the standards on monitoring and reporting place responsibility for compliance on the service provider.[58]

111. HREOC understands that the DIAC is in the process of reviewing the IDS as part of a tender process for a new detention services contract. HREOC is hopeful that the new contract will:

- provide more specific guidance on what steps service providers need to take to comply with human rights standards; and
- improve the accountability mechanisms set out in the IDS.

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[57] Written Replies by the Government of Australia to the List of Issues (CAT/C/AUS/Q/4) prepared by the Committee against Torture to be considered during the examination of the fourth periodic report of Australia (CAT/C/67/Add.7), [140].
[58] HREOC's comments on Australia's compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or punishment, April 2008, http://www.humanrights.gov.au/legal/submissions/2008/080415_torture.html.

112. However, HREOC's preferred approach is for the government to codify in legislation the minimum standards that should apply to all persons in immigration detention.[59] The content of any such codification should be guided by the minimum standards for detention set out in international human rights law.[60]

113. HREOC also notes that in 2008, the UN Committee against Torture recommended that the IDS be codified into legislation.[61]

114. **Recommendation 11**: Australia's laws should codify the minimum standards of treatment in immigration detention facilities, with content guided by international human rights law.

External scrutiny of immigration detention facilities

115. HREOC is one of a number of external agencies responsible for scrutinising conditions in immigration detention facilities.[62] However, HREOC's work in immigration detention has some limits.

116. Under the HREOC Act, HREOC has the power to investigate individual complaints of breaches of human rights in detention under s 11(1)(f).[63] If conciliation is unsuccessful or inappropriate and HREOC finds that there has been a breach of human rights, then HREOC can prepare a report of the complaint, including recommendations for action, for the Attorney General. The report must be tabled in Parliament. Many of these complaints have involved breaches of article 10(1) of the ICCPR which specifies that all persons deprived of their

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[59] HREOC has made this recommendation on a number of occasions. See *A last resort?*, Recommendation 4; HREOC's comments on Australia's Compliance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, April 2008 at http://www.humanrights.gov.au/legal/submissions/2008/080415_torture.html.

[60] Guidance is also provided by the HREOC's Immigration Detention Guidelines (2000) at http://www.humanrights.gov.au/human_rights/immigration/idc_guidelines2000.html.

[61] *Concluding Observations of the Committee against Torture: Australia,* (Advance unedited version) 40th session, 28 April-16 May 2008, CAT/C/AUS/CO/115, May 2008.

[62] Others are the Commonwealth Ombudsman and the Immigration Detention Advisory Group.

[63] 'Human rights' are strictly defined by s 3 of the HREOC Act and relate only to the six international instruments scheduled to, or declared under the HREOC Act. The instruments scheduled to, or declared under the HREOC Act are: (a) the ICCPR; (b) the *Declaration on the Rights of the Child*; (c) the *Declaration on the Rights of Mentally Retarded Persons*; (d) the *Declaration on the Rights of Disabled Persons*, (e) the CRC; and (f) the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.*

liberty shall be treated with humanity and respect for the inherent dignity of the person.[64]

117. However, HREOC's recommendations to provide remedy for breaches of the ICCPR and the CRC are not legally enforceable.

118. Pursuant to its statutory functions, HREOC has also sought to protect the rights of those in immigration detention by conducting inspections of immigration detention facilities for the purpose of monitoring whether the conditions in immigration detention and the treatment of immigration detainees comply with Australia's human rights obligations. To effectively perform these functions, HREOC must have access to immigration detention facilities.

119. HREOC does not have a **specific** statutory power to enter immigration detention facilities.[65] As a matter of practice, HREOC has always obtained access to detention facilities for the purposes of general inspections and investigating individual complaints of human rights breaches by detainees.

120. HREOC does not have the legal powers to effectively monitor Australia's compliance with CAT. This is because CAT is not scheduled to the HREOC Act and has not been declared under s 47 of the HREOC Act.

121. Other agencies which scrutinise immigration detention facilities also face limitations because they are either advisory or their recommendations are not enforceable.

122. The Commonwealth Ombudsman's powers with regard to immigration detention were expanded in 2005 to include reviews of the cases of people who had been in detention for two years or more.[66] The Ombudsman's findings and

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[64] A list of reports on breaches of human rights of individuals in immigration detention can be found at: http://www.humanrights.gov.au/legal/reports_hreoca.html.

