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# Submission

Made jointly by the Law Institute of Victoria, Liberty Victoria and The Justice Project

## Inquiry into Immigration Detention in Australia

To: Joint Standing Committee on Migration

A submission from the Law Institute of Victoria, Liberty Victoria and The Justice Project

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## 1 Introduction

This submission to the Joint Standing Committee on Migration *Inquiry into immigration detention in Australia* (the Inquiry) is made jointly by the Law Institute of Victoria (LIV), Liberty Victoria and The Justice Project.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 13,000 members. LIV members have experience in representing people in immigration detention and the LIV has been active in advocating for the rights of refugees and asylum seekers held in detention centres. In October 2005, the LIV adopted a policy statement on refugees and asylum seekers, in response to the Human Rights and Equal Opportunity Commission *Report of the national inquiry into children in immigration detention. A last resort?*

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It traces its history back to 1936 and has been campaigning for human rights for 70 years. Liberty Victoria has long campaigned for Australia to fully recognise and respect the basic rights and freedoms of refugees, asylum seekers and non-lawful non-citizens in detention. In 2001, Liberty Victoria litigated on behalf of the asylum seekers on board the *Tampa* who were denied access to Australian courts. Liberty has continued to lobby politicians and publicly campaign for the humane and just treatment of asylum seekers.

The Justice Project was established in 2004 by Kurt Esser, The Right Honorable Malcolm Fraser, Julian Burnside QC, Young Australian of the Year (2004) Hugh Evans and others. The Justice Project arose out of concerns regarding the violation of the basic human rights of refugees, asylum seekers and others needing humanitarian protection and aims to stand up for the principle of basic human rights in our society. Since its inception, The Justice Project has continued to campaign against mandatory immigration detention and offshore processing and to agitate for a fair and humane refugee policy.

Together, the LIV, Liberty Victoria and The Justice Project (the joint authors) welcome the review of immigration detention law and policy and urge the government to act upon the findings of the Inquiry.

We note that a public hearing is proposed in Melbourne on Thursday 11 September 2008 and we would welcome the opportunity to appear and give oral evidence to the Inquiry.

## 2 Terms of reference

The joint authors wish to address the following terms of reference:

- (TOR1) the criteria that should be applied in determining how long a person should be held in immigration detention (see section 4 below)
- (TOR 2) the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks (see section 4 below)
- (TOR 3) options to expand the transparency and visibility of immigration detention centres (see section 5 below)

- (TOR 4) the preferred infrastructure options for contemporary immigration detention (see section 6 below)
- (TOR 5) options for additional community-based alternatives to immigration detention by:
  - (a) inquiring into international experience; (see section 7 below)
  - (b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework; (see section 7 below)
  - (c) comparing the cost effectiveness of these alternatives with current options (see section 8 below).

Set out below are our general comments followed by our responses to select elements of the Inquiry's terms of reference.

### 3 Executive summary

#### 3.1 General comments

Since its introduction in 1992, immigration detention has been the subject of many significant reports and inquiries in Australia. In formulating this submission, the joint authors have drawn particularly on the following:

- (a) Human Rights and Equal Opportunity Commission (HREOC) reports:
  - *Summary of Observation following the Inspection of Mainland Immigration Detention Facilities (2007)* (HREOC *Observations of Mainland Immigration Detention Facilities* Report);
  - *Report of the national inquiry into children in immigration detention. A last resort?* (2004) (HREOC *Children in Immigration Detention* Report); and
  - *Report of an inquiry into the detention of unauthorised arrivals, Those who've come across the seas* (1998) (HREOC *Unauthorised Arrivals* Report).
- (b) Commonwealth and Immigration Ombudsman reports:
  - *Department of Immigration and Citizenship administration of detention debt waiver and write-off* (2008) (Ombudsman *Debt Waiver* Report);
  - *Department of Immigration and Citizenship: Report into referred immigration cases: detention process issues* (2007) (Ombudsman *Detention Process Issues* Report);
  - *Department of Immigration and Multicultural Affairs administration of s 501 of the Migration Act 1958 as it applies to long-term residents* (2006) (Ombudsman *s 501* Report);
  - *The inquiry into the circumstances of the Vivian Alvarez matter*, (Report No. 03/2005) (Ombudsman *Alvarez* Report);
  - *Referred immigration cases: Mr T and Mr G*, (Report Nos. 04/2006 and 06/2006 respectively) (Ombudsman *Referred Immigration* Reports); and

- *Referred immigration cases on Mental Health and Incapacity and Children in Detention* (Report Nos. 07/2006 and 08/2006) (Ombudsman *Mental Health and Children* Report).
- (c) Joint Standing Committee on Migration reports:
  - Review of Audit Report No. 1 2005-2006: Management of Detention Centre Contracts - Part B;
  - Not the Hilton: Immigration Detention Centres Inspection Report (2000);
  - Report of inspections of detention centres throughout Australia (1998); and
  - Asylum, Border Control and Detention (1994).
- (d) Palmer, M, AO APM, *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau* (2005) (Palmer Report); and
- (e) Roche, M, *Detention Services Contract Review* (2006) (Roche Report).

This submission is made in light of the speech delivered by Senator Chris Evans, Minister for Immigration and Citizenship, on 29 July 2008 to the Centre for International and Public Law, Australian National University.

The joint authors applaud the government's commitment to restore integrity to Australia's immigration system. We note that Cabinet has endorsed a policy containing seven values that will guide new detention policy and practice and we strongly support the commitment to fundamentally reform the immigration detention system so that "detention in Immigration Detention Centres is only to be used as a last resort and for the shortest period practicable".<sup>1</sup>

The joint authors recognise that mandatory detention will remain in the following situations:

- (a) All unauthorised arrivals, for management of health, identity and security risks to the community;
- (b) Unlawful non-citizens who present unacceptable risks to the community; and
- (c) Unlawful non-citizens who have repeatedly refused to comply with their visa conditions.<sup>2</sup>

Our comments below regarding criteria for determining length of detention and release following health and security checks (section 4) therefore relate to these categories of detention.

The joint authors agree with Minister Evans that the immigration detention infrastructure is "ageing and inappropriate"<sup>3</sup> and we hope that our comments below provide constructive alternative pathways for a new immigration system.

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<sup>1</sup> Senator Evans, Minister for Immigration and Citizenship, "New Directions in Detention, Restoring Integrity to Australia's Immigration System", speech delivered to Centre for International and Public Law, Australian National University (29 July 2008), ("Minister's speech") 8 (key immigration value number 5).

<sup>2</sup> Ibid 7 (key immigration value 2).

The joint authors commend the government commitment to reform and we urge the Department of Immigration and Citizenship (the Department) to implement our recommendations, as set out below.

### 3.2 Summary of recommendations

In relation to TOR 1 and 2, the joint authors recommend that:

1. Legislative provision for indefinite detention should be immediately abolished (see section 4.1);
2. Detention of all unauthorised arrivals, for management of health, identity and security risks to the community should be limited to a maximum period of one month (see section 4.2);
3. Where the Department considers that detention of an unlawful non-citizen is necessary because the person presents an unacceptable risk to the community, or because the person has repeatedly refused to comply with visa conditions, the Department should be required to apply to the Federal Magistrates Court for an “immigration detention order” (see section 4.3);
4. The criteria governing the court’s discretion in making an “immigration detention order” should include:
  - (a) the age and sex of the applicant;
  - (b) the applicant’s physical and mental health;
  - (c) whether the applicant is accompanied by family members;
  - (d) the applicant’s country of origin;
  - (e) whether any person is willing to offer a surety to secure the applicant’s continued attendance for processing;
  - (f) whether the applicant presents an unacceptable risk to the community; and
  - (g) any other factors which the court considers relevant in the particular circumstances (see section 4.3);
5. Section 256 of the *Migration Act* should be amended, so that the Department and others who are detaining persons in immigration detention are *required* to provide application forms for a visa and access to independent legal advice (see section 4.2);
6. Detention of unlawful non-citizens pending removal should be allowed only when removal is an immediate practical possibility (see section 4.4);
7. In the case of s501 cancellations, persons should be allowed to live with their family until removal is an immediate practical possibility (see section 4.5);

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<sup>3</sup> Ibid 14.



