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**Submission to the  
 Joint Standing Committee on Migration  
 Inquiry into Immigration Detention**

August 2008

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### **Case Study 1 'Mrs Abbas'**

Mrs Abbas fled a Middle Eastern country with her husband and several young children in the year 2000. The family initially arrived in Indonesia where they experienced a terrible few months of uncertainty and fear.

Eventually they found passage to Australia and were detained in a remote immigration detention centre for nearly a year. Mrs Abbas found the conditions of incarceration and disempowerment unbearable, and reached such a state of desperation that she attempted suicide. She also experienced frightening episodes of dissociation that resulted in her hospitalisation. She suffered from severe depression, and witnessed despair and self-mutilation by other detainees. She was painfully humiliated by the way in which the detainees were treated with contempt and disregarded by guards who called the detainees by number and not by name. Her memories of how she and other detainees were treated remain painful and she finds it difficult to speak about the period.

In the detention centre Mrs Abbas found that her previous role in life was completely taken away from her. She was unable to cook for her family or otherwise care for them in the way that she felt was fit for a mother. The family had no area of privacy of their own. She worried about the strangers who shared their daily life, and about the sights to which her children were exposed. One child was severely traumatised after witnessing a detainee setting fire to himself, and since being released has been seen individually by a counsellor to address the psychological effects.

Mrs Abbas has been diagnosed with Post Traumatic Stress Disorder, the symptoms of which include: depression, anxiety, sleep difficulties, concentration and memory problems, and she has flashbacks to events in the detention centre.

She is very irritable and angry with her children, impatient and suffers from mood swings. She has lost a sense of pleasure in life, and everything feels like burden. She is upset with herself for getting so angry with the children and says that they fight continually. She worries about the effect of her emotional state upon her relationship with her husband, and the level of tension between them.

Mrs Abbas has been in counselling for two years and continues to require therapeutic intervention. She often cancels sessions when she cannot get out of bed due to deep depression and lassitude. On two occasions she has been referred for psychiatric attention for expressed suicidal ideation and for crisis intervention to attempt to deal with her depressive state.

## **Part A Background**

### **1. The Forum of Australian Services for Survivors of Torture and Trauma**

The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) is a national network of agencies that provide specialist torture and trauma rehabilitation services to people from refugee or refugee-like backgrounds. There is a FASSTT agency in each state and territory. FASSTT agencies collectively work with approximately 13,000 clients each year.

Many of our clients were detained in immigration detention facilities in Australia and some are currently in detention. A number of their cases are described in case studies in this submission.

FASSTT agencies seek to combat the impact of torture and trauma on the individual, the family and the community by conducting psychosocial assessments, counselling and advocacy; training and building the capacity of other service providers; conducting research; and facilitating community development.

FASSTT agencies are not-for-profit organisations and receive funding from State and Federal Governments, philanthropic trusts and private donations. FASSTT agencies are the principal contractors to the Department of Health and Ageing to provide services under the Program of Assistance for Survivors of Torture and Trauma. A number of FASSTT agencies are also contracted under the DIAC-funded Integrated Humanitarian Settlement Strategy to deliver short term torture and trauma counselling to new arrivals.

### **2. Standards relating to immigration detention**

A key issue for the inquiry of the Joint Standing Committee is to specify the standards for subjects such as the criteria for length of detention, detention services, alternatives to detention and so forth.

In this regard, the Department of Immigration and Citizenship (DIAC) pertinently acknowledges that in addition to its obligations under Australian law 'the department...has obligations under international law and conventions to which Australia is a signatory.' These are cited as the International Covenant on Civil and Political Rights (ICCPR), the UN Refugees Convention, and the UN Convention on the Rights of the Child and the Universal Declaration of Human Rights.<sup>1</sup>

The conventions and guidance by authoritative entities about their application provide a body of standards on immigration detention. Of particular relevance are:

- Article 9 of the ICCPR (Appendix 1)
- the Executive Committee of the United Nations High Commissioner for Refugees (ExCom) Conclusions on the Detention of refugees and asylum seekers (Appendix 2)
- the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Appendix 3)

It is important to note that the ICCPR applies to all people deprived of their liberty, not only asylum seekers.

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<sup>1</sup> <http://www.immi.gov.au/managing-australias-borders/detention/regulations/legislation-con> (accessed 4 August 2008).

There are two significant domestic sources of standards which FASSTT's submission draws upon:

- the Royal Australian College of General Practitioners' *Standards for Health Services in Australian Immigration Centres*. These were prepared at the initiative of DIAC in response to concerns about health care in immigration detention documented by, among others, the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (the 'Palmer Inquiry') and the Human Rights and Equal Opportunity Commission report on children in immigration detention, *A Last Resort?*
- the *DIAC Detention Health Framework*, also a post-Palmer Inquiry initiative.

### **3. Terminology**

In this submission 'detention' refers to all the forms covered by the Inquiry's terms of reference, including Immigration Detention Centres, Immigration Residential Housing, Immigration Transit Accommodation and community detention.

We note that this usage may be broader than commonly used elsewhere. For example, the UNHCR guidelines on the detention of asylum seekers are concerned with detention as 'confinement with a narrowly bounded or restricted location...where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.'<sup>2</sup> The guidelines do not relate to restrictions on asylum seekers' domicile and residency, which may be described as 'detention' in Australia.

### **4. Children and other vulnerable people in immigration detention**

HREOC thoroughly addressed the plight of children in immigration detention in the inquiry leading to the report *A Last Resort?* FASSTT member agencies provided evidence to that inquiry and we would be pleased to provide copies of the submissions at the request of the Joint Standing Committee on Migration. We commend HREOC's report to the Joint Standing Committee on Migration and therefore do not focus on children in this submission.