[65] It is noted, however, that s 13(1) of the HREOC Act gives HREOC the power to 'do all things that are necessary or convenient to be done for or in connection with its functions'. Section 11(1)(p) of the HREOC Act also gives HREOC the function of doing ' anything incidental or conducive to the performance of' any of the functions in ss 11(1)(a) – (o). Section 26 of the HREOC Act provides that it is an offence for a person to 'hinder, obstruct, molest or interfere with: (a) a member participating in an inquiry or examination under this Act; or (b) a person acting on behalf of the Commission, while that person is holding an inquiry or carrying out an investigation under this Act'. HREOC also has statutory information gathering powers and powers to examine witnesses under ss 21-24 of the HREOC Act.

[66] *Migration Amendment (Detention Arrangements) Act 2005* (Cth).The Commonwealth Ombudsman also has the power to investigate 'action relating to matters of administration' undertaken by a department of a prescribed authority: *Ombudsman Act 1976* (Cth), s 5(1). This means that in the immigration and

recommendations in these cases are tabled in Parliament. However, as with individual complaints investigated by the Ombudsman, the recommendations are not enforceable.

123. The role of the Immigration Detention Advisory Group (IDAG) is advisory.

124. HREOC welcomes the Australian Government's commitment to accede to the Optional Protocol to the CAT (OPCAT). The Optional Protocol establishes a system of regular visits to all places of detention in order to prevent torture and ill-treatment.

125. The domestic and international inspection mechanisms envisaged by OPCAT would improve Australia's ability to prevent torture and other cruel, inhuman or degrading treatment or punishment in places where persons are deprived of their liberty. It would also assist Australia in fulfilling its obligations under the CAT, ICCPR, and CRC.

126. HREOC encourages the government to explore the options for a national mechanism to inspect places of detention in compliance with OPCAT.[67]

127. **Recommendation 12:** HREOC urges the government to accede to the Optional Protocol to CAT which requires the establishment of an independent national scheme of inspection of all places of detention.

The infrastructure and physical environment of immigration detention facilities

128. The Human Rights Commissioner's Summary of Observations following the Inspection of Mainland Immigration Detention Facilities in 2006 and 2007 make various recommendations in relation to the infrastructure and physical environment of mainland immigration detention facilities.[68]

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immigration detention area, the Ombudsman can investigate 'action relating to matters of administration' undertaken by the Department.

[67] The United Nations Committee against Torture has recommended increasing HREOC's power to effectively monitor compliance with CAT. See *Concluding Observations of the Committee Against Torture: Australia*, (Advance unedited version) 40th session, 28 April-16 May2008, CAT/C/AUS/CO/115, May 2008

[68] Summary of Observations 2006 and 2007 at http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3.

129. The Human Rights Commissioner's inspections for 2008 are currently taking place. A report is expected before the end of 2008.

130. Rather than repeat all the findings of past reports here, this submission highlights a few key observations drawn from the Human Rights Commissioner's inspections.

131. In general, while there have been some improvements since 2005 in terms of the physical environment and infrastructure of detention facilities (including the closure of remote facilities such as Woomera and Baxter), immigration detention facilities remain security-driven and prison-like environments. High fences topped by wire, walled-in courtyards, series of locked gates, lack of greenery and outdoor space contribute to the prison-like atmosphere of many facilities. Some facilities are run-down, dilapidated and need to be renovated or restructured.

132. There are some key issues on specific facilities as follows.

Villawood Stage One

133. HREOC welcomes the announcement of a feasibility study into the redevelopment of Villawood Stage 1.

134. Villawood Immigration Detention Centre (VIDC) holds the largest number of detainees of all the centres, many of them long term. VIDC is divided into three Stages of facilities, with the Sydney Immigration Residential Housing (SIRH) in adjacent buildings. Stage 1 provides the most secure facility of the VIDC Stages, perhaps among all facilities in Australia. Hence detainees who are perceived as difficult to manage seem to be placed in Stage 1. This adds to an overall atmosphere at VIDC as security-driven and tense, compared to the atmosphere at the smaller centres.

135. During his inspections of immigration detention facilities in 2007, the Human Rights Commissioner was particularly concerned with the prison-like appearance of Stage 1. HREOC staff were shocked by the dilapidated infrastructure of Stage 1 compared to other centres and facilities they visited. Of particular note were:

- dormitory 1, which is dark, depressing and lacks privacy
- external areas, which do not have enough greenery or outlook
- the bleak visitors facilities

- the dining room, without windows or natural light or decoration.

136. The Human Rights Commissioner was also concerned with the practice of transferring detainees with mental health concerns from Stages 2 and 3, which hold lower security detainees, to Stage 1 for Suicide and Self-Harm (SASH) observation. There are no dedicated observation rooms for detainees on SASH in Stage 2 and 3 of VIDC. As Stage 1 is a completely separate and secure facility where 'high risk' detainees are held, detainees view the move as punitive.[69] This may discourage referrals for SASH among detainees and staff, hence increasing their mental health risks.