8. The courts should have the power to order the removal of a person from immigration detention if they are satisfied that, in the particular case, continued detention is unjustified (see section 4.6);
9. The government should establish a cost-efficient, fair and transparent system of awarding adequate compensation to persons wrongly detained (see section 4.7);
10. Section 209 of the Migration Act should be revoked; in the event that s209 is retained, unlawful non-citizens who are subsequently granted a visa should be excluded from the operation of s209 (see section 4.8);

**In relation to TOR 3, the joint authors recommend that:**

11. Offshore detention (including on Christmas Island) should be abolished (see section 5.1);
12. The boundaries of Australia's migration zone should be redefined to allow persons to apply for asylum in Australia where they are in Australian sovereign territory, including its territorial waters (see section 5.1);
13. Third parties, particularly the media, be permitted greater access to immigration detention centres, whilst fully respecting detainee privacy (see section 5.2);
14. Any monitoring and surveillance by detention facility providers must be strictly regulated to protect detainee privacy and to promote transparency (see section 5.3);
15. The operation, management and control of immigration detention centres must return to the federal government (see section 5.4);
16. For the purposes of the current tender process, the federal government should impose strict operating and management requirements on private contractors operating immigration detention centres (see section 5.5);
17. Private contractors operating immigration detention centres should be regulated under s273 of the *Migration Act 1958* and the Department should be required annually to report to Parliament in respect of the operation of the regulations (see section 5.6);
18. Complaints procedures should be reviewed, ensuring that a range of processes are available to detainees to address the range of complaints that arise (see section 5.7);
19. Minimum standards of treatment in immigration detention should be codified in legislation to enable detainees to obtain a direct remedy upon breach of those standards (see section 5.7);

**In relation to TOR 4, the joint authors recommend that:**

20. HREOC's recommendations in its 2007 report *Observations of Mainland Immigration Detention Facilities Report* should be immediately implemented (see section 6.1);

21. All detainees should have immediate access to an independent lawyer who is also a migration agent (section 6.2.1);
22. Detainees should have access to facilities which allow them to communicate directly with their legal representatives, without interference by Departmental officers (see section 6.2.2);
23. Different categories of detainees should be held at different immigration detention centres, so that unauthorised arrivals detained for management of health, identity and security checks are held separately from those unlawful non-citizens who present unacceptable risks to the community and those unlawful non-citizens who have repeatedly refused to comply with their visa conditions (see section 6.2.3);
24. Immigration detention centres should provide a greater variety of meals than that which is currently provided and that self-catering areas in detention should be significantly improved (see section 6.2.4);

**In relation to TOR 5, the joint authors recommend that:**

25. The *Guidelines on the Minister's Detention Intervention Powers* should be amended to allow more flexibility and transparency in residence determinations (see section 7.3.1);
26. There should be a single Bridging Visa with full work rights and Medicare entitlements for asylum seekers at all stages of the refugee determination process (see section 7.3.2);
27. Following successful identification, health and security checks (during an initial period of immigration detention, whether in an Immigration Detention Centre or Immigration Residential Housing) that:
  - (a) there is community release of asylum-seekers with reasonable reporting conditions;
  - (b) if an asylum seeker is deemed to be a flight risk, then bail, bond or a surety sureties options should be considered; and
  - (c) if the asylum-seeker is destitute or having difficulty integrating into the community, then accommodation at an open Reception Centre (as defined in 7.6.3.1) be made available (see section 7.5).
28. For asylum seekers deemed to be a low to moderate flight risk, we recommend that:
  - (a) Australia adopt a reporting system whereby asylum seekers are required to report in person to a designated authority, in a reasonable location which is accessible to the asylum seeker and at a reasonable frequency, such as once a month; and
  - (b) Australia considers linking the provision of income support to reporting conditions if there is a concern about compliance.
29. Following successful identification, security and health checks, where an asylum seeker is considered to be a flight risk, we recommend that:

- (a) Australia adopts a bail and/or bond system (as defined in section 7.5.2.1) of community release where both legal advice and legal aid is provided to all detainees who require it;
- (b) Decisions on the granting of bail should be made on a case by case basis by the Federal Magistrates Court (FMC) to establish conditions of release;
- (c) Decisions should be reviewable in an independent and timely appeal process; and
- (d) Bail and reporting conditions should be imposed on an individual basis according to the asylum seeker's financial and other circumstances.

If asylum seekers cannot afford bail, we recommend:

- (e) Non-governmental agencies provide volunteer sponsors/sureties and a fixed place of accommodation which asylum seekers can nominate at bail hearings, similar to the Toronto Bail Program.
30. Following successful identification, security and health checks, if the asylum-seeker is destitute or having difficulty integrating into the community, we recommend that:
- (a) Australia adopts an open Reception Centre-style of accommodation where security is less stringent compared to initial identification detention and where detainees have access to a multitude of resources; and
  - (b) Australia adopts a caseworker system as employed in Sweden in order to respect detainees' human rights and dignity and to empower them by education about their rights and detention processes.

#### **4 Criteria for determining length of detention and release following health and security checks**

Currently, ss189 and 196 of the *Migration Act 1958 (Cth)* (the *Migration Act*) (together) provide that "unlawful non-citizens", that is, those who have come to Australia without permission, will remain in detention until (a) they are granted a visa, (b) they are deported, or (c) they are removed from Australia at their own request or upon the rejection of their attempts to secure a visa.

We recognise that immigration detention has a legitimate role to play in some circumstances. The particular circumstances will have an important bearing on whether detention is justifiable, and for how long. These circumstances are described below and we make recommendations on how they should affect criteria for detention, consistent with the recommendations contained in the HREOC *Children in Immigration Detention Report*.<sup>4</sup>

The joint authors welcome the government's commitment to detain unauthorised arrivals only for the purposes of health, identity and security checks.<sup>5</sup> We support the government proposal in the Minister's speech that following these initial

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<sup>4</sup> At p 137.

<sup>5</sup> Minister's speech, above n 1, 9.

checks, the onus of proof will be reversed so that the Department will have to justify why a person should continue to be detained.

The joint authors consider that legislative amendment is necessary to implement the proposed change in onus of proof and to repeal legislative provision for indefinite immigration detention.

#### 4.1 Indefinite detention should be abolished

The joint authors strongly oppose the current legislative provision for indefinite immigration detention in ss189 and 196 (outlined above) of the *Migration Act*.

In *Al-Kateb v Godwin*<sup>6</sup> (*Al-Kateb*), the High Court of Australia held that the “unambiguous” wording of ss189, 196 (and 198) authorise the indefinite detention of an unlawful non-citizen in circumstances where there is no real prospect of removing them. The Court found that the legislative powers are valid under s51(xix) of the Constitution. This ruling means that indefinite immigration detention in Australia is deemed legal and constitutional.

The joint authors are strongly of the view that regardless of the circumstances of detention, the current provision for indefinite detention cannot be justified. We submit that legislative amendment is required to remove the possibility of indefinite detention.

The joint authors welcome the government’s key immigration value that “detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.”<sup>7</sup> We agree that regular review of the length of persons’ detention is vital to ensure that detainees are lawfully detained and to increase transparency in the immigration system.<sup>8</sup> We submit however that “regular review”, as proposed by the Minister, is insufficient to ensure that persons have a reasonable prospect of release if legislative provision for indefinite detention remains.

In support of our proposal to amend the *Migration Act*, the joint authors highlight the following:

##### (a) Mental health

Numerous mental health studies<sup>9</sup> have shown that it is seriously damaging for a person to be incarcerated in circumstances where they cannot know when, if

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<sup>6</sup> (2004) 208 ALR 124.

<sup>7</sup> Minister’s speech, above n 1, 8 (key immigration value 4).

<sup>8</sup> See Commonwealth and Immigration Ombudsman, *Department of Immigration and Citizenship: Report into referred immigration cases: detention process issues* (2007).

<sup>9</sup> See e.g. “Long-term immigration detention and mental health” (below n14); B McSherry, “The government’s duty of care to provide adequate health care to immigration detainees” *Journal of Law & Medicine* 13(3):281-4, 2006; D Silove and Z Steel (eds), *The Mental Health and Well-being of On-shore Asylum Seekers in Australia*, University of New South Wales, Psychiatry Research and Teaching Unit, Sydney, (1998), A Sultan and K O’Sullivan, “Psychological Disturbances in Asylum-seekers Held in Long Term Detention: A Participant Observer Account” (2001) 175 *MJA* 593; Z Steel, S Momartin, C Bateman, A Hafshejani, D Silove, N Everson, K Roy, M Dudley, L Newman, B Blick and S Mares, “Psychiatric Status of Asylum-seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia” (2004) 28 (6) *Australian and New Zealand Journal of Public Health* 527; S Mares, L Newman and M Dudley, “Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention” (2002) 10 *Australasian*

ever, they will be released. The effect is magnified for people whose English is limited or non-existent, because they will be less likely to understand what is happening to them. We emphasise that “regular review” in itself does not remove the possibility of indefinite detention.