UNHCR Guidelines on the detention of asylum seekers at Appendix 3 also provide detailed guidance on the detention of children (see Guideline 6).

FASSTT's submission also does not deal with other vulnerable groups but we trust the Joint Standing Committee on Migration will consider their needs as well. We have in mind for example unaccompanied elderly people and people with a physical or mental disability (see UNHCR Guideline 7) and trafficked women and children.

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<sup>2</sup> 'Guideline 1: Scope of the Guidelines', *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999.

## **5. Summary of recommendations**

FASSTT requests the Joint Standing Committee on Migration to adopt the following recommendations:

### **5.1 Criteria to be applied in determining length of detention**

#### **Recommendation 1**

There should be detailed guidance as to the interpretation of the grounds of detention so that they are not applied in an unduly restrictive manner.

#### **Recommendation 2**

The Ombudsman's six-monthly review of detainees and the Minister's responses to the Ombudsman's recommendations should be tabled in Parliament, as is the case with respect to long-term detainees.

The grounds and procedures for immigration detention should be in the *Migration Act 1958*.

The legislated grounds and procedures should be based on standards provided by the ICCPR as detailed by ExCom and the UNHCR.

### **5.2 Transparency and visibility**

#### **Recommendation 3**

The Government should establish an Immigration Detention Health Review Commission as recommended by the Palmer Inquiry.

### **5.3 Infrastructure options**

#### **Recommendation 4**

Asylum seekers should not be detained in facilities which are prison-like.

#### **Recommendation 5**

Asylum seekers should not be detained in facilities in which people being deported for serious crimes are also detained.

### **5.4 Services**

#### **Recommendation 6**

An asylum seeker on Christmas Island detained in the immigration detention centre or in the community who is assessed as a survivor of torture or trauma should be transferred as soon as reasonably possible to a city where they can receive services from a FASSTT agency.

Torture and trauma survivors on Christmas Island who are released from immigration detention should be transferred to a city where they can receive services.

### **5.5 Community-based alternatives**

#### **Recommendation 7**

There should be a range of community-based alternatives to detention so that decision-makers have the flexibility needed to implement the policy that individuals will not be detained unless it is necessary to do so on specific grounds.

**Recommendation 8**

The government should ensure that asylum seekers in the community are not destitute while they await the determination of their applications for visas.

**5.6 Detention debt****Recommendation 9**

The detention debt policy should be abolished.

If the government does not agree to do so, it should amend the policy so that detention debts are not raised against people who been granted visas on humanitarian grounds.

## Part B Submission on specific inquiry terms of reference

### 6. Criteria to be applied in determining length of immigration detention

#### Case Study 2 'Robert'

Robert spent four years of his adolescence in an immigration detention centre. During this time he learned English and undertook school studies. Following his release, Robert completed Year 12 and entered tertiary study.

Robert has had to pull back on his studies and undertake treatment because he experiences debilitating trauma-related symptoms associated with his detention. In unfamiliar situations he is overwhelmed by floods of panic. He isolates himself from others. He has an exaggerated startle response when a mobile phone rings – detainees were not allowed to have mobile phones in detention, and were punitively treated if caught with a smuggled phone.

#### Case Study 3 'Mary'

Mary and her husband were detained in an immigration detention centre. She was released after one and a half years when she was pregnant. Her husband remained in detention. The impact of her trauma is intergenerational. Her capacity to care for her baby and to interpret and respond to his health needs has been degraded by her heightened levels of anxiety and the strategies that she uses to manage these. The child had 'failure to thrive', and exhibited many classic signs of a traumatised child including watchfulness, lack of playfulness and appearing withdrawn.

Until recently, the government's stated policy was that unauthorised arrivals by boat would generally be detained in immigration detention centres until they were granted a substantive visa or removed. That is, the only criterion of length of detention was simply the time required to process the application for a protection or other visa.

This policy saw thousands of asylum seekers detained for extended periods since the introduction of mandatory detention in 1992.

The impact on the mental health of many of those detained has been very detrimental. This has been documented through our work with numerous clients and by research studies.<sup>3</sup> The evidence indicates that the key factors which have contributed to the damaging impact of detention in immigration detention facilities are:

<sup>3</sup> See for example, Silove D, Austin P, Steel Z (2007) 'No Refuge From Terror: the Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' *Transcultural Psychiatry*, 44(3):359-393; Steel Z, Momartin S, Bateman C, Hafshejani A, Silove DM, Everson N, Roy K, Dudley M, Newman L, Blick B et al (2004) 'Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia' *Australian and New Zealand Journal of Public Health*, 28(6); Siobhanian F, Boyle G J, Bahr M, Fallo T (2006) 'Psychological Status of Former Refugee Detainees from the Woomera Detention Centre Now Living in the Australian Community' *Psychiatry, Psychology and Law*, 13(2).

- A large number of asylum seekers had traumatic experiences including torture prior to arriving in Australia, which gave rise to a wide range of psychiatric and psychological disorders that were unable to be treated in, or were exacerbated by, detention;
- The lengthy duration of detention;
- The uncertainty of the length of detention;
- The detention environment (for example: remoteness; harsh climatic conditions; and prison-like physical arrangements and operational regimes);
- The lack of appropriately trained staff in detention centres, particularly in the area of mental health; and
- The negative and humiliating public characterisation of asylum seekers as, for example, 'criminals', 'illegals' and 'queue jumpers'.

The policy of detaining people until their visa applications were finalised was not only harmful to those detained, it was also inconsistent with Australia's obligations under international law.