137. Although HREOC is aware that there are plans to improve the facilities in Stage 1, there have not been any substantial changes to Villawood Stage 1 to change this view of the infrastructure and environment of that section of the facility. HREOC repeats the recommendation the Human Rights Commissioner made in his report in 2007.

138. **Recommendation 13:** HREOC recommends that VIDC Stage 1 is demolished and replaced with a new facility as a matter of priority. This recommendation is made subject to there being a continuing need for such a secure facility at all.[70]

Perth Immigration Detention Centre

139. HREOC is concerned about the inadequacy of Perth Immigration Detention Centre (PIDC) in its current form, to accommodate anyone other than a small number of short term detainees.

140. In his visit to PIDC in 2007, the Human Rights Commissioner noted that PIDC is a small, cramped centre which is not equipped to house detainees for long periods of time. Some problems include:

- The dormitory accommodation is drab and dark.
- The two outside areas are shabby and claustrophobic. There is no greenery, poor ground covering and it is not conducive to outdoor activities.
- Area 1 bathrooms are shabby and dark.

[69] Summary of Observations 2007, Section 6.3.
[70] Summary of Observations 2007, Recommendation 25.

- There is no Visitors area. It is not appropriate for visiting families to have to meet in the detainee common areas.
- The education area is cramped – English classes are conducted while other detainees are on the computers or trying to access the internet. PIDC needs a dedicated education area.[71]

141. While the Human Rights Commissioner was informed of plans to renovate PIDC substantially during 2008, HREOC understands that most of the planned renovations have been cancelled due to budgetary constraints.

142. **Recommendation 14:** PIDC should be promptly and substantially renovated to address the concerns raised by the Human Rights Commissioner in his 2007 report.

Christmas Island

143. The Human Rights Commissioner has yet to inspect the new facilities on Christmas Island. While HREOC cannot yet comment on the infrastructure of the new centre, HREOC has inspected the previous facilities on Christmas Island in the past.[72]

144. HREOC understands that the new facilities on Christmas Island cost $396 million and can accommodate up to 800 detainees. These facilities are currently empty, although one family of two adults and two children is living in community detention on the island.

145. HREOC is concerned by the remote location of the centre. The problems of providing appropriate support for children in the remote Woomera, Curtin and Port Hedland facilities in particular are set out in *A last resort*?.[73] For example, it becomes more difficult to access legal assistance, specialist health and mental health services, religious instruction and community support. For this reason, UNHCR Guidelines regarding unaccompanied children suggest that:

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[71] Summary of Observations 2007, Section 23.
[72] HREOC visited the old site of detention, the Sports Hall in December 2001. See HREOC Media Release, Christmas Island Detainees Inspection of Conditions, Professor Alice Tay, 14 December 2001; HREOC, *A Report on Visits to Immigration Detention Facilities 2001*, the previous Human Rights Commissioner inspected the Phosphate Hill facility.
[73] Chapter 13, *A last resort?*.

> Facilities should not be located in isolated areas where culturally appropriate community resources … may be unavailable.[74]

146. Christmas Island is more remote than the facilities inspected by HREOC in *A last resort?*. HREOC is also concerned that it may be difficult, and impractical, to place large numbers of families in 'community detention' on the island, if such a number were to arrive in the future.

147. The same concerns about the remoteness of Christmas Island arise for adult detainees.

148. Because Christmas Island is an excised offshore place, detainees are unable to access the same visa application process, free legal advice, and access to review rights which are provided to protection applicants who arrive on the mainland.

149. **Recommendation 15:** Immigration detainees should not be held on Christmas Island.

Current alternatives to immigration detention facilities

150. There are now a number of alternatives to detention in immigration detention centres. A small, but significant, number of detainees have been able to access these alternative forms of detention.

151. The Human Rights Commissioner has visited the Sydney and Perth-based Immigration Residential Housing (IRH) facilities and has also interviewed a small selection of people on Residence Determination arrangements in their homes. He has also inspected some alternative detention arrangements, including the detention of juvenile illegal foreign fishers in Darwin.

152. As discussed above, HREOC recommends legislative amendments to the Migration Act which would facilitate reduced numbers of people held in immigration detention, and increased use of bridging visas for those awaiting the results of applications or awaiting removal.

153. In the event that an unlawful non-citizen is detained, all possible alternatives to immigration detention centres should be considered. HREOC welcomes the

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[74] UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, Geneva, 1997, [7.7].

development of alternative forms of detention, as in general they provide an improved environment for detainees.