**(b) Administrative, not punitive**

International law recognises that, in order to avoid the characterisation of arbitrariness, detention should not continue beyond the period for which there is appropriate justification.<sup>10</sup> Administrative detention should be imposed only for the purpose of health and security checks. The government has recognised that mandatory indefinite detention is unacceptably punitive in character.<sup>11</sup>

Guideline 3 of the United Nations High Commissioner for Refugees (UNHCR) *Revised guidelines on applicable criteria and standards relating to the detention of asylum seekers (Guidelines on Detention)* states: “The detention of asylum seekers 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”.<sup>12</sup>

**(c) Judicial oversight**

The *Migration Act* currently allows mandatory indefinite detention based on the reasonable suspicion of an immigration officer or a police officer that a person is an unlawful non-citizen.<sup>13</sup> Once detained, the detention is not reviewable by the courts. This breaches the fundamental common law principle of *habeas corpus* and Article 9 of the *International Covenant on Civil and Political Rights*<sup>14</sup> (ICCPR). (See further below, section 4.5).

**(d) Condemnation by human rights watchdogs**

Australia’s system of mandatory indefinite detention has been universally condemned by human rights non-government organisations (NGOs),<sup>15</sup> as well as our domestic statutory human rights body, the Human Rights and Equal Opportunity Commission (HREOC).<sup>16</sup>

**(e) International treaty obligations**

Australia’s policy of mandatory indefinite detention is in breach of its international treaty obligations, including obligations under: *International Covenant on Civil and*

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*Psychiatry* 91; D Silove, P McIntosh, R Becker, Risk of re-traumatisation of asylum-seekers in Australia. (1993) *Aust NZ J Psychiatry*, 27: 606-612.

<sup>10</sup> *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993

<sup>11</sup> Above n 1, 5.

<sup>12</sup> UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seek* (1999), available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>.

<sup>13</sup> *Migration Act*, s 189.

<sup>14</sup> *International Covenant on Civil and Political Rights* G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966), entered into force 23 March 1976.

<sup>15</sup> See eg, *By Invitation Only: Australian Asylum Policy*, Human Rights Watch (2002); Amnesty International, Australia: The impact of indefinite detention: the case to change Australia’s mandatory detention regime, ASA 12/001/2005 (<http://amnesty.org/en/library/asset/ASA12/001/2005/en/dom-ASA120012005en.html>).

<sup>16</sup> See for example HREOC, *Report of the National Inquiry into Children in Immigration Detention, A last resort?*, (2004); *Report of an inquiry into the detention of unauthorised arrivals, Those who’ve come across the seas*, (1998).

*Political Rights (ICCPR); Convention on the Rights of the Child*,<sup>17</sup> and *Convention Relating to the Status of Refugees*.<sup>18</sup> These contraventions have been repeatedly highlighted in the comments and observations of United Nations treaty bodies and Special Rapporteur Reports.<sup>19</sup> Minister Evans acknowledges that the United Nations Human Rights Committee has made 14 adverse findings against Australia in immigration detention cases.<sup>20</sup>

The joint authors wish to highlight to the Inquiry comments of the Human Rights Committee in *D & E v Australia*,<sup>21</sup> in which the Committee confirmed that Australia's mandatory immigration detention regime is a violation of article 9(1) of the *ICCPR*. *D & E v Australia* concerned a family of Iranian asylum seekers who were kept in mandatory immigration detention for over three years. The Committee observed:

[Australia] has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with [Australia's] immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for the authors, including two children, for [three years and two months], without any appropriate justification, was arbitrary and contrary to article 9, paragraph 1 of the Covenant.

For reasons (a) – (e) above, the joint authors urge the Inquiry to recommend the abolition of legislative indefinite detention. We propose that “regular review” of the length of detention be subject to objective criteria, which require the Department to justify the ongoing need for detention to a court or tribunal (see comments below in section 4.6 in relation to wrongful detention and judicial oversight and section 7 in relation to alternatives to detention).

We make the following recommendations in relation to objective criteria for determining length of detention and release in the following categories:

- (a) Unauthorised arrivals, for management of health, identity and security risks to the community;
- (b) Unlawful non-citizens who present unacceptable risks to the community; and
- (c) Unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

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<sup>17</sup> *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

<sup>18</sup> *Convention Relating to the Status of Refugees*, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954.

<sup>19</sup> See eg, *Concluding observations of the Human Rights Committee: Australia 24/07/2000 (A/55/40)*; UN Special Rapporteur, *Report on Australia's human rights compliance while countering terrorism (2006)*; Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia. Executive Summary, UN Doc E / CN4 / 2003 / 8 / Add2 (24 October 2002).

<sup>20</sup> Minister's speech, above n 1, 13.

<sup>21</sup> *D & E v Australia*, Communication No 1050/2002 (11 July 2006), para 7.2.

## **4.2 Detention of all unauthorised arrivals, for management of health, identity and security risks to the community**

A non-citizen who enters Australia without a visa is liable to be detained under s189 of the *Migration Act*. Such people might or might not have identification papers, and they might or might not be seeking asylum.

The joint authors emphasise that all unauthorised arrivals should be able to exercise their right to apply for protection, or some other visa they may be eligible for, on arrival. To facilitate this, we consider that all unauthorised arrivals should have the right to immediate access to legal advice. Access to accurate independent legal advice on arrival is vital to ensure that detainees understand visa options open to them.

The joint authors are of the view that s256 of the *Migration Act* should be amended, so that the Department and others who are detaining persons in immigration detention are *required* to “give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention”.

### **4.2.1 Persons not seeking asylum**

Detained non-citizens who are not seeking asylum are likely to be returned peremptorily to their countries of origin, but might need to be held in detention for a short time while travel arrangements are made.

The joint authors submit that greater accountability is required for the treatment of such persons. Specifically, the Department should be required to report on the number of unauthorised arrivals “turned around” at airports and whether such persons were adequately advised about visa options. Persons arriving unauthorised and not seeking asylum should be allowed the opportunity to apply for any visa for which they may be eligible.

Where persons are not eligible to apply for any visa and are to be removed, the joint authors consider that detention should not in any case exceed one month. Thereafter, such persons should be released into the community on conditions equivalent to bail. We consider that a system equivalent to bail will ensure that such persons remain available for removal when removal becomes a practical possibility. (On bail and reporting requirements, see recommendations in section 7 below.)

### **4.2.2 Persons seeking asylum in Australia**

Those detained non-citizens who are seeking asylum are, at present, liable to be detained until they receive a visa or until they are removed from Australia. The joint authors welcome the government’s commitment to detain unauthorised arrivals only for management of health, identity and security risks to the community. We applaud the commitment that children will not be detained in an immigration detention centre. Following these initial checks, persons will be detained only where need is established.

The joint authors submit that in most cases detention beyond initial identity, health and security checks will not be justified. There is little or no incentive for genuine refugees to disappear into the community pending processing of their protection visa application, because Australia is a destination country and not a

transit country for most asylum-seekers.<sup>22</sup> Statistics show that a very high percentage of unauthorised arrivals are successful in their claim for protection.<sup>23</sup>

The joint authors propose that mandatory detention on arrival be limited to a maximum of one month, to enable identity, health and security checks to be performed. We are of the view that one month is sufficient to perform these checks, particularly given advances in computer and database technologies. After this period, unlawful non-citizens should be released into the community while their immigration status is resolved, unless the Department is able to justify continued detention to a judge or magistrate on the basis described below in section 4.3.

#### **4.3 Unlawful non-citizens who present unacceptable risks to the community and unlawful non-citizens who have repeatedly refused to comply with their visa conditions**

Where the Department considers that detention of an unlawful non-citizen is necessary because the person presents an unacceptable risk to the community, or because the person has repeatedly refused to comply with visa conditions, the Department should be required to apply to the Federal Magistrates Court for an “immigration detention order”. The court should have discretion to grant such an order if, in a particular case, the court is persuaded that a longer period of detention is justified. The criteria governing the court’s discretion should include:

- (a) the age and sex of the applicant;
- (b) the applicant’s physical and mental health;
- (c) whether the applicant is accompanied by family members;
- (d) the applicant’s country of origin;
- (e) whether any person is willing to offer a surety to secure the applicant’s continued attendance for processing;
- (f) whether the applicant presents an unacceptable risk to the community; and
- (g) any other factors which the court considers relevant in the particular circumstances.<sup>24</sup>

The period of detention should be extendable for no more than three months on any one occasion, and in no circumstances should detention be extendable beyond 12 months.

When asylum-seekers are released from detention they should be released on conditions calculated to secure their continued availability for processing. See recommendations regarding reporting requirements and bail in section 7 below.

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<sup>22</sup> UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, para 4, POLAS/2006/03, available at <http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf>.

<sup>23</sup> Between 1999 and 2003, 87% of people who arrived by boat were eventually granted asylum. The figure is close to 100% for Iraqi and Afghani arrivals, and 50% for Iranian and Palestinian arrivals (1999-2001), see Mary Crock, Ben Saul, Azadeh Dastiyari, *Future Seekers II: Refugees and Irregular Migration in Australia* Federation Press, Sydney 2006.