The applicable standards as stated by ExCom provide that detention should only be sanctioned when it is necessary on these specified grounds: to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.<sup>4</sup>

The criteria are pertinent to decisions with respect to both whether detention is necessary initially and, if so, the length of detention, because a criterion that warranted detention at one point may have ceased to apply (for example, when identity has been verified).

### **6.1 The new immigration detention policy**

A new policy on immigration detention was announced by Senator Evans, Minister for Immigration and Citizenship, on 29 July 2008. Its key elements include:

- People will be detained only if 'necessary' on specified grounds and for the shortest practical time;
- The Department of Immigration has the onus of proof that detention is necessary;
- The necessity to detain individuals will be regularly reviewed; and
- Children will not be detained in immigration detention centres.

FASSTT welcomes the new policy as a significant reform to treat vulnerable people more humanely and consistently with our international obligations.

### **6.2 Guidance on the interpretation of grounds of detention**

Under the new policy, the specified grounds of necessity that will determine whether detention is necessary from the beginning and subsequently the length of detention are consistent with the grounds agreed by ExCom, cited above.

The specified grounds are however very broad. It will be important that detailed guidance is provided as to how they are to be interpreted so that they are not applied in an unduly restrictive

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<sup>4</sup> Paragraph (b), 'Detention of Refugees and Asylum-Seekers', *Executive Committee Conclusions*, No. 44 (XXXVII) - 1986, paragraph (b).



manner, which would cause unnecessary or prolonged detention. For instance, the new policy states that all unauthorised arrivals will be detained 'for management of health, identity and security risks to the community.' How will DIAC assess and manage these 'risks'? For example, does the ongoing policy of mandatory detention of unauthorised arrivals mean that they will be detained indefinitely until there is evidence that they are *not* a security risk? ASIO sometimes takes many months to provide security clearances. Such an approach would seem to be contrary to the principle of the new policy that the onus is on DIAC to establish the necessity for detention and not to presume that detention is necessary.

UNHCR, the Human Rights Committee and other sources should be consulted. As an example, UNHCR guidelines provide advice on the issue of identity, having regard to the fact that asylum seekers fleeing persecution may arrive with no documents or false documents for good reasons:

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.<sup>5</sup>

The UNHCR and Human Rights Committee have also provided guidance on the interpretation of other grounds such as 'public order' and 'health'.<sup>6</sup>

#### **Recommendation 1**

There should be detailed guidance as to the interpretation of the grounds of detention so that they are not applied in an unduly restrictive manner.

### **6.3 Procedural safeguards**

While FASSTT believes the changes introduced by the new policy are very positive, it believes that further action is needed with respect to the procedural safeguards for decision-making about detention.

To date, only these procedural elements have been announced:

- Detainees' cases will be reviewed by 'a senior departmental official' every three months to certify that further detention is warranted; and
- The Ombudsman has been asked to review cases after six months.

These are inadequate procedures for the determination of whether a person should be deprived of liberty. The review timeframes are far too long (three months and six months); DIAC decision-makers are not independent; the Ombudsman's role is only advisory; and detainees will not be able to challenge a decision that their detention is necessary. It is not apparent that the Ombudsman will be able to undertake the additional reviews without extra resources and there has not been an announcement on this key matter. To ensure public scrutiny, the Ombudsman's reviews and the Minister's responses should be tabled in Parliament, as is presently the case with respect to long-term detainees.

<sup>5</sup> 'Guideline 3(iii): Exceptional Grounds for Detention', *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999.

<sup>6</sup> See O Field, *Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Series*, UNHCR, POLAS/2006/03, April 2006.

The procedural arrangements for the new policy fall well short of procedures specified in the human rights standards. UN Guideline 5 specifies important ‘minimum procedural guarantees’ for detained asylum seekers that include:

- To receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order;
- To be informed of the right to legal counsel and where possible to receive free legal assistance;
- To have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities, followed by periodic regular reviews of the necessity for the continuation of detention; and
- To be able to challenge the necessity of the deprivation of liberty at a review hearing.

UNHCR’s Guideline 5 is consistent with Article 9 of the ICCPR, which is at Appendix 1. FASSTT notes in particular two elements of Article 9 that the new policy does not provide:

- The grounds for detention should be established by law (9(1)); and
- People deprived of their liberty by detention must be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful (9(4)).

FASSTT believes that the Parliament should amend the *Migration Act 1958* to provide that a person should not be detained unless it is necessary to do so on the basis of grounds agreed by ExCom and in accordance with procedures in UNHCR guidelines.

### **Recommendation 2**

The Ombudsman’s six-monthly review of detainees and the Minister’s responses to the Ombudsman’s recommendations should be tabled in Parliament, as is the case with respect to long-term detainees.

The grounds and procedures for immigration detention should be in the *Migration Act 1958*.

The legislated grounds and procedures should be based on standards provided by the ICCPR as detailed by ExCom and the UNHCR.

## 7. Criteria to determine release from immigration detention following health and security checks

The criteria discussed in the preceding section are pertinent to the Joint Standing Committee on Migration's second term of reference. In essence, a person should not be placed in detention initially or should be released from detention on review if it is not necessary to detain them (any longer) on any of the specified grounds.

The primary focus of the new policy on immigration detention is the criteria and procedures to determine whether and for how long it is necessary to detain a person.

It is also important to consider the issue of the *form* of detention either initially or on review. In particular, if detention is deemed to be necessary, what criteria should be used to determine whether a person should be placed in or released from an immigration detention centre, or whether they should be detained in a community-based alternative?