154. However, HREOC has some concerns with the alternative forms of detention, as follows.

Immigration Residential Housing

155. There are two IRH facilities currently in operation:

- Sydney Immigration Residential Housing (SIRH), which opened in 2006, continues to operate adjacent to the Villawood IDC, in Sydney.
- Perth Immigration Residential Housing (PIRH), in the suburb of Redcliffe in Perth, opened early in 2007.[75]

156. In 2006 and 2007, the Human Rights Commissioner visited and interviewed detainees at both these facilities.

157. The IRH facilities are undoubtedly softer detention environments than detention centres. IRH facilities aim to provide family-style housing where detainees can experience greater autonomy. Detainees can prepare and cook their own food and make shopping trips and other excursions under the supervision of the detention services provider. The detainees whom HREOC spoke to in these facilities were in general happier to be in IRH than in the IDCs, due to increased freedom, privacy and autonomy.

158. However, in his 2007 Summary Report of Inspections, the Human Rights Commissioner noted some concerns about the IRH facilities.

Low usage of IRH

159. The IRH facilities do not seem to be used to their full capacity. SIRH has a capacity of 40. However, only half that number were detained there during the 2007 inspections. PIRH can hold 20 but only four were accommodated there during the 2007 inspections. This low usage has been a consistent feature.

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[75] *A last resort?* raised a number of concerns with the previous versions of IRH – the Woomera Residential Housing project - Chapter 6. The greatest concern was the separation of families which occurred at the time.

160. HREOC has come across a number of detainees in IDCs who would appear to be suitable for accommodation at the IRH facilities. It is unclear why the facilities have not been used to their full capacity.

Activities at the SIRH

161. HREOC understands that the IRH facilities are designed to allow detainees more autonomy and to allow greater engagement in external activities, and as a result there are few activities provided internally. However, it appears that for various reasons and at various times the provision of external activities is limited, especially at SIRH. When external activities are restricted for operational reasons, or for reasons specific to certain detainees (as was the case with four detainees in the SIRH at the time of our visit in 2007), they are left with fewer activities than if they were in the detention centre.

162. **Recommendation 16:** DIAC should fully utilise the IRH facilities.

163. **Recommendation 17:** DIAC should ensure that detainees in IRH have access to recreational and educational programs.

Children and families at the IRH

164. It is important to recognise that IRH facilities are still closed facilities, and a mix of detainees with different needs, and detention experiences, may all be contained in the same facility. HREOC has been aware of several cases where children and families have been detained in IRH facilities for a significant period of time. While the IRH facilities are significantly better than the IDCs, they are still a closed detention facility and, for children and their families, are inappropriate for anything but the briefest of periods.

165. During 2007 inspections of immigration detention facilities, HREOC spoke to a family with a small child who was detained in IRH for two months before they were given a Residence Determination. The father told us that he had been concerned about the effect of the detention on his daughter, who was distressed at being surrounded by strangers. His wife was also pregnant.[76]

[76] HREOC, Summary of Observations 2007. p20

166. HREOC notes that, unlike Residence Determinations, which are specifically excluded from the principle of last resort in s 4AA, children and their families should only be detained in IRH facilities as a matter of last resort.

167. The Human Rights Commissioner recommended in his 2007 summary report that children and families should only be detained in IRH facilities for four weeks maximum. Unaccompanied minors should only be detained in IRH for two weeks maximum.

168. **Recommendation 18**: Children and their families should only be detained in IRH for a maximum period of four weeks. Unaccompanied children should only be detained in IRH for a maximum period of two weeks.

Residence Determinations

Benefits of Residence Determinations

169. An increasing number of people have been released from detention centres into community detention arrangements under Residence Determinations. On 4 July 2008, 44 people were in community detention on Residence Determinations, 12 of them children.[77]

170. In 2007, the Human Rights Commissioner and staff visited some detainees subject to Residence Determinations.[78] In general, these people were happy with their living arrangements, and said that the arrangements were significantly better than being detained in IDCs or IRH. Most important was the opportunity to engage in community life, the ability to provide a normal living environment for their children, and the privacy and freedom from supervision.

171. Children in particular benefit from the comparative freedom of community detention. They are able to attend school and engage in community life along with their parents. Although it appears that children, like their parents, cannot travel and cannot have other children stay at their houses without DIAC permission, in most other respects they are able to lead a normal life.

172. Based on these findings, the Human Rights Commissioner concluded that within the current immigration detention system, if a person must remain in detention,

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[77] Statistics provided to HREOC from DIAC, 4 July 2008.
[78] Three families with children, two individuals, and one unaccompanied minor.

then Residence Determinations are the best alternative detention arrangement. The Commissioner recommended that DIAC make greater efforts to arrange Residence Determinations for *all people who are detained for three months or more*. The only qualification to this recommendation may be where the person is a demonstrated high security or public health risk.[79]

Narrow criteria for referral for Residence Determinations

173. However, the eligibility criteria for referral to the Minister for Residence Determinations are limited. The Draft Guidelines on the Minister's Detention Intervention Powers (s 197AB) specify that a detainee may be referred to the Minister for Residence Determination in the following circumstances:

    - minor children and their families
    - unaccompanied minors
    - an adult with special needs that cannot be cared for in detention
    - an adult with unique and exceptional circumstances such that failure to recognise them would result in hardship and harm to an Australian citizen or Australian family unit
    - torture and trauma background.