<sup>24</sup> See also Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (1994), recommendation 11.



#### 4.4 Detention pending removal

A non-citizen may be detained pursuant to s189 of the *Migration Act* pending their removal from Australia in various circumstances, including:

- (a) where a visa is cancelled for breach of conditions (typically, student or tourist visas);
- (b) where a visa (including permanent residency) is cancelled on character grounds (see further below under heading 4.4);
- (c) where a visa has expired (visa “overstayers” – typically tourist visas); and
- (d) illegal foreign fishers.

The joint authors note that it is current practice for the Department to release such persons into the community on a bridging visa, with conditions similar to bail, where this is deemed appropriate. We support the efforts of the Department to ensure that detention is used only as a last resort and welcome pragmatic solutions to otherwise draconian provisions of the Act.

The joint authors consider that greater judicial oversight is required to ensure that persons are released on bridging visas where they are eligible (see further below, section 4.6). We further recommend that the courts (specifically, the Federal Magistrates’ Court), should have a role in determining bail and reporting requirements (see below, section 7).

In some cases, we recognise that immigration detention may be justified to ensure that, while arrangements for departure are made, a person does not disappear into the community to avoid removal. The joint authors are of the view that any such period of detention should be sufficient only for necessary departure arrangements to be made. .

#### 4.5 Section 501 cancellations

Section 501 of the *Migration Act* allows the Minister to cancel a visa that has been granted to a person, including permanent residency, on grounds of character. Upon visa cancellation, such persons are liable to be placed in immigration detention pending removal. The joint authors note that the Minister has delegated his decision-making power in respect of s501 to senior Departmental officers (as per evidence to the Senate Estimates Committee, 19 February 2008).

In 2006 the Commonwealth Ombudsman reported many deficiencies in the content and application of policies relating to administration of s501 of the *Migration Act* as it applies to long-term residents and procedures for cancellation of long-term permanent residents’ visas.<sup>25</sup>

In some cases, persons have been held in immigration detention for substantial periods before removal, despite having lived in Australia for many years and having Australian families. One man presently in immigration detention in Victoria has lived in Australia for nearly 30 years, and has spent the past nine years in

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<sup>25</sup> Commonwealth and Immigration Ombudsman, *Department of Immigration and Multicultural Affairs administration of s501 of the Migration Act 1958 as it applies to long-term residents* (2006).

immigration detention after his visa was cancelled on the morning he was intended to be released from prison.<sup>26</sup> His family lives in Perth.

The joint authors consider that in the case of s501 cancellations, persons should be allowed to live with their family until removal is an immediate practical possibility. The human hardship and misery inflicted on individuals and families in s501 cases cannot be overstated.

The joint authors welcome the recent decision of the Full Federal Court in the case of *Sales v Minister for Immigration and Citizenship*<sup>27</sup> (17 July 2008) (*Sales*) which has had the effect of releasing a number of detainees from long-term immigration detention. The joint authors urge the Department to follow this decision and to reinstate visas of detainees whose circumstances are similar to those treated by the *Sales* decision.

#### 4.6 Wrongful detention and judicial oversight

As noted above, s189 of the *Migration Act* requires that authorised officers must detain a person if the officer knows or reasonably suspects that the person is an unlawful non-citizen. The scope and operation of this power has been explored and criticised in numerous reports, including the Palmer Report.<sup>28</sup> It should be noted that between 2000 and 2006, 247 persons were found to have been wrongfully placed in immigration detention.<sup>29</sup>

Currently, “eligible non-citizens” in immigration detention can apply for a bridging visa under s73 of the *Migration Act*. Once granted, the bridging visa enables an eligible non-citizen to be released into the community pending the outcome of their substantive visa application. Where the application is refused, this is reviewable by the Migration Review Tribunal (MRT) under s347. We note that the MRT has no power however to order release of persons wrongfully detained, as their review power is limited to *unlawful* non-citizens (illustrated in *Chan Ta Srey v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1292).

The joint authors consider that increased judicial oversight of immigration detention would reduce the risk of wrongful detention and provide greater accountability in the immigration detention system. In *Al-Kateb*, the High Court confirmed that under the *Migration Act* as it presently stands, a court cannot order removal of a person from immigration detention. With respect, the joint authors regard this to be a breach of the fundamental common law principle of *habeas corpus* and of art. 9 of the *ICCPR*.

The joint authors strongly endorse the recommendation made by HREOC that “any decision to detain a person should be under the prompt scrutiny of the

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<sup>26</sup> Maribyrnong Immigration Detention Centre Detainee Identification Number MB1109.

<sup>27</sup> [2008] FCAFC 132.

<sup>28</sup> Palmer, M, AO APM, *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau*, (July 2005). See also Commonwealth Ombudsman reports: *The inquiry into the circumstances of the Vivian Alvarez matter* (Report No. 03/2005); *Referred immigration cases: Mr T and Mr G* (Report Nos. 04/2006 and 06/2006 respectively); *Referred immigration cases on Mental Health and Incapacity and Children in Detention* (Report Nos. 07/2006 and 08/2006).

<sup>29</sup> Commonwealth and Immigration Ombudsman, *Department of Immigration and Citizenship: Report into referred immigration cases: detention process issues* (2007).

judicial system”.<sup>30</sup> In this regard we agree with the comments of the Law Council of Australia in its Shadow Report to the Human Rights Committee:

[T]he Australian Government’s policy [of mandatory indefinite detention] fails to balance considerations of efficacy with fairness and proper safeguards to individual liberty. The seriousness of taking away a person’s liberty demands that the person be accorded fair and balanced treatment from a judicial officer before being sent to detention. This cannot always be properly achieved by Departmental officers.

A number of high profile cases of wrongful immigration detention, such as the detention of Australian citizens Cornelia Rau and Vivian Alvarez and over 200 other wrongful detention cases demonstrate the urgent need to reintroduce judicial oversight at the front end of the detention process.<sup>31</sup>

As outlined above (section 4.3), the joint authors propose that courts should have the power to order the removal of a person from immigration detention if they are satisfied that, in the particular case, continued detention is unjustified. This would enable courts to balance the humanitarian concerns of prolonged detention against the prudential interests which detention is intended to serve.

#### **4.7 Wrongful detention and compensation**

The joint authors applaud the government for its prompt resolution of the compensation claim by Cornelia Rau, on taking office in November 2007.

The joint authors note concern however for the remaining 247 people identified by the Commonwealth Ombudsman as having been improperly detained by the Department between 2000 and 2006<sup>32</sup> and we seek further information from the government in relation to their compensation status.

The joint authors consider that to date, the government’s approach to compensating those persons who were wrongfully detained in immigration detention has been ad hoc. The only publicly available document about the potential claims of the 247 people is the official report published by the Commonwealth Ombudsman. Although this reports went some way to identifying systemic problems that existed within the Department, it is unclear which of the detainees, if any, still have unresolved claims for compensation, and the stage each claimant is at in gaining compensation.

The joint authors call on the government to initiate urgently a streamlined review process to identify which, if any, of the remaining claimants has a reasonable claim for compensation, and then establish a cost-efficient, fair and transparent system of awarding adequate compensation. We propose that any proceedings should be non-adversarial.

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<sup>30</sup> HREOC, *Summary of Observation following the Inspection of Mainland Immigration Detention Facilities* (2007).

<sup>31</sup> Law Council of Australia, *Shadow Report to the Human Rights Committee* (2008) (publication pending).

<sup>32</sup> Ombudsman *Detention Process Issues Report*.

#### 4.8 Section 209 and Detention Costs

The joint authors take the view that the government should revoke those sections of the *Migration Act* that allow the Commonwealth to charge detainees for the cost of their involuntary detention, for example, s209.

Section 209 of the *Migration Act* currently provides that a non-citizen who is detained is liable to pay the Commonwealth the costs of his or her detention. The decision to raise a detention debt is not reviewable on merit by an administrative tribunal, increasing the possibility that it may be imposed arbitrarily. The debt is (generally) only recoverable at the end of a person's detention.<sup>33</sup> Liability arises even where a person seeking asylum is found to be a genuine refugee and is granted a protection visa (see further below). It has been reported that Australia is the only country in the world which charges innocent people the cost of incarcerating them.<sup>34</sup>

The Commonwealth Ombudsman reports that costs charged to detainees vary among Australian immigration detention centres, but in most cases the daily fee exceeds \$100 per day. In the 2006-07 financial year, the Department of Immigration and Citizenship (the Department) raised debts of \$28.961 million for the detention of unlawful non-citizens.<sup>35</sup> The highest debt raised during that period was over \$340,000 for a family.<sup>36</sup>

Currently, persons eventually granted visas must either accept the liability, or rely on debt write-off or debt waiver procedures to escape liability. The joint authors consider that these procedures operate in an arbitrary manner, without the procedural safeguards ordinarily afforded to persons by way of the rule of law.