DIAC's *Detention Health Framework* includes a new model to determine the location and type of detention placement 'which aims to reduce the potential of the immigration environment to adversely affect the health of people in detention'. Consideration of an individual's health and wellbeing is an indicator for determining the form and location of detention.<sup>7</sup>

FASSTT's experience and research conducted by others affirms that the prison-like regime and environment of immigration detention centres is particularly damaging. Any person may be adversely affected by such detention. The distress may be especially severe for survivors of torture and trauma.

Appropriate mental health care for torture and trauma survivors cannot be provided in a detention facility. That is so more generally for any person with mental health problems, not just survivors of torture and trauma, as HREOC noted following its inspection of detention centres in 2007:

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 cannot usually be addressed by the mental health professionals.<sup>8</sup>

The government has acknowledged the particularly detrimental impact of immigration detention centres in the 'values' underpinning the new policy which include the principle that detention in immigration detention centres should only be a last resort and for the shortest practicable time. As explained by the Minister for Immigration and Citizenship, this means that immigration detention should be 'in the least restrictive form appropriate to an individual's circumstances.'<sup>9</sup> FASSTT supports this principle and it is consistent with the general human rights principle that the form of

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<sup>7</sup> *Detention Health Framework*, section 2.5, page 35. Mental health is also a consideration in deciding whether a person should be detained or granted a bridging visa. Under the Migration Regulations, a bridging visa may be granted to a person 'who has a special need (based on health or previous experience of torture or trauma) in respect of which a medical specialist appointed by Immigration has certified that the non-citizen cannot properly be cared for in a detention environment.' Migration Regulations 1994 – Regulation 2.20 (9).

<sup>8</sup> Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007*, page 24.

<sup>9</sup> Speech, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System,' 29 July 2008.

restrictions on liberty should be the least intrusive instrument among those which might achieve the desired result.<sup>10</sup>

If the principle is rigorously applied then *no* detainee should be detained in an immigration detention centre unless there are compelling security grounds which necessitate incarceration. It will be important to the welfare of detainees and in particular those who have special needs that the implementation of the principle is not frustrated by inadequate availability of placement options. The availability of options is identified as a potential constraint in the current placement model<sup>11</sup> and the new policy is likely to increase the demand for placements in settings other than immigration detention centres. The expansion of community detention options is clearly essential to ensure that people are only detained in immigration detention centres when a less restrictive form is not appropriate. The expansion of community-based alternatives to detention will also be relevant to the implementation of the principle (see section 11 below).

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<sup>10</sup> Human Rights Committee General Comment No. 27 on Article 12: Freedom of Movement, 1999, CCPR/C/21/Rev1/Add.9.

<sup>11</sup> 'Under the new placement model, placement decisions are based on the person's specific circumstances with associated risk factors, and the availability of the full range of detention accommodation options.' Section 2.5, *Detention Health Framework*, page 20.

## **8. Expanding the transparency and visibility of immigration detention centres**

FASSTT welcomes the greater transparency and visibility of immigration detention centres which has developed in recent years, particularly in response to concerns about the incidence and impact of long-term and unlawful detention. External scrutiny will be enhanced if Australia ratifies the Optional Protocol to the UN Convention against Torture, as the government has indicated it favours.

The Palmer Inquiry and others documented significant deficiencies in a range of areas including access to and adequacy of appropriate health services. Acute problems have been evident particularly with the delivery of the services by external providers, as the following two instances illustrate.

### **(i) Management of detention centre contracts**

In 2006, the Australian National Audit Office reported serious deficiencies in the manner in which the then Department of Immigration and Multicultural and Indigenous Affairs managed detention centre contracts:

(T)he Contract does not adequately specify key responsibilities that are to be met, either by DIMIA or GSL. In particular, clear and consistent definitions are not provided for health standards that are central to detainee welfare. For example; ‘Duty of Care’ and the specific obligations for a subcontractor supplying psychological services are not consistent with the department’s Immigration Detention Standards.<sup>12</sup>

### **(ii) Monitoring of external service providers**

In 2005, the Federal Court found that the government had failed in its duty of care by not ensuring that mental health services provided under contract were adequate for the needs of detainees.<sup>13</sup> Having contracted others to provide the services:

it was imperative that the Commonwealth conduct regular and systematic performance audits of the providers of its psychiatric and psychological service providers, the more so as (a) the extended chain of contracting for service provision left the Commonwealth in no legal relationship with, and remote from, the service providers; and (b) service provision itself was fragmented between various, uncoordinated separate providers. The evidence is that such audits have not occurred up to the time of these hearings.

The evidence suggested that the failure might reflect structural deficiencies rather than an isolated occurrence, the Court stating that: ‘it is difficult to avoid the conclusion that the Commonwealth’s own arrangement for outsourcing health care services itself requires review. Its aptness is open to real question.’<sup>14</sup>

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<sup>12</sup> Australian National Audit Office, ‘Management of the Detention Centre Contracts—Part B: Department of Immigration and Multicultural and Indigenous Affairs’ *Audit Report No. 1*, ANAO, Canberra, 2005–06, paragraph 18.

<sup>13</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*, (2005) 216 ALR 252.

<sup>14</sup> Paragraph 259.

## **8.1 The need for an independent monitor of health services**

FASSTT acknowledges that the Australian Government and DIAC have responded positively to shortcomings identified by the Australian National Audit Office, the Federal Court, the Palmer Inquiry and other sources.

Among other developments, FASSTT welcomed the establishment two years ago of the Detention Health Advisory Group (DeHAG), whose membership includes a nominee of FASSTT. DeHAG 'has contributed to a number of significant initiatives aimed at assuring the standard and quality of an appropriate level and range of physical and mental health care.'<sup>15</sup> These include the development of the *Detention Health Framework* and the *Standards for Health Services in Australian Immigration Detention Centres*. FASSTT is pleased that DeHAG will continue to operate beyond its initial two year appointment.