174. During his inspections, the Human Rights Commissioner met many adult detainees who would benefit from a Residence Determination. In some cases this may have helped prevent an escalation of mental health problems.

175. Given that the public interest principle is guiding the exercise of the Minister's discretion in these cases, HREOC considers that the Draft Guidelines unduly restrict the ability of DIAC to refer adults for Residence Determination. It is unclear why the circumstances for the exercise of the discretion need to be 'unique' or 'exceptional circumstances'. HREOC has previously recommended that the Draft Guidelines (which are still to be finalised) be broadened so that all people detained for three months or more are able to apply for Residence Determinations.[80]

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[79] Summary of Observations 2007, Recommendation 5.
[80] Summary of Observations 2007, Recommendation 4.

176. **Recommendation 19:** All people in immigration detention for three months or more should be able to apply for a Residence Determination.

Conditions under Residence Determinations

177. Despite the general satisfaction among detainees with the conditions of Residence Determinations, there are some problems:

    a. Some detainees would like to be able to work to support their family themselves, and to be able to engage in meaningful activities.

    b. Some detainees express a desire to study for a qualification in order to prepare for the future.

178. At present, detainees on Residence Determinations can attend English classes and community education classes, but are not permitted to study for a qualification. Some detainees have been on Residence Determinations for several years. It would be a valuable use of time to study for a qualification, or a module leading to a qualification, while awaiting a decision on their applications

179. **Recommendation 20**: The Minister or DIAC should have discretion to vary the conditions of Residence Determinations so that detainees can engage in meaningful activities such as further education and training leading to occupational qualifications, and work, if appropriate.

Care and welfare of detainees in the community

180. Despite general satisfaction with the conditions under Residence Determinations, some detainees expressed anxiety and depression about their uncertain future, especially parents. In several cases, individuals were accessing mental health services.

181. Community detention provides greater autonomy for immigration detainees. However, for some immigration detainees, especially those with significant health issues, community detention needs to be supplemented with significant community and welfare support. HREOC understands that the government's Community Care Pilot, operating on a trial basis in Sydney and Melbourne, provides greater support for detainees with complex needs to be able to live in the community.

The provision of services in immigration detention facilities

182. The provision of services within immigration detention facilities has a direct impact on the human rights of immigration detainees.

183. As discussed in Appendix One, international law sets out what is required for humane detention consistent with respect for human dignity as required by the ICCPR and CRC.

184. The vulnerability of immigration detainees and the fact that they are not held as suspects or convicted offenders argue strongly for the adoption of international minimum standards. Since immigration detainees are not held as criminal suspects or because they represent a risk to community safety, the most lenient detention regime is appropriate. The primary concern of immigration detention authorities should be one of care for the well-being of detainees.

185. Much of HREOC's work on human rights and immigration detention to date has been involved in examining the services provided to detainees within immigration detention, assessing whether these services have met human rights standards, and making recommendations for action.[81]

186. In March 2000, HREOC produced the *Immigration Detention Centre Guidelines*.[82] These Guidelines are based on the relevant international minimum standards which set out what is required for humane detention. The aim of the Guidelines was to establish a benchmark against which HREOC and others may evaluate the conditions in immigration detention.

187. The Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007 by the Human Rights Commissioner provides the most recent assessment of the conditions in immigration detention facilities.

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[81] HREOC Reports of individual complaints; Summary of Observations 2006 and 2007; *A last resort?*; *Those who've come across the seas.*
[82] HREOC, Immigration Detention Guidelines (2000) at http://www.humanrights.gov.au/human_rights/immigration/idc_guidelines2000.html.

188. While HREOC cannot repeat all the recommendations made with respect to the administration of services in immigration detention, the following are some areas where HREOC has repeatedly raised concerns.[83]

Mental health and detention

189. Mental health services are now better than they were several years ago. In particular:

- The newly introduced system of routine mental health assessments has improved the capacity of mental health services to identify and treat mental illness.
- Mental health staff recommendations or referrals are generally treated seriously by DIAC staff.

190. However, the Human Rights Commissioner, during inspections of facilities in 2006 and 2007, has found that indefinite and prolonged detention continues to be a fundamental problem that has a significant impact on the mental health of detainees, regardless of the delivery of mental health services. It is not possible to properly treat the mental health problems suffered by most immigration detainees. This is because the main way to treat a mental health concern is to remove the primary cause of the problem. In the case of immigration detainees, detention and uncertainty are amongst the main causes and they usually cannot be addressed by mental health professionals.