The Department has indicated to the Commonwealth Ombudsman that it does not often use the mechanisms provided for debt recovery in the *Migration Act*,<sup>37</sup> because it is uneconomical to pursue recovery of many debts.<sup>38</sup> This highlights the practical reality that most detention bills cannot be recovered. Minister Evans acknowledges that "the cost to the taxpayer of detention is massive and the debt recovery virtually non-existent".<sup>39</sup>

The existence of the debt nevertheless continues, however, to create hardship for those who are liable. Complaints to the Ombudsman's office indicate that "the size of some 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>40</sup>

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<sup>33</sup> Commonwealth and Immigration Ombudsman, *Department of Immigration and Citizenship administration of detention debt waiver and write-off* (2008), para 1.2.

<sup>34</sup> Julian Burnside, *The Third Annual MCA Address*, given at the MCA Annual Assembly in Melbourne on 27 September 2004.

<sup>35</sup> The total operational cost of immigration detention in 2006/7 is in the realm of \$200 million: see speech by Minister Evans, above n1.

<sup>36</sup> Above n 33, see Table at para 1.3.

<sup>37</sup> *Migration Act*, ss 216, 222, 223 and 224.

<sup>38</sup> Migration Series Instruction 396, *Liability of non-citizens to repay costs of detention, removal or deportation*, para 6.2.

<sup>39</sup> Minister's Speech, above n 1, 13.

<sup>40</sup> Ombudsman *Debt Waiver Report*, above n 33, para 1.5.

The joint authors consider that given the reportedly small number of people who actually pay the sums levied, the administrative costs of running the scheme must far outweigh any money recovered.

In addition, the joint authors strongly oppose the imposition of detention costs on those asylum-seekers who are eventually found to be genuine refugees.

Under art. 14 of the *Universal Declaration of Human Rights*,<sup>41</sup> “everyone has the right to seek and to enjoy in other countries asylum from persecution”. To this end, Australia has signed and ratified the 1951 UN *Convention on the Status of Refugees* (the Convention) and its protocol, signifying its intention to provide protection to those seeking asylum in Australia.

Article 31 of the Convention prohibits the imposition of penalties by Contracting States where refugees enter illegally or without authorisation, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The joint authors submit that the arbitrary imposition of a levy for costs of detention as provided in s209 of the *Migration Act* is a penalty on account of illegal entry and therefore breaches Australia’s international obligations under the Convention.<sup>42</sup>

In the event that s209 is retained, the joint authors urge the Committee to recommend that unlawful non-citizens who are subsequently granted a visa be excluded from the operation of s209.

## 5 Options to expand the transparency and visibility of immigration detention centres

The joint authors welcome that the Inquiry addresses transparency and visibility issues in relation to detention centres and processes. Many independent and reputable reports on Australia’s immigration detention operations have called for the need for greater transparency and visibility in this area as a means of ensuring accountability for the conditions and duration of detention.<sup>43</sup>

We emphasise that the level of transparency and visibility required for detention centres depends on the form of detention used. We suggest that if the government were to implement proposals similar to those made in this submission, the nature and function of those centres would mean that transparency and visibility concerns would decrease.

The following options to expand the transparency and visibility of existing detention centres relate to Immigration Detention Centres (as defined in the Minister’s speech), which are to be used only as a last resort and for the shortest practicable period of time.<sup>44</sup> Our comments are made in light of the experiences of our staff and members, some of whom regularly visit (amongst others), Maribyrnong immigration detention centre.

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<sup>41</sup> *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

<sup>42</sup> For penalties and international obligations in general see e.g. Guy S Goodwin-Gill *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, A paper prepared at the request of the Department of International Protection for the UNHC Global Consultations (2001), available at <http://www.unhcr.org/protect/PROTECTION/3bcfdf164.pdf>

<sup>43</sup> See Reports listed in General Comments section of this submission.

<sup>44</sup> Minister’s Speech, above n 1, 8.

## 5.1 Abolition of offshore detention

The joint authors applaud the government for its swift closure of Nauru and Manus Island (the “Pacific Solution”) on taking office.

The joint authors welcome the government’s announcement that in the future, asylum seekers will receive publicly funded advice and assistance and access to independent review of unfavourable decisions.<sup>45</sup> We stress that “independent review” must however be by access to Australian courts and tribunals.

The joint authors note with concern however that unauthorised boat arrivals at places excised from Australia’s migration zone will continue to be processed on Christmas Island.<sup>46</sup> Offshore immigration detention centres lack transparency and visibility by the very fact of their physical isolation and legal particularities. For there to be any degree of transparency or visibility, the joint authors consider that immigration detention centres must be located on mainland Australia, preferably within, or close to, major cities. As immigration detention is not intended to be punitive, it is important that legal representatives, family and friends and other support groups (including the media) have access to detainees and to detention centres.

The joint authors also wish to note their strong opposition to the excision of offshore islands, which provides that visa applications are not valid where they are made by a person who entered Australia at an “excised offshore place”.<sup>47</sup> All parts of Australia’s territories and territorial waters are subject to international law and should be considered to be part of Australia’s migration zone. The joint authors consider there is no sound policy reason to continue to excise parts of Australia.<sup>48</sup>

We note that “no decision has been taken on the boundaries of the current excision zone”<sup>49</sup> and urge the government to respect its international obligations<sup>50</sup> by allowing persons to apply for asylum where they are on Australian sovereign territory.

## 5.2 Increasing third party access to immigration detention centres

The current operators of immigration detention centres place severe restrictions on third party access. In 2002 the Australian Press Council (APC) made a public statement about restrictions placed on media access to asylum seekers and to detention centres. The APC reported that: “Journalists are routinely denied access to people who come to Australia as asylum seekers. The immigration

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<sup>45</sup> Ibid 5.

<sup>46</sup> Ibid; Minister for Immigration and Citizenship, ‘Labor unveils new risk-based detention policy’ (Media Release, 29 July 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>

<sup>47</sup> *Migration Act*, s 46A.

<sup>48</sup> See eg, George Williams, “New refugee solution needs legal help”, Australian Policy Online, 5 August 2008, available at [http://www.apo.org.au/webboard/comment\\_results.shtml?filename\\_num=224252](http://www.apo.org.au/webboard/comment_results.shtml?filename_num=224252).

<sup>49</sup> Minister’s Speech, above n 1, 4.

<sup>50</sup> *Convention Relating to the Status of Refugees*, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954.

detention centres at Port Hedland, Woomera, Villawood in Sydney and Maribyrnong in Melbourne follow the same exclusion procedures as high-security prisons".<sup>51</sup>

The joint authors recommend that third parties, particularly the media, be permitted access to immigration detention centres. We consider that there is no justification for the currently reported restrictions in relation to cameras and recording equipment, beyond *genuine* concerns for detainee privacy. Concerns about detainee privacy are not sufficient justification for the exclusion of media from immigration detention centres.

The continuing exclusion of media from immigration detention centres has undermined the important role of media scrutiny in informing the public about government actions and thereby increasing transparency and accountability.

### **5.3 Balancing privacy and transparency in relation to surveillance of immigration detention centres**

The joint authors recognise that a balance must be struck in order to adequately protect detainee privacy and simultaneously enhance transparency and visibility at immigration detention centres. We consider that the principles of privacy and transparency are fundamentally compatible where they aim to protect the rights of the detainee.

The joint authors submit that the use of surveillance monitoring in immigration detention facilities can unnecessarily impact on the privacy of detainees, without achieving the corollary transparency. The joint authors note with concern anecdotal reports from detainees that they are constantly watched by GSL Australia Pty Ltd (GSL) officers,<sup>52</sup> and that emails, internet usage and telephone calls are monitored. Some detainees also believe that microphones were recently installed in ceilings in communal areas in the Maribyrnong detention facility.

The joint authors recommend that any monitoring and surveillance by detention facility providers must be strictly regulated to protect detainee privacy and to promote transparency.

### **5.4 The federal government should run and operate all immigration detention centres**

The joint authors consider that the only effective way of expanding transparency and visibility of immigration detention centres is for the federal government and not private contractors to operate those centres.

We note that the government has determined to finalise the current tender process and to address the broader policy issue of public versus private sector management at the end of the term of the contracts concluded as part of this process.<sup>53</sup> The joint authors urge the government not to renege on its

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<sup>51</sup> Australian Press Council News, *Access to refugees* (2002) - Volume 14, No.1, available at <http://www.presscouncil.org.au/pcsite/apcnews/feb02/refugees.html>.