A key Palmer Inquiry finding that has not been implemented is that there is a need for an independent body to audit the delivery of health services to people detained in immigration detention facilities. The Inquiry concluded that 'an expert body specifically dealing with health matters is required to complement and strengthen (the) efforts of bodies such as the Immigration Detention Advisory Group and the Commonwealth Ombudsman.'<sup>16</sup> It recommended the establishment of an 'Immigration Detention Health Review Commission' which would among other things 'initiate reviews and audits of health care standards and the welfare of immigration detainees.'<sup>17</sup> In order to ensure it was able to undertake its functions effectively, Palmer recommended that the body have a statutory basis and be staffed 'with a core of experienced people with relevant skills.'<sup>17</sup>

The government subsequently decided not to implement the recommendation on the grounds that 'the Commission was not needed given the new oversight role of the Commonwealth Ombudsman for Immigration.'<sup>18</sup>

In the event, the Commonwealth Ombudsman has not included the tasks recommended by the Palmer Inquiry in his oversight of operations of the Department for Immigration and Citizenship. FASSTT is not aware that the Ombudsman has been resourced and staffed for the purpose. The Ombudsman has only observer status on DeHAG.

HREOC has begun to conduct annual inspections of immigration detention facilities including the provision of health services. These are welcome but it is not apparent they were undertaken by the 'experienced people with relevant skills' recommended by Palmer. Nor does HREOC undertake other functions that Palmer recommended for the Commission.

DeHAG does not have statutory powers or its own staff. It cannot and does not undertake the range of functions that the Palmer Inquiry recommended were necessary.

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<sup>15</sup> Detention Health Advisory Group, 'Report against 2006-2007 Work Programme', <http://www.immi.gov.au/managing-australias-borders-/detention/services/dehag>, accessed 23 July 2008.

<sup>16</sup> Page 153.

<sup>17</sup> Recommendation 6.11, pages 153-156.

<sup>18</sup> Question taken on notice, Budget Estimates hearing, 22 May 2006, Immigration and Multicultural Affairs Portfolio, (215) Output 1.3: Enforcement of Immigration Law.

Given the history of serious deficiencies in the provision of health services in immigration detention, monitoring and auditing by an independent expert body is important. This is so whether detention and detention services continue to be undertaken by external agencies or revert to direct government control.

***Recommendation 3***

The Government should establish an Immigration Detention Health Review Commission as recommended by the Palmer Inquiry.

## 9. Infrastructure options for contemporary immigration detention

### Case Study 'Peter'

Peter fled his country of origin fearing arrest and mistreatment in custody as had happened to political dissidents such as he was. He arrived in Australia as an asylum seeker and was detained for more than five years in various detention centres, mainly in remote locations.

Peter had strong Post Traumatic Stress Disorder symptoms in the first three months after his release from detention. Two years after release from detention he still had profound depression and anxiety.

Peter's self confidence is greatly eroded and he continues to have a deep fear of authority. He is frustrated and dismayed by his anxiety and any unexpected or new situation makes him very anxious. He is also worried by his tendency to withdraw socially and inability to trust people.

Peter describes his responses as being as a result of his immigration detention experience. Detention rendered him powerless and he describes being treated brutally and as if he was a criminal.

Peter comments: 'all people coming out of detention are marked by the shock and degradation of their on arrival treatment in Australia. Although ex detainees know in their heads that not all people are alike, it is difficult to believe that emotionally, and so we often feel very alone with no-one to trust.'

The UNHCR guidelines on conditions of detention (Guideline 10) provide a good framework for the elements of immigration detention infrastructure – see Appendix 3.

Two guidelines cover initial health screenings and the provision of medical treatment and psychological counselling and are discussed in the next part of this submission.

A further guideline of importance is that asylum seekers should not be detained in prisons or accommodated with people convicted of or charged with crimes. This is pertinent to Australian practice in two distinct respects.

First, asylum seekers should not be presumed to be dangerous criminals. Accordingly, the design and operation of immigration detention facilities where asylum seekers are detained should not be prison-like. FASSTT clients describe with considerable dismay the use of prison-like practices in immigration detention centres, such as being called by their number rather than their name and nightly checks of their rooms. The fact that immigration detention services have been contracted to companies that also operate prisons may have contributed to the transfer of practices. FASSTT is very concerned that, in the words of the Immigration Minister, the new facility on Christmas Island 'represents a maximum security environment.'<sup>19</sup>

FASSTT commends the government's decision to convert the old Phosphate Hill facilities and pull down the fencing so that it provides 'a community environment' to accommodate children and families and 'small groups of unauthorised' arrivals.

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<sup>19</sup> Speech, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System,' 29 July 2008.



If larger numbers arrive they will be detained in 'a maximum security environment' which the government acknowledges is inappropriate. The Joint Standing Committee must explore options to ensure that such an outcome does not occur.

**Recommendation 4**

Asylum seekers should not be detained in facilities which are prison-like.

The second comment FASSTT makes relating to the guidelines is that asylum seekers should not ordinarily be detained in facilities in which people being deported after visa cancellation for serious crimes are also detained. FASSTT agencies have received reports of asylum seekers in detention being intimidated by other detainees who had histories of violence.

The Ombudsman has reported similar concerns:

More options for alternative forms of immigration detention have led to a reduction in the number of people in IDCs. However, a greater proportion of people now in the IDCs have a criminal background and have had their visas cancelled under s501 of the Migration Act. From complaints and visits to IDCs we have become aware that this is having an adverse effect on the day-to-day experience of people in detention with incidents of assault, theft of personal items and bullying being reported.<sup>20</sup>

**Recommendation 5**

Asylum seekers should not be detained in facilities in which people being deported for serious crimes are also detained.