191. HREOC also has concerns with the lack of observation facilities for detainees on Suicide and Self-Harm (SASH) observation in Villawood Stage 2 and 3, as discussed in the section on 'Infrastructure and Physical Environment' in this submission.

Meaningful activities within detention

192. Many detainees continue to complain of a lack of meaningful activities. Long term detainees in particular wish to do something constructive with their time in detention. The Human Rights Commissioner has found that:

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[83] Additional concerns can be viewed in Summary of Observations 2006 and 2007 at http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html.

- Although there are limited education programs in the centres, these are mostly English classes and are often irregular and not part of a set course of study. Detainees are unable to engage in study leading to qualifications, according to DIAC policy. This is also the case for those on Residence Determinations as well.
- Excursions and home visits provide one means of relieving boredom and mental stress, yet these have not been provided with regularity and were restricted due to security concerns in 2007.

193. HREOC repeats the following recommendations made in the 2007 Report:

194. **Recommendation 21:** DIAC should allow long term detainees to enrol in substantive education courses at TAFE and other institutions, irrespective of whether it leads to a qualification. Enrolment could be by correspondence. DIAC should also consider permitting detainees to attend certain classes in person.

195. **Recommendation 22:** DIAC should ensure a regular and varied excursions program for all detainees in immigration detention facilities, including those in IRH. Detainees on s 501 visa cancellations should not be automatically barred from participating in excursions.

Treatment of detainees by detention staff

196. In general, HREOC has observed an improvement in staff attitudes in immigration detention. DIAC and GSL staff appear more open to requests, suggestions and concerns voiced by detainees. However, HREOC continues to receive complaints from individuals about their treatment within immigration detention facilities. Some of these investigations have resulted in findings of breaches of article 10 of the ICCPR, which affirms that all persons deprived of their liberty shall be treated with humanity and respect for their inherent dignity of the person.[84]

197. For example, the recently released HREOC Report No. 39 (2008) concerned a complaint by two immigration detainees transferred from Maribyrnong Immigration Centre to Baxter Immigration Detention Facility on 17 September 2004. The President of HREOC found that DIAC and GSL had breached articles 7 and 10(1) of the ICCPR by subjecting the detainees to degrading treatment and a

[84] For list of HREOC Reports, see http://www.humanrights.gov.au/legal/HREOCA_reports/index.html.

lack of respect for human dignity during the first seven hour leg of that transfer. In that report, the President made various recommendations including to enhance detainee complaint making procedures and to improve human rights training for the providers of detention services.[85] DIAC and GSL's responses to these recommendations are contained in the report.[86]

198. **Recommendation 23:** DIAC and GSL should increase their human rights training for all current and future employees.

Interpreters and translation

199. GSL and DIAC use the Telephone Interpreting Service for most interpreting needs. While DIAC and GSL staff generally feel that TIS is adequate for basic communication, the Human Rights Commissioner has raised concerns that there are times when TIS is inadequate, or inappropriate, for dealing with complex issues.

200. HREOC acknowledges that where there is a mix of different language groups among detainees, it is not cost-effective to employ on-site interpreters at all centres. However, where there is a large body of detainees from one language group, DIAC and GSL should consider employing an on-site interpreter, or contract an on-site interpreter on a regular basis.

201. The Human Rights Commissioner has also heard a number of times about the difficulties of understanding written communications provided only in English.

202. **Recommendation 24:** DIAC should, where possible, ensure the availability of onsite interpreters when there is a large detainee population from a single language group. This is particularly relevant to VIDC which has a large population of Mandarin-speaking detainees.

203. **Recommendation 25:** DIAC should ensure that all official documents, including documents and notices about the operation of the centres, are provided in the main

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[85] *Report of Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2008] HREOC Report No 39, [324]-325] at http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_39.pdf.
[86] *Report of Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2008] HREOC Report No 39, p 92 -94 at http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_39.pdf.

languages of the detainee population. Detainees should be able to request assistance in translating personal documents.

Appendix One – What are the main human rights principles relevant to immigration detention?

204. The treatment of people in immigration detention must comply with Australia's international human rights obligations. Australia has voluntarily agreed to be bound by:

- The *International Covenant on Civil and Political Rights 1996* ('ICCPR').
- The *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984* ('CAT').
- The *Convention Relating to the Status of Refugees ('Refugee Convention') (1951) and Protocol Relating to the Status of Refugees (1967).*
- The *Convention on the Rights of the Child* ('CRC').