<sup>52</sup> GSL Australia Pty Ltd (GSL) currently operates immigration detention centres on contract to the Department.

<sup>53</sup> Minister's Speech, above n 1, 15.

commitment when in opposition to ultimately return management of detention centres to the public sector.<sup>54</sup>

We commend to the Inquiry the report “Asylum seekers in Sweden: an integrated approach to reception, detention, determination, integration and return”, by Grant Mitchell, which explains how Sweden successfully transitioned from a private to public sector model for operation of immigration detention facilities,<sup>55</sup> (see further below under section 7 in relation to alternatives to detention).

For the reasons set out below, we submit that the operation, management and control of immigration detention centres *must* return to the federal government. In this respect, we imply that the federal government must retain ultimate legal responsibility for the operation, management and control of immigration detention centres.

#### **5.4.1 The federal government is best placed to operate immigration detention centres**

Currently, there is no legislated procedure for the operation and regulation of immigration detention centres. Instead, the contract between the Australian government and GSL governs the delivery of immigration detention services in Australia. Under this contract, necessarily restricted by commercial in confidence, the private contractor is responsible for determining the operations and rules of each immigration detention centre. This results in the private contractor determining levels of transparency and visibility in each centre. The joint authors endorse the statement of Finn J of the Federal Court of Australia that this state of affairs is “not conducive to ordered and principled public administration”.<sup>56</sup>

The joint authors submit that where a private contractor operates an immigration detention centre, the operation of the centre will always be subject to the objectives of the operator and managed in a way that is consistent with the operator’s expertise. The core business of GSL, the current operator, is correction services. This core capability seems to have influenced the operation of immigration detention centres, so that they are run like prisons.

For example, we understand that there are strict requirements for access to immigration detention centres, including rigorous identity checks, security screening, full body metal detection, x-ray of food and belongings and camera surveillance. The centre’s computer database stores details of visitors’ names, drivers licence numbers, addresses, telephone numbers, dates of birth, timing and frequency of visits, detainees visited and other habitual companions during visits. These procedures are not legislated, but are conditions determined by GSL.

The joint authors recognise that it is not practicable or appropriate for the federal government to outline precisely the manner in which immigration detention centres should be operated. We submit that this problem should be remedied by direct federal government operation of detention facilities, based

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<sup>54</sup> Minister’s Speech, above n 1, 15.

<sup>55</sup> Grant Mitchell, ‘Asylum seekers in Sweden: An integrated approach to reception, detention, determination, integration and return’ (2001), 4 *Protocol* 39.

<sup>56</sup> *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93, [2].



on the non-punitive and non-correctional nature of administrative immigration detention.

Unlike a private contractor, the public sector does not operate for profit and can therefore implement a fairer, more efficient and transparent system. Further, the joint authors submit that the federal government is better placed to implement its own immigration policies.

#### 5.4.2 Non-delegable duty of care

Section 189 of the *Migration Act* requires an “officer” to detain a person where they have a “reasonable suspicion” that the person is an unlawful non-citizen. Where a private contractor operates an immigration detention centre, that private contractor is detaining suspected unlawful non-citizens under s189 of the *Migration Act*. The contractor is thereby undertaking a duty which can be properly performed only by an “officer” as defined under the *Migration Act*.

Pursuant to s5 of the *Migration Act*, “officer” includes *inter alia* members of the Department, the federal and state police and “a person” or “any person who is included in a class of persons” authorised in writing by the Minister to be an officer for the purposes of the *Migration Act*. Certain “contractors” have been authorised by Minister Vanstone to be an officer for the purposes of the Act,<sup>57</sup> including “Each person holding, or for the time being occupying and performing the duties of, a Contractor position in Schedule A to this Instrument”. Schedule A to that instrument identifies 63 contractors by number only, without any description of the nature of the service being provided.

The joint authors commend the decision of Finn J in *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*<sup>58</sup> (*S v Secretary*), particularly paragraphs [195] to [213], [257] and [259], in relation to the government’s non-delegable duty of care and his Honour’s findings that:

- (a) The Commonwealth of Australia (the Commonwealth) owes detainees a non-delegable duty of care because of its particular “relationship” with detainees;<sup>59</sup>
- (b) The Commonwealth is not able to discharge this duty by the employment of independent contractors; and<sup>60</sup>
- (c) Whosoever the officer in a given case, the detaining and holding of a detainee is both on behalf of the Commonwealth and by the Commonwealth.<sup>61</sup>

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<sup>57</sup> *Authorisation of Person to be Officers* IMMI 06/085 (22 January 2007), notified in Gazette GN 5 on 7 February 2007. On 21 April 2003 Philip Ruddock authorised persons working under contractor for Information Technology purposes to be officers for the purposes of the Act: see *Authorisation of Persons Working under Contract for Information Technology Purposes to be Officers for the Purposes of the Migration Act 1948* (21 January 2003), notified in Gazette GN 19 of 14 May 2003.

<sup>58</sup> [2005] FCA 549.

<sup>59</sup> See *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [199], [207] citing *Kondis v State Transport Authority* (1984) 154 CLR 672, 687 and *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93.

<sup>60</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [207].

<sup>61</sup> At [199].

The non-delegable duty of care includes the managing of detainees in immigration detention centres. This obligation is the responsibility of the government as the democratically elected representative of the people and cannot and ought not be contracted out.

In *S v Secretary*, Finn J commented that “[t]he nature and reach of such common law duty as is imposed on either respondent [Secretary, Department of Immigration and Multicultural Affairs and the Commonwealth of Australia] is necessarily contrived by the legislative scheme on which it is to be engrafted.”<sup>62</sup>

In *Alsalihi v Manager Baxter Immigration Detention Facility*,<sup>63</sup> Selway J held:

The duties and obligations of persons responsible for the detention of others are very onerous. Those duties can be enforced not merely by judicial review, but also by the personal liability of the officers involved, both criminal and tortious. The relevant statutory powers discussed above [ss189 and 196 of the *Migration Act*] are not adequate to identify precisely what the powers are or who is responsible for them. On one view the officer who first takes the unlawful non-citizen into detention has the continuing responsibility for that detention thereafter. On another, it is the officer who is in charge of the detention centre. On another, it is the person who has the actual physical control over the detainee from time to time. And, of course, all of this is confused by the presence of private companies having a role in the management and administration of detention centres. A comparison between the provisions relating to the powers of detention contained in the Act, and the provisions of other statutory schemes which provide for mandatory detention such as in relation to prisoners or those suffering mental or infectious diseases, is instructive in this regard.<sup>64</sup>

In addition to the Commonwealth's non-delegable duty of care, detainees are currently owed duties of care by the private contractor operating the detention centres. It is not always easy to identify where the Commonwealth's non-delegable duty of care ends and where the private contractor's duty of care begins. In litigation, issues of liability and the appropriate defendant are often unclear at the beginning of a proceeding. In order to protect their interests, detainees may bring proceedings against both the Commonwealth and the private contractor. If it is later discovered that either the Commonwealth or the private contractor is not an appropriate party, the detainee will be liable for costs. Similarly, the involvement of two defendants, where issues of liability are unclear, can delay resolving a claim through negotiation.

To avoid the confusion identified by Selway J, we submit that the Commonwealth should be responsible for, and bear the liability for, all matters involving the operation and management of immigration detention centres.

The joint authors consider that in order to enhance transparency, the government should provide information publicly about those persons authorised to detain suspected unlawful non-citizens in immigration detention. We emphasise that regardless of authorisation, *S v Secretary* confirms that

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<sup>62</sup> At [195].

<sup>63</sup> [2004] FCA 352.

<sup>64</sup> *Ibid* [48].

authorisation of contractors as officers for the purposes of the Act does not affect the Commonwealth's duty of care to detainees.

We submit that the Commonwealth can only effectively discharge its duty of care to detainees by operating, managing and controlling detention centres without delegation.

#### **5.4.3 The federal government has a duty to ensure due process for immigration detainees**

The joint authors are concerned by the lack of due process safeguards in place for immigration detainees. We note that because immigration detention is not punitive or correctional in nature, detainees are not afforded the same level of protections enjoyed by persons suspected of having committed a crime.

The joint authors raise particular concern as to lack of regulation in the following areas:

- (a) the procedure for "arresting" a suspected unlawful non-citizen;
- (b) taking the person into immigration detention;
- (c) managing the person's various medical, psychological and social needs on arrival to the centre;
- (d) the nature and amount of information that is communicated to the person (including informing the person of their options and their rights); and
- (e) releasing a person from detention.

The lack of due process in (a) is illustrated in the Ombudsman Detention Issues Process report, which found that in many cases of wrongful detention, Departmental officers did not have an adequate basis on which to form a reasonable suspicion that the person being detained was an unlawful non-citizen. The joint authors agree with the Commonwealth Ombudsman that "the power to detain a person under s189 should be exercised with great caution and by a rigorous process".<sup>65</sup>

The joint authors submit that the lack of adequate due process safeguards is compounded inside immigration detention centres because they are operated by private contractors.