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<sup>20</sup> Commonwealth Ombudsman, *Annual Report 2006/07*, page 86.

## 10. Services for detained people

Under the new *Detention Health Framework*, all people entering detention are to be assessed to identify potential health risk factors so that appropriate preventive or remedial action may be taken. FASSTT welcomes that the *Detention Health Framework* expressly acknowledges that people who have experienced torture and/or trauma may be particularly vulnerable:

In response to a recommendation by the Immigration Detention Advisory Group, DIAC is developing new guidelines to ensure that people who have experienced previous torture and/or trauma are identified and that their detention placement does not exacerbate their condition. The identification and appropriate treatment of survivors of torture and trauma is a high priority and DIAC is currently working with the Detention Health Advisory Group to develop a best-practice approach.<sup>21</sup>

As noted above, current policy properly has regard to detainees' health as a factor in determining whether to detain (or grant a bridging visa) and in the case of detention whether to place someone in an immigration detention centre or the community. Detainee health should also be a factor in determining whether to detain a person on Christmas Island, whether in the detention centre or in the community.

### 10.1 Services on Christmas Island

The placement of immigration detention facilities in remote locations has inevitably created difficulties for the provision of adequate medical, psychiatric and counselling services. The remoteness of Baxter was a significant factor in the serious shortcomings identified in the litigation described above.<sup>22</sup>

It is important to note that the government's duty of care to detainees arises regardless of location. Remoteness does not provide a justification for inadequate care. As the Federal Court stated:

having made its choice of location, the Commonwealth, not the detainees, should bear the consequences of it insofar as that choice has affected or compromised the medical services that could be made available to meet the known needs of detainees.<sup>23</sup>

This is pertinent to detention on Christmas Island where health services are limited. Island residents and immigration detainees requiring specialist care are taken to the mainland.

It is impractical to establish a service on Christmas Island for survivors of torture and trauma who require counselling. FASSTT therefore submits that any asylum seeker on Christmas Island detained in the facility or in the community who is assessed as a survivor of torture or trauma should be transferred as soon as reasonably possible to a city where they can receive services from a FASSTT agency. Torture and trauma survivors who are not detained should also be transferred to a city where they can access appropriate services.

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<sup>21</sup> Section 5.2.3, page 45.

<sup>22</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*, (2005) 216 ALR 252.

<sup>23</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*, (2005) 216 ALR 252, paragraph 213.

***Recommendation 6***

An asylum seeker on Christmas Island detained in the immigration detention centre or in the community who is assessed as a survivor of torture or trauma should be transferred as soon as reasonably possible to a city where they can receive services from a FASSTT agency.

Torture and trauma survivors on Christmas Island who are released from detention should be transferred to a city where they can receive services from a FASSTT agency.

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

The Joint Standing Committee on Migration is tasked to examine 'options for additional community-based alternatives to immigration detention.' The establishment of additional options is important in order to realise the objective of detaining people only when necessary.

It is also important to consider options for community-based detention in order to realise the objective of using immigration detention centres as a last resort when some form of detention is considered to be necessary.

The Australian Community Care Pilot program established in 2006 provides a good model that should be considered by the Joint Standing Committee on Migration as an alternative to immigration detention. In addition to ensuring that the needs of asylum seekers with complex health and welfare concerns are addressed, the program has seen a far higher rate of voluntary departures for unsuccessful asylum seekers than was achieved when such people were held in immigration detention centres. As well, the financial costs of the program are substantially less than the costs associated with immigration detention centres. FASSTT believes there is sufficient evidence of the program's effectiveness for it to be established on a permanent basis. FASSTT requests the Joint Standing Committee on Migration to obtain a detailed briefing about the program from DIAC and other agencies involved in its operation.

The UNHCR guidelines suggest that governments consider a number of options outlined below. Some involve restrictions which in the Australia context may be called 'community-based detention':

- *Reporting requirements:* an asylum seeker is not detained on condition that s/he reports periodically to the authorities during the status determination procedures;
- *Residency requirements:* an asylum seeker is not detained on condition that s/he resides at a specific address or within a particular area until her/his status has been determined;
- *Provision of a guarantor/ surety:* an asylum seeker is not detained if s/he provides a guarantor who is responsible for ensuring their attendance at official appointments and hearings;
- *Release on bail:* a detained asylum seeker can apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum seekers they must be informed of its availability and the amount set must not be prohibitive.

The UNHCR has published a major review of these and other alternatives employed by governments in many countries and their effectiveness in achieving public policy objectives such as reducing the risk of absconding.<sup>24</sup>

FASSTT believes that decision-makers should have a range of options to choose from so that they can deal with a variety of circumstances, as courts do in the criminal justice jurisdiction. For instance, if there was only a bail/surety scheme, a person might be detained simply because they had no money or guarantor.

It is important that the options include a program such as the Community Care Pilot for people who require particular assistance.

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<sup>24</sup> O. Field, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, UNHCR, POLAS/2006/03, April 2006.

**Recommendation 7**

There should be a range of community-based alternatives to detention so that decision-makers have the flexibility needed to implement the policy that individuals will not be detained unless it is necessary to do so on specific grounds.

Whichever option or options are adopted, there must be provision for asylum seekers' basic survival needs to be met, whether through employment or financial assistance to the asylum seekers or the agencies responsible for their care.

FASSTT and other non-governmental organisations have assisted many clients whose physical and mental health was seriously affected because they had no incomes, being denied permission to work or without entitlement to any social security.

