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Joint Standing Committee on Migration
Department of House of Representatives
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By email: Anna.Engwerda.Reps@aph.gov.au

28 July 2008

Dear Inquiry Secretary

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Joint Committee.

Matthew Zagor and Susan Harris Rimmer are in Canberra, Eve Lester is in Melbourne and Alice Edwards is available by phone from the UK. We stand ready to give evidence at a hearing if required.

Kind regards

Susan Harris Rimmer
President, Australian Lawyers for Human Rights

Australian Lawyers for Human Rights

Submission to the Joint Standing Committee on Migration

Inquiry into immigration detention in Australia

About ALHR

1. Australian Lawyers for Human Rights (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

2. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of about 1200 lawyers, with active National, State and Territory committees.

3. Through training, information, submissions and advocacy, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

Overview

4. Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make submissions on the inquiry into immigration detention. ALHR has made a number of submissions on immigration-related matters to the Australian Parliament over the past decade, including on immigration detention. In addition to making the present submission, ALHR has also joined a consortium of other human rights agencies in submitting a statement of principles to this inquiry, coordinated by A Just Australia.

5. ALHR has long had serious concerns about human rights issues relating to immigration detention more broadly. These have included holding people in incommunicado-like conditions, conditions of detention more broadly, problems of accountability and transparency as a result of the engagement of private contractors, and access to counsel. However, the

principal focus of this submission is on the issue of mandatory detention and the well-documented human rights consequences for 'unlawful non-citizens'. We retain this focus, because in our opinion each of the other identified problems is either directly or indirectly referable to the fact that detention is automatic and not subject to the checks and balances that are normally associated with measures to deprive people of their liberty. With this in mind, ALHR believes that this Committee should focus on concrete law reform proposals that deliver an effective model of judicial oversight, accountability, monitoring and intervention in relation to immigration detention.

6. Introduced in May 1992, the mandatory detention policy was a hastily crafted knee-jerk response to applications in the Federal Court by a small group of Cambodian asylum-seekers for release after having spent more than two years in immigration detention. The government of the day could not have known the far-reaching consequences: the untold psychological damage the policy would cause; the millions (even billions) it would unnecessarily cost the Australian taxpayer; and the international notoriety Australia would acquire as a result. Nor could it have known the way in which the mandatory detention policy would be misused during the last decade or so in an effort deliberately and calculatedly to demonise and torment people genuinely seeking the international protection Australia placed on offer more than fifty years ago through its ratification of the *Convention relating to the Status of Refugees* in 1951. Although the mandatory detention policy has survived constitutional challenge in the High Court, this attests more to the historical and highly exclusionist context in which the *Commonwealth Constitution* was drafted than the propriety of such laws in the very different context of the present day.

7. To date, much excellent work has been done on the problems inherent in Australia's current system of immigration detention by, *inter alia,* Federal Parliamentary Committees and parliamentarians, the UN Human Rights Committee, the Commonwealth Ombudsman, the Palmer and Comrie

inquiries and reports, expert psychological and medical research and analysis, and the Human Rights and Equal Opportunity Commission.[i] The common thread through these reports has essentially been that time and time again mandatory detention has proven itself inherently and irredeemably problematic, and ultimately irreconcilable with basic human rights and respect for human dignity. In particular, mandatory detention is extremely likely to result in arbitrary and indefinite detention, which in turn has taken an unacceptable psychological toll on a vulnerable community. Amongst the most serious violations that have been specifically identified include the right not to be arbitrarily deprived of liberty, the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment, the right to humane treatment when deprived of liberty, the right to the highest attainable standard of physical and mental health, and the best interests of the child.

8. However, despite some notable efforts on the part of some concerned parliamentarians to remedy the scourge of mandatory detention, which efforts resulted in some of its harsher elements being softened, it is alarming that some of the most critical findings and recommendations made by this range of authorities have gone unheeded. Moreover, well researched, more effective and cheaper alternative models, which would still ensure the integrity of the migration system have been brushed aside.[ii] This inquiry is therefore a most welcome opportunity genuinely to revisit the issues in a meaningful and rights-respecting way.

9. In 2008, more than sixteen years since the scheme was first introduced, the fundamental problem of the mandatory detention regime remains in tact; namely, the continuing lack of judicial oversight. It is this problem that ALHR regards as the central issue that the Joint Standing Committee on Migration should address. It is our strong submission that failure to remedy this central issue of judicial oversight will not only perpetuate the well-documented human rights violations of individual detainees but will

also cast a grave and enduring shadow over Australia's international reputation.