#### **5.4.4 Personnel**

Detention centre staff should understand the significance of the concept of administrative detention. The Roach Report *Detention Services Contract Review* (2006) recognised that the "administrative detention concept has important implications for the operation of detention facilities".<sup>66</sup> The joint authors consider that Departmental officers are best placed to administer immigration detention facilities consistently with this concept.

The authors recommend that significant attention be paid to the needs of vulnerable detainees, and that those needs should not be subordinated to considerations of profit-making or shareholder accountability.

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<sup>65</sup> Ombudsman *Detention Issues Process* report, above n 32, 5.

<sup>66</sup> Mick Roche, *Detention Services Contract Review: An independent review by Mick Roche to the Department of Immigration and Multicultural Affairs* (Summary) (2006).

## 5.5 The federal government should impose strict operating and management requirements

In the event that operation of immigration detention centres is not returned to the Department, the joint authors consider that the federal government should impose strict operating and management requirements on the private contractor. The joint authors note that the government has determined to finalise the current tender process to engage private contractors to operate immigration detention centres.

Minister Evans has reported that the new service delivery model for which tenders have been sought “has a strong focus on human rights, effective programs and activities for people in detention, high service delivery standards and best practice governance”.<sup>67</sup> We agree that the binding contractual nature of these commitments is an improvement on the *Core Operating Principles*<sup>68</sup> and *Immigration Detention Standards*<sup>69</sup> currently in place. We consider that government, and not the successful tenderer, should determine the level of transparency and visibility of immigration detention centres.

In 2006, the Roche Report found that the major area requiring change in the detention service contract with GSL was in relation to performance management.<sup>70</sup> As a result of this review, the Department decided to re-tender all detention services, with the aim to “develop new client-focused detention service contract arrangements, including improved performance monitoring and contract management processes”.<sup>71</sup>

The joint authors recommend that the government impose strict operating and management requirements for contractual arrangements in order to expand the transparency and visibility of existing immigration detention centres.

The joint authors propose that monitoring and enforcement of reasonable standards of care be assessed by strict reporting requirements. As a condition of the contract, every six months private contractors should be required to provide a qualitative report to the Department addressing the following matters:

- (a) A summary of the services provided, or made available, to immigration detainees and the level or degree of service provided;
- (b) A summary of how many detainees are using the services and an analysis of the nationality, gender and age of the detainees who use the services;
- (c) The frequency with which the services are accessed; and
- (d) If the services are provided by contractors, details of the contractors.

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<sup>67</sup> Minister’s Speech, above n 1, 16.

<sup>68</sup> Department of Immigration and Citizenship, *Core Operational Principles*, available at <http://www.immi.gov.au/managing-australias-borders/detention/about/core-principles.htm>.

<sup>69</sup> The Immigration Detention Standards form part of the contract with GSL. See <http://www.immi.gov.au/managing-australias-borders/detention/about/standard-of-care.htm>

<sup>70</sup> Above n 66, 7.

<sup>71</sup> Department of Immigration and Multicultural Affairs, *Tender for New Client Focused Detention Service Arrangements Fact Sheet*, available at [http://www.immi.gov.au/about/department/perf-progress/dima-improvements/fact\\_sheets/Tender\\_for\\_New\\_Client\\_Focused\\_Detention\\_Service\\_Arrangements.pdf](http://www.immi.gov.au/about/department/perf-progress/dima-improvements/fact_sheets/Tender_for_New_Client_Focused_Detention_Service_Arrangements.pdf).

In addition, an independent third party, such as the Ombudsman, should complete a qualitative assessment of the service provided. The independent third party should have power to conduct visits and assessments unannounced and all reports should be tabled in Parliament.

Detention staff should be fully and regularly briefed on the complexity of the migration experience and must be monitored in their interactions with detainees, to ensure maximum respect, understanding and awareness of issues confronting detainees. Staff should receive human rights training, emphasising that immigration detention is administrative and not punitive detention.

## **5.6 The federal government should regulate operation of detention centres under s273 of the *Migration Act***

In addition, the joint authors consider that the Department should make regulations in relation to the fair and transparent operation and regulation of detention centres under s273 of the *Migration Act*.

To date, there has been a failure to make regulations for detention centres under s273 (3).<sup>72</sup> In *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour*,<sup>73</sup> Selway J held that when powers of detention are conferred there are at least two reasons for the parliament to make provision for the manner of the exercise of those powers:

- (a) To curtail the possible abuse of the powers; and
- (b) To protect those who have to exercise them by providing some guidance as to what the powers are.<sup>74</sup>

The joint authors recommend that the Department should be required annually to report to Parliament in respect of the operation of the regulations and propose that the Joint Standing Committee on Migration should be responsible for scrutinising these reports.

The joint authors recommend legislative codification of minimum standards of treatment in immigration detention and we endorse the view of HREOC that this would ensure that detainees can:

- (a) enforce their rights to be treated in accordance with human rights standards; and
- (b) obtain a direct remedy upon breach of those standards.<sup>75</sup>

See further comments below under section 6.

## **5.7 Complaints procedures**

The joint authors are aware that complaints processes in privately-run immigration detention centres are highly bureaucratic, requiring considerable

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<sup>72</sup> *S v Secretary*, above n 58, [199], [198]; *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93, [9] (*Mastipour*).

<sup>73</sup> [2004] FCAFC 93.

<sup>74</sup> *Ibid*, para 8.

<sup>75</sup> HREOC, *Immigration Detention and Human Rights: Questions and Answers*, available at [http://www.humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html](http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html).

documentation. Our understanding of the current procedures is that all complaints, irrespective of nature or degree, must be submitted by way of a standard form. This procedure applies to relatively minor complaints or requests, such as a request to retrieve items from storage as well as time critical and serious complaints or requests, such as requests to see a medical practitioner. The procedure for processing of forms is unclear. In particular, there are no clear guidelines as to the time in which a decision should be made or, indeed, whether a response is even required.

Detainees are also able to make complaints to the Commonwealth Ombudsman. The joint authors understand that there is some awareness among the detainee population of the role of the Ombudsman and we note that complaints are made to that office. The joint authors submit however that the role of the Ombudsman in relation to complaints is insufficient to ensure accountability. This is primarily due to the lack of power to enforce recommendations made. Furthermore, not all complaints made by detainees warrant investigation and accordingly, the role of the Ombudsman does not negate the need for clear, internal complaints procedures within detention centres.

The joint authors propose that a range of complaints processes should be available to detainees to address the range of complaints that arise. Most minor or administrative complaints should be resolved using an internal complaints procedure, the processes of which should be transparent and public. More serious complaints, especially those involving requests for medical assistance, could be referred to an external body, similar in membership and structure to the Immigration Detention Health Advisory Group. Where complaints are not resolved by the internal procedure or the proposed external body, we suggest complaints could then be directed to the Ombudsman, provided that the power of the Ombudsman to enforce its recommendations is increased.

Additional tracking mechanisms are required to ensure that complaints are received, acknowledged, and taken into account. Complaints that require a specific outcome should be answered with notification that the required outcome has been attained, or with reasons provided as to why the outcome has not been achieved.

Detention providers should be required to inform detainees of their rights and the available complaints procedures. In particular, detainees should be made aware of the roles of the Commonwealth Ombudsman and HREOC.

Furthermore, we consider that legislative codification of minimum standards of treatment in immigration detention would enable detainees to obtain a direct remedy on breach of those standards against the Commonwealth.