FASSTT is aware that the government is considering the findings of a review of entitlements of people on bridging visas. We believe the issue is critical to the Inquiry's term of reference on alternatives to detention.

**Recommendation 8**

The government should ensure that asylum seekers in the community are not destitute while they await the determination of their applications for visas.

## 12. Detention debt

### **Case Study 'Michael'**

Michael has a debt that will take him over 80 years to repay on the instalments he can manage from his manual employment on casual rates. He is terrified of falling sick and being unable to repay the debt. He is unable to take any leave without pay and therefore cannot travel overseas to visit his elderly parents.

The *Migration Act 1958* requires that non-citizens who are detained are liable to pay the government the costs of their detention. Although the detention debt requirement does not fall within the Inquiry's terms of reference FASSTT considers it of such importance to the regime of immigration detention as to request the Committee to comment on the subject in its report.

Detention debts may be very considerable. In the year ended 30 June 2007, one family was advised that their debt was more than \$340,000.<sup>25</sup> The consequences for people who have not paid or not arranged to repay the debt may be very profound.

They can be refused a visa and/or be prevented from entering Australia. Families may be split if a person who has left owing a detention debt is refused permission to re-enter.

The Commonwealth Ombudsman has recently noted that 'complaints to the Ombudsman's office indicate that the size of some of the debts cause stress, anxiety and financial hardship to many individuals who are now living lawfully in the Australian community, as well as for those who have left Australia.'<sup>26</sup>

FASSTT agencies often see the serious impact of detention debt on their clients. The policy reinforces and prolongs emotions such as shame and guilt which are common effects of torture and trauma, and impedes the recovery of survivors.

FASSTT believes that the detention debt policy should be abolished. At the very least, detention debts should not be raised against people who have been granted visas on humanitarian grounds.

### **Recommendation 9**

The detention debt policy should be abolished.

If the government does not agree to do so, it should amend the policy so that detention debts are not raised against people who were granted visas on humanitarian grounds.

<sup>25</sup> Commonwealth Ombudsman, 'Administration of Debt Waiver and Write-Off,' 2008, page 2.

<sup>26</sup> Commonwealth Ombudsman, 'Administration of Debt Waiver and Write-Off,' 2008, page 3.

## **Appendix 1: International Covenant on Civil and Political Rights**

### ***Article 9***

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## **Appendix 2: Executive Committee Conclusions, Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) – 1986**

The Executive Committee,

Recalling Article 31 of the 1951 Convention relating to the Status of Refugees.

Recalling further its Conclusion No. 22 (XXXII) on the treatment of asylum-seekers in situations of large-scale influx, as well as Conclusion No. 7 (XXVIII), paragraph (e), on the question of custody or detention in relation to the expulsion of refugees lawfully in a country, and Conclusion No. 8 (XXVIII), paragraph (e), on the determination of refugee status.

Noting that the term "refugee" in the present Conclusions has the same meaning as that in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, and is without prejudice to wider definitions applicable in different regions.

- (a) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;
- (b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;
- (c) Recognised the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention;
- (d) Stressed the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens;
- (e) Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review;
- (f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;
- (g) Recommended that refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies;
- (h) Reaffirmed that refugees and asylum-seekers have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations as well as to measures taken for the maintenance of public order;
- (i) Reaffirmed the fundamental importance of the observance of the principle of non-refoulement and in this context recalled the relevance of Conclusion No. 6 (XXVIII).



## Appendix 3 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers<sup>1</sup> (February 1999)

### *Introduction*

1. The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.
2. Of key significance to the issue of detention is Article 31 of the 1951 Convention<sup>2</sup>. Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are **necessary**, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country.
3. Consistent with this Article, detention should only be resorted to in cases of **necessity**. The detention of asylum-seekers who come "directly" in an irregular manner should, therefore, not be automatic, or unduly prolonged. This provision applies not only to recognised refugees but also to asylum-seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one. Conclusion No. 44(XXXVII) of the Executive Committee on the Detention of Refugees and Asylum-Seekers examines more concretely what is meant by the term "**necessary**". This Conclusion also provides guidelines to States on the use of detention and recommendations as to certain procedural guarantees to which detainees should be entitled.
4. The expression "**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. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "**coming directly**" and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression "**without delay**". The expression "**good cause**", requires a consideration of the circumstances under which the asylum-seeker fled. The term "asylum-seeker" in these guidelines applies to those whose claims are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.
5. Asylum-seekers are entitled to benefit from the protection afforded by various International and Regional Human Rights instruments which set out the basic standards and norms of treatment. Whereas each State has a right to control those entering into their territory, these rights must be exercised in accordance with a prescribed law which is accessible and formulated with sufficient precision for the regulation of individual conduct. For detention of asylum-seekers to be

lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.<sup>3</sup>

6. Although these guidelines deal specifically with the detention of asylum-seekers the issue of the detention of stateless persons needs to be highlighted.<sup>4</sup> While the majority of stateless persons are not asylum-seekers, a paragraph on the detention of stateless persons is included in these guidelines in recognition of UNHCR's formal responsibilities for this group and also because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum-seekers and stateless persons. The inability of stateless persons who have left their countries of habitual residence to return to them, has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

### ***Guideline 1: Scope of the Guidelines***

These guidelines apply to all asylum-seekers who are being considered for, or who are in, detention or detention-like situations. For the purpose of these guidelines, UNHCR considers detention as: **confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.** There is a qualitative difference between detention and other restrictions on freedom of movement.

Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.

When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

### ***Guideline 2: General Principle***

As a general principle asylum-seekers should not be detained.