Detention in International Law

10. The background papers prepared by HREOC for the national inquiry into the detention of children in 2002 provide a comprehensive description of the nature of the international legal obligations incumbent upon Australia for detained persons generally. We therefore do not repeat them here. However, we note that it is well established that mandatory detention of asylum seekers in this fashion is in breach of Australia's international legal obligations. Although the applicable instruments will be well known to members of the Committee, it is worth recalling that the list of international instruments, guidelines and jurisprudence that Australia's mandatory detention policy currently offends is long, and includes:

- *Convention relating to the Status of Refugees* (1951) and the associated *Protocol (*1967) (Refugee Convention);
- *International Covenant on Civil and Political Rights* (1966) (ICCPR);
- *International Covenant on Economic Social and Cultural Rights* (1966) (ICESCR*)*;
- *UNHCR Revised Guidelines on Detention of Asylum Seekers (*UNHCR Guidelines);*]*
- UN *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (Beijing Rules);
- UN *Rules for the Protection of Juveniles Deprived of their Liberty* (1990) (Riyad Rules);
- Conclusions of the Executive Committee of the UNHCR (ExCom);
- UN *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Torture Convention);
- UN *Convention on the Rights of the Child* (1989) (CROC); and the

- UN *Convention for the Protection of the Human Rights of All Migrant Workers and Members of their Families* (1990) (MWC).

11. While ALHR acknowledges that detention of asylum seekers and others may be necessary in certain circumstances, it does so with two strong provisos. First, that independent judicial oversight is vital to ensure that members of the public service charged with detaining individuals do so mindful of the weight responsibility associated with a decision to deprive an individual of their liberty. Second, that while detention may be permissible in certain circumstances, the presumption against depriving a person of his or her liberty should only be disturbed exceptionally and for as short a time as possible, in particular in order to:

    (a) verify identity;

    (b) determine the elements on which the claim for refugee status or asylum is based;

    (c) deal with cases where asylum seekers have destroyed their travel and/or identity documents or have fraudulent documents with which they intend to mislead the authorities of the state in which they intend to claim asylum;

    (d) protect national security or public order.[iii]

12. Consistent with the jurisprudence of the Human Rights Committee concerning its interpretation of 'arbitrary detention' under article 9 ICCPR, and the recommendations of the HREOC, we would add the following criterion:

    (e) where there is a demonstrable likelihood that the person will abscond.[iv]

13. It is important to emphasise that these grounds should be narrowly construed, consistent with the principle that the right to personal liberty only be infringed in exceptional circumstances and where reasonably necessary. None should be permitted to justify prolonged detention, and

detention of all individuals should remain subject to regular periodic judicial review.

14. To detain asylum seekers for reasons other than those listed above, or for an unjustifiable period for whatever reason, risks detaining an asylum seeker arbitrarily and therefore unlawfully, at international law. As the Human Rights Committee has been at pains to note, the 'lawfulness' of detention at domestic law is not the measure of 'arbitrariness' of detention at international law.[v] Rather, in order to satisfy standards of lawfulness, detention must be for a *proper purpose*, and *proportionate* to that purpose, to achieve its aim to be lawful. Principles of non-discrimination apply at all times.

15. Detention contrary to these reasons may also be in violation of specific principles of the 1951 Refugee Convention, including an obligation upon Australia as a state party not to penalize asylum-seekers on account of their illegal entry or stay.[vi]

The current position in Australian domestic law

16. Currently, under the *Migration Act 1958* (Cth) (Migration Act), all persons who arrive in Australian without authorisation are automatically detained. This policy captures so-called 'onshore' asylum seekers as a class of people, that is, people who arrive in Australia without authorisation and claim refugee status. It also covers those outside the territory of Australia, or in its 'migration zone', who are either within Australia's jurisdiction or under its effective control.

High Court cases

17. The first case before the High Court of Australia to deal with the issue of mandatory detention was the December 1992 decision in *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs.* Although the Court found the mandatory detention legislation to be constitutional, the Court was persuaded that detention was for a limited

period of time; 273 days, or roughly nine months. However, the legislative framework of the detention model would subsequently reveal that the 273 day limit, on which the 'detention clock' could stop for a number of reasons could effectively hold individuals in detention for years not months.