205. Immigration detention is not a prison or correctional sentence. Immigration detainees are detained pursuant to the *Migration Act 1958* (Cth) ('Migration Act') and not pursuant to arrest or charge for any criminal offence. Accordingly, the treatment of immigration detainees should be as favourable as possible, and in no way less favourable than that of untried or convicted prisoners.[87]

Freedom from arbitrary detention

206. The right to liberty is a fundamental human right protected by all major human rights instruments. While there are occasions when the state deprives people of their liberty, article 9(1) of the ICCPR states:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law (ICCPR, art 9(1)).

[87] Rule 94, *Standard Minimum Rules for the Treatment of Prisoners*.

207. The prohibition on arbitrary detention includes detention which, while it may be lawful, is unjust or unreasonable. The United Nations Human Rights Committee ('UNHRC') has stated that to avoid being arbitrary, detention must be a proportionate means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights.[88]

Judicial review of detention

208. Judicial oversight of all forms of detention is a fundamental guarantee of freedom and liberty from arbitrariness. Article 9(4) of the ICCPR provides

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

209. The UNHRC has stated that that the right to challenge the 'lawfulness' of one's detention under article 9(4) must include the opportunity to challenge detention which is arbitrary within in the meaning of article 9(1).[89] In *A v Australia*[90] the UNHRC stated that 'lawfulness' in the context of article 9(4) does not simply mean lawfulness under municipal law.[91] The UNHRC found that:

    a. While the complainant had the opportunity to seek judicial review of his detention, the operation of the Migration Act precluded any chance of success; his detention was automatically lawful in municipal law.[92]

    b. To comply with article 9(4) courts must be empowered to order the release of a person in detention, if their detention is incompatible with article 9(1) or any other provisions of the ICCPR. [93]

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[88] *A v Australia*, Communication No. 560/1993.
[89] UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993 (1997); UNHRC Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002); UNHCR, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003); UNHCR Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (2006).
[90] UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993 (1997).
[91] It is noted that the current and previous Australia Government reject this view of the meaning of 'lawful'. The Government has stated '[u]nder article 9(4), the obligation on States parties is to provide for review of the lawfulness of detention. In the view of the Government, there can be no doubt that the term 'lawfulness' refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary'. See *Response of the Australian Government to the views of the Committee in Communication numbers* 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004, http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications.
[92] See further the discussion in Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (2nd ed), 2004, [7.60].

210. In *C v Australia,*[94] *Bakhtiyari v Australia,*[95] *D & E v Australia,*[96] and *Baban v. Australia,*[97] and *Shams et al v Australia,*[98] the UNHRC confirmed its view that an inability to challenge detention that is incompatible with article 9(1) will result in a breach of article 9(4).[99]

Freedom from torture, cruel, inhuman and degrading treatment and the right for detainees to treated with humanity

211. Article 7 of the ICCPR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

212. Article 10(1) of the ICCPR further provides people deprived of their liberty must be treated with 'humanity and respect for the inherent dignity of their person'.[100]

213. There is some overlap between articles 7 and 10(1) in the case of detained persons. That is, inhuman or degrading treatment or punishment will also constitute a lack of treatment with humanity and respect for the inherent dignity of the human person.

214. However, the UNHRC has confirmed that the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR.[101]

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[93] The UNHRC rejected an argument that there had been no breach of article 9(4) because the complainant had access to the courts but was unable to be released by virtue of the application of division 4B of the *Migration Amendment Act 1992* (Cth); UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993 (1997), [9.4]-[9.5].
[94] UNHRC Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002).
[95] UNHCR, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), [8.2].
[96] UNHCR Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (2006).
[97] Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003).
[98] UNHCR Communication, Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Doc. CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (2007).
[99] A *habeas corpus* application to the High Court does not meet the requirements of article 9 because the High Court cannot consider whether the individual's detention was justified.See further *Bakhtiyari v Australia*, [8.2]; *Shams El Al v Australia*, [6.5].
[100] The minimum requirements for 'humanity' and 'dignity' in detention have been set out by the Human Rights Committee in General Comments and by incorporation of the detailed provisions of the Standard Minimum Rules and the Body of Principles into ICCPR article 10.1.
[101] M. Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 247-8.

215. Further, the UNHRC has confirmed that while article 7 imposes a prohibition against certain forms of treatment or punishment, article 10(1) imposes a positive obligation upon States to protect the humanity and dignity of detained prisoners due to their particular vulnerability.[102]

216. Torture and cruel, inhuman or degrading treatment or punishment is also prohibited by CAT. Under article 3 of CAT, the refoulement of a person to another country if there are substantial grounds for believing that he or she would be in danger of being subjected to torture is prohibited.

Special protection of children's rights

217. International human rights law recognises the rights of those with special needs – in particular children, asylum seekers and refugees – to special protection.