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

### ***Guideline 3: Exceptional Grounds for Detention***

Detention of asylum-seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.<sup>5</sup>

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.<sup>6</sup>

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with EXCOM Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if **necessary**:

(i) to verify identity

This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based

This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim.<sup>7</sup> This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order

This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centres, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.<sup>8</sup>

#### **Guideline 4: Alternatives to Detention**

Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.

Alternatives to detention which may be considered are as follows:

(i) **Monitoring Requirements**

Reporting Requirements: Whether an asylum-seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum-seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum-seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments.

Residency Requirements: Asylum-seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.<sup>2</sup>

(ii) **Provision of a Guarantor/ Surety.** Asylum seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.

(iii) **Release on Bail.** This alternative allows for asylum-seekers already in detention to apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum-seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.

(iv) **Open Centres.** Asylum-seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.

These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum-seekers while allowing asylum-seekers basic freedom of movement.

#### **Guideline 5: Procedural Safeguards<sup>10</sup>**

If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:

(i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;

(ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;

(iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;

(iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;

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

Detention should not constitute an obstacle to an asylum-seekers' possibilities to pursue their asylum application.

### ***Guideline 6: Detention of Persons under the Age of 18 years<sup>11</sup>***

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, **minors who are asylum-seekers should not be detained.**

In this respect particular reference is made to the Convention on the Rights of the Child in particular:

Article 2 which requires that States take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members;

Article 3 which provides that in any action taken by States Parties concerning children, the best interests of the child shall be a primary consideration;

Article 9 which grants children the right not to be separated from their parents against their will;

Article 22 which requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance;

Article 37 by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time.

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

If children who are asylum-seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison- like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma.

Children who are detained, benefit from the same minimum procedural guarantees (listed at Guideline 5) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.<sup>12</sup>

### ***Guideline 7: Detention of Vulnerable Persons***

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories:<sup>13</sup>

Unaccompanied elderly persons.

Torture or trauma victims.

Persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary.

### ***Guideline 8: Detention of Women***

Women asylum-seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

Where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum-seekers should be granted access to legal and other services without discrimination as to their gender,<sup>14</sup> and specific services in response to their special needs.<sup>15</sup> In particular they should have access to gynaecological and obstetrical services.

### ***Guideline 9: Detention of Stateless Persons***

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.<sup>16</sup>

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally.<sup>17</sup> Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

### **Guideline 10: Conditions of Detention<sup>18</sup>**

Conditions of detention for asylum-seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points in particular should be emphasised:

- (i) the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- (ii) the segregation within facilities of men and women; children from adults (unless these are relatives);
- (iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;
- (iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;
- (v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;
- (vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;
- (vii) the opportunity to continue further education or vocational training;
- (viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;
- (ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries etc.;
- (x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

### **Conclusion**

The increasing use of detention as a restriction on the freedom of movement of asylum seekers on the grounds of their illegal entry is a matter of major concern to UNHCR, NGOs, other agencies as well as Governments. The issue is not a straight-forward one and these guidelines have addressed the legal standards and norms applicable to the use of detention. Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry

requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based.

1. These Guidelines address exclusively the detention of asylum seekers. The detention of refugees is generally covered by national law and subject to the principles, norms and standards contained in the 1951 Convention, and the applicable human rights instruments.

2. The Geneva Convention of 28 July 1951 Relating to the Status of Refugees.

3. Views of the Human Rights Committee on Communication No. 560/1993, 59th Session, CCPR/C/D/560/1993.

4. UNHCR has been requested to provide technical and advisory services to states on nationality legislation or practice resulting in statelessness. EXCOM Conclusion No. 78(XLVI) (1995), General Assembly Resolution 50/152, 1996. See also Guidelines: Field Office Activities Concerning Statelessness. (IOM/66/98-FOM70/98).

5. Article 9(1) International Covenant on Civil and Political Rights. (ICCPR) Article 37(b) UN Convention on the Rights of the Child. (CRC) Article 5(1) European Convention for the Protection of Human Rights and Fundamental Freedoms. (ECHR) Article 7(2) American Convention on Human Rights 1969. (American Convention) Article 5 African Charter on Human and People's Rights. (African Charter)

6. Article 9(1), Article 12 ICCPR, Article 37(b) CRC Article 5(1)(f) ECHR Article 7(3) American Convention. See also UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings. Although it must be recognised that most individuals will be able to articulate their claims, this may not be the case in those who are victims of trauma. Care must be taken when dealing with these individuals as their particular problems may not be apparent, and it will require care and skill to assess the situation of a person with mental disability or a disoriented older refugee who is alone. See UNHCR Guidelines on The Protection of Refugee Women. Women particularly those who have travelled alone may have been exposed to violence and exploitation prior to and during their flight and will require counselling. Art 15 UDHR. See EXCOM No. 78(XLVI) Article 6 African Charter. EXCOM Conclusion No. 44(XXXVII)

7. EXCOM Conclusion No. 44 (XXXVII)

8. Sub Committee of the Whole of International Protection Note EC/SCP/44 Paragraph 51(c).

9. Art 16, Art 12 UDHR

10. Article 9(2) and (4) ICCPR Article 37(d) CRC Article 5(2) and (4) ECHR Article 7(1) African Charter. Article 7(4) and (5) American Convention EXCOM Conclusion no. 44 (XXXVII) UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. 1988 UN Standard Minimum Rules for the Treatment of Prisoners 1955

11. 12. 13. 14. 15. 16. 17. Article 10(1) ICCPR 1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. UN Standard Minimum Rules for the Treatment of Prisoners 1955 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty

18. Article 10(1) ICCPR 1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. 1955 UN Standard Minimum Rules for the Treatment of Prisoners. 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.