18. A number of subsequent decisions of the Court have assisted in cementing the most harshly constructed immigration detention scheme globally. In August 2004 the High Court of Australia declared by a bare majority (4:3) that failed asylum seekers who have nowhere to go and who pose no danger to the community can be kept in immigration detention indefinitely, and possibly for life. In *Al-Kateb v. Godwin* (2004) 219 CLR 562, *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* (2004) 219 CLR 664, and *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 the majority of the High Court said that provided the Immigration Minister retained the intention of eventually deporting or removing such people, the detention would be valid even if it was potentially indefinite, and regardless of its potentially traumatizing effect on detainees, including children. This is a more extreme consequence than the criminal sanction for even the most heinous of crimes.

19. Yet, there were members of the High Court bench who were clearly discomfited by what they recognized as a manifest injustice notwithstanding their view that such an outcome was constitutionally permissible. As Justice McHugh, in the majority, observed the absence of an entrenched constitutional provision protecting individual liberty allows for such tragic consequences. Indeed, according to His Honour, the aliens power permits such detention as an incident of the purpose of excluding non-citizens from the Australian community.

20. The minority judges, however, said that once there was no reasonable prospect in the foreseeable future that a failed asylum seeker could be deported or removed, continued detention would no longer be for a

purpose within the aliens power in the Constitution. In essence, detention had to be time limited. Otherwise, detention would become 'punitive' and thus in breach of the constitutional principle that punishment exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. In this context, it must be remembered that asylum-seekers arriving here without authorization have committed no offences and broken no laws.

21. The majority in *Al Kateb* indicated that the principle in *Chu Keng Lim v. Minister for Immigration* (1992) 176 CLR 1—limiting immigration detention to what was 'reasonably necessary' for a valid purpose—had been misunderstood. The *Lim* principle applied when a person was detained under the government's general executive power (e.g. for quarantine, mental health reasons, arrest pending trial etc). In contrast, Parliament had unlimited power to detain 'aliens' unless otherwise prohibited by the Constitution.

22. The result is judicial endorsement, albeit by a bare majority and in the face of strong dissent, of the constitutionality of a regime which removes the most fundamental of human rights in a democratic society, breaches international norms, has significant potential to severely traumatize an already vulnerable category of persons, and (in the absence of specific criteria for detention) is effectively unreviewable by either administrative or judicial bodies except on the most limited of grounds. As noted, even within the majority itself there were significant qualms about the human rights consequences of such a draconian power.

23. In contrast, the United Nations Human Rights Committee said in *A v. Australia* (560/93) 3/4/97 that national courts should be able to consider in a particular case whether detention is necessary in the circumstances.[vii] This could occur through the adoption of provisions ensuring freedom from arbitrary detention.

Palmer Report

24. In July 2005, the Palmer Report found that Ms Cornelia Rau had been unlawfully detained for over a decade and called for changes to the culture of the Department of Immigration and Citizenship. Mr Palmer also found real issues with the way section 189(1) was being understood and administered by the Department, especially with regard to what comprised 'reasonable suspicion' in any particular fact situation. He recommended stringent training measures for DIAC staff handling compliance matters.

25. Given that the 2004 High Court decisions on indefinite detention show a divergence with international law norms, and that Mr Palmer found that section 189(1) was not being administered properly, or even legally – a point reiterated in subsequent reports by the Commonwealth Ombudsman[viii] – ALHR recommend that the relevant provisions of the Migration Act require urgent amendment.

26. The Human Rights Committee has further held that in order for detention not to be determined to be arbitrary, individuals must have the right to an 'effective' periodic review of the reasons for their detention before a court. In order for the review to be 'effective, the court must have the power to order their release.[ix]

Changes to visa categories

27. ALHR believes that some detention issues would be ameliorated by changes to visa categories themselves. For example, ALHR is a strong advocate of the need for Australia to enact a form of complementary protection for those in need of protection who do not fit the criteria for the grant of refugee status. This would be consistent with international trends in international protection, notably in the European Union,[x] and with Australia's obligations under core human rights treaties, including the Convention against Torture. The 2006 private members bill introduced by Senator Andrew Bartlett is a good illustration of how complementary protection can be incorporated within migration law. We acknowledge the

work done by DIAC in revising Ministerial Series Instruction 386, but reform to the Act is needed. Current reliance on the Minister's non-compellable, non-appellable discretion to grant visas for humanitarian grounds under section 417 *Migration Act* is manifestly unreliable and unsatisfactory.

28. We also note that the use of section 501 leads to extended detention cases as noted by the Commonwealth Ombudsman and is in need of reform.

Optional Protocol to the UN Convention against Torture

29. The Optional Protocol to the UN Convention Against Torture is currently open for ratification. Adhering to the Optional Protocol would require the Commonwealth to set up or designate a single or several national preventive mechanisms with an independent mandate to inspect any places of detention where persons are deprived of their liberty, including unannounced visits. The OPCAT process is a good opportunity to review monitoring procedures for existing immigration detention centres.