218. The CRC protects comprehensively the human rights of children. Of particular importance with respect to children in immigration detention are that:

- children have a right to non-discrimination[103]
- the best interests of the child must be a primary consideration in all actions concerning children[104]
- detention must be a measure of last resort and for the shortest appropriate period of time; children must not be deprived of their liberty unlawfully or arbitrarily[105]
- no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment[106]
- children in detention have the right to be treated with humanity and respect for the inherent dignity of the person[107]
- children in detention must be able to challenge the legality of their detention before a court or other competent, independent and impartial authority[108]

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[102] UNHRC General Comment 21 (Replaces General Comment 9 concerning humane treatment of persons deprived of liberty), UN Doc HRI\GEN\1\Rev.1 AT 33 (1994), [3].
[103] *Convention on the Rights of the Child*, article 2.
[104] CRC, article 3(1).
[105] CRC, article 37(b).
[106] CRC, article 37(c).
[107] CRC, article 37(a), (c).

- children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma[109]
- asylum-seeking and refugee children are entitled to appropriate protection and assistance.[110]

219. The CRC goes further than the general prohibition on arbitrary and unlawful detention in article 9(1) of the ICCPR, by adding that detention of children should be a measure of *last resort* and for the *shortest appropriate period* of time.

220. While there is no set definition of the 'shortest appropriate period', when read with the 'last resort' principle, it is clear that Australia must consider any less restrictive alternatives that may be available to an individual child in deciding whether and for how long a child is detained. Detention of children should only occur in exceptional cases and, in these exceptional cases, the detention is only permitted for the shortest appropriate period of time.

Special protection of the rights of refugees and asylum seekers

Non-refoulement

221. Article 33 of the *Refugee Convention* prohibits Australia from returning a refugee to a country where his or her life or freedom would be threatened. This obligation of non-refoulement is also implied in articles 6 and 7 of the ICCPR, and article 3 of CAT.

222. The UNHCR has held that a state will contravene its obligations under the ICCPR if it removes a person to another country is circumstances where there is a real risk that their rights under the ICCPR – including the right not to be arbitrarily detained – will be violated.[111]

223. To avoid breaching article 33 of the *Refugee Convention,* a state must have an effective procedure to determine the validity of an asylum seeker's claim to be a refugee.

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[108] CRC, article 37 (d).
[109] CRC, articles 6(2), 39.
[110] CRC, article 22(1).
[111] *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996; *C v Australia* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993.

Prohibition against penalties

224. Article 31 expressly prohibits nations from penalising refugees on account of their illegal entry where they are 'coming directly from a territory where their life or freedom was threatened'.[112]

Presumption against immigration detention

225. The UNHCR Guidelines on Detention of Asylum Seekers state:

    a. The right to liberty is a fundamental right and therefore the use of detention against asylum seekers is inherently undesirable'; and 'as a general rule, asylum seekers should not be detained'.[113]

    b. Immigration detention is especially undesirable for vulnerable people such as single women, children, unaccompanied minors and those with special medical or psychological needs.[114]

[112] The UNHCR have stated the phrase 'coming directly' in article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, 'or from another country where his protection, safety and security could not be assured'. See UNHCR *Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, [4].
[113] UNHCR Guidelines on Detention of Asylum Seekers (1985), Guideline 2.
[114] UNHCR Guidelines, paragraph 2.

Appendix Two – Major recommendations of HREOC's *A last resort?: National Inquiry into Children in Immigration Detention, 2004*

Recommendation 1

Children in immigration detention centres and residential housing projects as at the date of the tabling of this report should be released with their parents, as soon as possible, but no later than four weeks after tabling.

The Minister and the Department can effect this recommendation within the current legislative framework by one of the following methods:

- transfer into the community (home-based detention)
- the exercise of Ministerial discretion to grant humanitarian visas pursuant to section 417 of the Migration Act
- the grant of bridging visas (appropriate reporting conditions may be imposed).

If one or more parents are assessed to be a high security risk, the Department should seek the urgent advice of the relevant child protection authorities regarding the best interests of the child and implement that advice.

Recommendation 2

Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child.*

In particular, the new laws should incorporate the following minimum features:

- There should be a presumption against the detention of children for immigration purposes.
- A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- All courts and independent tribunals should be guided by the following principles:

    - detention of children must be a measure of last resort and for the shortest appropriate period of time
    - the best interests of the child must be a primary consideration
    - the preservation of family unity
    - special protection and assistance for unaccompanied children.

- Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.

Recommendation 3

An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

Recommendation 4

Minimum standards of treatment for children in immigration detention should be codified in legislation.

Recommendation 5

There should be a review of the impact on children of legislation that creates 'excised offshore places' and the 'Pacific Solution'.