30. ALHR recommends to the Committee's attention the year-long Human Rights Audit of the ACT's Correctional Facilities undertaken in July 2007. The audit is an excellent example of the practical measures necessary to make detention facilities human rights compliant.

31. ALHR recommends to the Committee a forthcoming article by ALHR member Alice Edwards, "The Optional Protocol to the Convention against Torture and the Detention of Refugees" (International and Comparative Law Quarterly, forthcoming 2008) (attached).

Conclusion

32. ALHR will also provide the Committee with a supplementary submission in response to the Minster's announcement in Canberra today.

RECOMMENDATIONS

- That the current system of mandatory detention of asylum seekers be replaced with a community model (based on the Refugee Council/Hotham Mission proposal), and that a proportionality test be added for all other applicants.
- That migration legislation be amended so as to provide for detention only on those grounds noted in paragraphs 13-14 above.
- That the Migration Act be amended so as to provide that the principles of an assumption of liberty of person and a commitment to the humane treatment of detainees be made explicit as objectives of the legislation, complementing s4AA concerning the detention of children.
- That it be made explicit that the grounds for detention be applied, to the fullest extent possible, consistent with these principles and in light of the vulnerability of each potential detainee, especially those from countries in conflict or who have experienced personal trauma.
- That detention of people in the Christmas Island facility be abandoned, or at least restricted to circumstances in which is it is essential, and that health and security screening be expedited in cases involving children and protection visa applicants to within a 7 day period.
- That the detention of criminal deportees and section 501 cases be urgently reviewed, as these cases often become long-term detainees.
- That until mandatory detention is discontinued, the Immigration Ombudsman and/or HREOC and the Regional Office of UNHCR should be granted the same powers of complete access to detainees that the Immigration Detention Advisory Group had, for the purpose of regular, rigorous and independent monitoring of Australia's detention centres.
- That the Australian Government should offer full cooperation to the Regional Office of UNHCR when it comes to its detention monitoring

responsibilities under its mandate and should offer early opportunities to interview persons who arrive by boat or as stowaways.

- That Australia should ratify the Optional Protocol on the Convention Against Torture. In ALHR's view the national preventative mechanism should be located in HREOC.
- That the Committee should consider the issue of NGOs visiting detention and levels of access to detainees, and how this access could be better facilitated and managed.
- That the Committee consider the following articles as a comparative perspective on detention practices:
    - Ophelia Field and Alice Edwards, "Alternatives to Detention of Asylum Seekers and Refugees" in UNHCR (2006) Legal and Protection Policy Research Series, Geneva. http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf.
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[i] For example:

- Those who've come across the Seas: Detention of Unauthorised Arrivals HREOC (1999);
- Joint Standing Committee on Foreign Affairs Defence and Trade- Human Rights sub-committee - A report on visits to Immigration Detention Centres - tabled 18 June 2001;
- The Flood Report - Inquiry into Immigration Detention Procedures in February 2001;
- Two reports by the Commonwealth Ombudsman in March 2001 - Report of an Own Motion Investigation in the Department of Immigration and Multicultural Affairs Immigration Detention Centres; Report of an Own Motion Investigation into Immigration Detainees held in State Correctional Facilities;
- Joint Standing Committee on Migration produced Not the Hilton - Immigration Detention Centres: Inspection Report in September 2001.

[ii] See further the Refugee Council 'Alternatives to Detention' paper – online http://www.refugeecouncil.org.au/current/alt2.html, accessed July 2008.

[iii] See ExCom Conclusion Number 44, UN Doc. A/AC.96/688, paragraph 128. Note further Note on International Protection, 15 August 1988: UN Doc. A/AC/96/713, paragraph 19 which provides that 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] See recommendations in HREOC, *Those who've come across the seas: Detention of unauthorised arrivals* (Commonwealth of Australia 1998) at 235.

[v] *A v Australia* Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April 1997.

[vi] For more on this, see A. Edwards, 'Tampering with Asylum: The Case of Australia' (2003) 15(3) *Int'l J. Ref. L.* 192-211.

[vii] This point has been repeatedly reiterated by the Committee. See, for instance, *Bakhtiyari v Australia*, United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003.

[viii] See, for instance, Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs – Report on referred immigration cases: Mr T*, March 2006—04|2006, 17-23.

[ix] See, also, C v. Australia, HRC Case No. 900/1999.

[x] See EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.