## **6 The preferred infrastructure options for contemporary immigration detention**

### **6.1 International standards for contemporary immigration detention infrastructure**

The joint authors commend to the Inquiry the *Immigration Detention Guidelines*, developed by HREOC in March 2000 (the HREOC Guidelines).<sup>76</sup> The joint

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<sup>76</sup> HREOC, *Immigration Detention Guidelines* (2006), available at [http://www.hreoc.gov.au/legal/submissions/Appendix\\_idc\\_guidelines.pdf](http://www.hreoc.gov.au/legal/submissions/Appendix_idc_guidelines.pdf)

authors reaffirm the fundamental principles articulated in the HREOC Guidelines that:

- (a) Immigration detention is not a prison or correctional sentence. Immigration detainees are detained pursuant to the *Migration Act* 1958 (Cth) and not pursuant to arrest or charge for any criminal offence. Accordingly, the treatment of immigration detainees should be as favourable as possible and in no way less favourable than that of untried or convicted prisoners.
- (b) Australia's immigration detention practice must conform to international law protecting human rights and defining the status of refugees. The relevant international law is set out in:
  - Convention (1951) and Protocol (1967) Relating to the Status of Refugees;
  - International Covenant on Civil and Political Rights (1966);
  - International Covenant on Economic, Social and Cultural Rights (1966);
  - International Convention on the Elimination of All Forms of Racial Discrimination (1969);
  - Convention on the Elimination of All Forms of Discrimination Against Women (1979);
  - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); and
  - Convention on the Rights of the Child (1989)...<sup>77</sup>
- (c) Each immigration detainee shall be treated in a humane manner and with respect for the inherent dignity of the human person.<sup>78</sup> Each immigration detainee aged under 18 years shall, in addition, be treated in a manner which takes into account the needs of a person of his or her age.<sup>79</sup>
- (d) In the design and delivery of services, facilities, activities and programs, immigration detention authorities should seek (a) to minimise differences between life in detention and life at liberty<sup>80</sup> and (b) to meet the individual needs of each detainee taking into account his or her history and experiences, age, gender and cultural, religious and linguistic identity.<sup>81</sup>
- (e) Immigration detention authorities shall avoid practising discrimination among immigration detainees on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>82</sup>

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<sup>77</sup> HREOC, *Immigration Detention Guidelines* (2006), 4.

<sup>78</sup> Article 10, *ICCPR*; Principle 1, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Guideline 10 *UNHCR's Revised Guidelines on the Detention of Asylum-Seekers*.

<sup>79</sup> Article 37(c), *Convention on the Rights of the Child*.

<sup>80</sup> See generally Rule 60(1), *Standard Minimum Rules for the Treatment of Prisoners*; Rule 86(f), *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.

<sup>81</sup> Rules 63, 66, 69, *Standard Minimum Rules for the Treatment of Prisoners*; Principle 3, *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*; Rule 4, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.

<sup>82</sup> Article 26 *International Covenant on Civil and Political Rights* (ICCPR); Rule 6 *Standard Minimum Rules for the Treatment of Prisoners*; Principle 5(1), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

- (f) Immigration detainees have the right to be heard in judicial and administrative proceedings affecting them.<sup>83</sup>

[References below are from the cited guidelines, although footnote numbering has been adjusted]

In addition, the various guidelines issue by the United Nations High Commissioner for Refugees (UNHCR), including the UNHCR *Guidelines on Detention*<sup>84</sup> should be noted by the Inquiry (see further below in section 7).

The joint authors support the detailed recommendations in the HREOC Guidelines in relation to:

- (a) Information
- (b) Privacy
- (c) Contacts with the outside world
- (d) Religion
- (e) Education
- (f) Work and recreation
- (g) Food
- (h) Accommodation, clothing and bedding
- (i) Transport and removal
- (j) Detainees' property
- (k) Notification of death, illness, injury, release, transfer or removal
- (l) Health care services
- (m) Mental health services
- (n) Detainees with special needs
- (o) Selection and training of staff
- (p) Discipline and punishment
- (q) Use of force
- (r) Complaints
- (s) Monitoring, inspection and reporting.

In addition, the joint authors highlight HREOC's recommendations in its 2007 *Observations of Mainland Immigration Detention Facilities* Report in relation to best practice infrastructure for contemporary immigration detention and in particular, recommendations relating to improved access to interpreters.

## 6.2 Additional recommendations

In addition to the HREOC recommendations outlined above, the joint authors make the following comments. Our comments in relation to infrastructure relate only to existing immigration detention centres and are subject to the proposed reform of immigration detention as outlined in this submission.

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<sup>83</sup> Eg, article 12(2), *Convention on the Rights of the Child*. See also Rule 30(2), *Standard Minimum Rules for the Treatment of Prisoners*.

<sup>84</sup> UNHCR *Guidelines on Detention*, above n 12.



### **6.2.1 Legal advice**

The joint authors welcome the announcement by Minister Evans that “asylum seekers will receive publicly funded advice and assistance”.<sup>85</sup> We recommend that all detainees have immediate access to an independent lawyer who is also a migration agent (see above proposal to amend s256 of the *Migration Act*, section 4.2).

Access to accurate independent legal advice from the outset of detention is vital to ensure that detainees understand visa options open to them. We consider that early legal advice will decrease the length of time spent in detention and alleviate some of the stress and anxiety associated with the visa application process.

### **6.2.2 Privacy and client legal privilege**

The client legal privilege of detainees must be respected. In order to ensure this, detainees should have access to facilities which allow them to communicate directly with their legal representatives. In addition to telephones and e-mail, detainees should have access to facsimile machines, which are not monitored or used by officers of the Department.

Currently, facsimiles between a detainee and his/her representative are sent via an officer of the Department. We highlight that this creates a conflict of interest where legal proceedings are underway between the Department and the detainee.

### **6.2.3 Accommodation**

The joint authors recommend separate immigration detention facilities for different categories of detainee. In this regard, we consider it is appropriate that unauthorised arrivals detained for management of health, identity and security checks be held separately from those unlawful non-citizens who present unacceptable risks to the community and those unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

The joint authors applaud the government’s key immigration value that “[c]hildren, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre”<sup>86</sup> and we urge the government to provide legislative protection for this policy.

### **6.2.4 Food and nutrition**

The joint authors note a level of deep dissatisfaction with food in immigration detention facilities, as reported by our members or staff who directly interact with detainees (particularly in the Maribyrnong detention centre). Detainees complain of unpalatable and inedible food. Visitors note alarming rates of rapid weight loss, and dependence on cigarettes for appetite suppression.

We recommend that immigration detention centres provide a greater variety of meals than that which is currently provided. All meals should be culturally appropriate and palatable and cater for any additional food requirements due to health, religious, or dietary reasons.

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<sup>85</sup> Minister’s Speech, above n 1, 5.

<sup>86</sup> Minister’s Speech, above n 1, 7 (key immigration value 3).

Self-catering areas in detention should also be significantly improved and detainees should be allowed and encouraged to shop and cook for themselves if they wish to do so. This is an important issue of self-determination and detainees' perception of having some control over their lives, health, nutrition and general wellbeing. Self-catering also helps to alleviate cultural problems that arise in relation to food. Visitors note detainees' comments that levels of satisfaction would be significantly improved by this capability.

## **7 Options for additional community-based alternatives to immigration detention by (a) inquiring into international experience and (b) considering the manner in which such alternatives may be used in Australia to broaden the options available within the current immigration detention framework**

### **7.1 Introduction**

The UNHCR Guidelines on Detention reaffirmed the general principle that asylum seekers should not be detained. In exceptional cases where such detention may be necessary, Guideline 3 recommends that it should only be resorted to "after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose".<sup>87</sup>

The joint authors commend to the Inquiry the report of the UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees (2006)* (UNHCR *Alternatives to Detention* Report). This study "aims to evaluate practical arrangements that minimise or avoid the need to deprive asylum seekers of their liberty while at the same time appropriately addressing concerns of States, including, in particular, that of reducing the incidence of asylum seekers who abscond and ensuring their compliance with asylum procedures".<sup>88</sup>

The joint authors adopt the UNHCR understanding of "alternatives to detention": that is, "alternative means of increasing the appearance and compliance of individual asylum seekers with asylum procedures and of meeting other legitimate concerns which States have attempted to address, or may otherwise attempt to address, through recourse to detention".<sup>89</sup> The use of the phrase "alternatives to detention" does not imply that detention is or ought to be the norm,<sup>90</sup> and does not include alternative *forms* of detention, such as 24 hour home detention, or more comfortable or hospitable accommodation where 24 hour supervision and escort is enforced.<sup>91</sup>

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<sup>87</sup> UNHCR *Guidelines on Detention*, above n 12.

<sup>88</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 4.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, para 6.

## 7.2 Summary of current alternatives to immigration detention in Australia

The HREOC Report notes that “there now exist a number of alternatives to detention in immigration detention centres. A small, but significant, number of detainees are able to access these alternative forms of detention”. These include the following:

- (a) *Immigration Residential Housing*: family-style housing; people are not free to come and go as they please, and must be accompanied by detention staff when they visit external sites (available in Sydney and Perth);
- (b) *Immigration Transit Accommodation facilities*: temporary accommodation where people will be spending only a short-time in detention (available in Brisbane; new centres near completion in Melbourne and Adelaide);
- (c) *Alternative detention*: includes people detained in private houses, hospitals, motels, correctional facilities, watchhouses, apartments and foster care; detainees are supervised by a “designated person”; and
- (d) *Residence determinations*: detainees are permitted to live unsupervised in the community; required to abide by a standard set of conditions, including that they must live at a specified address and report to the Department regularly; cannot engage in paid work; Australian Red Cross contracted by the Department to provide primary community and welfare support (the Asylum Seeker Assistance Scheme).

Bridging visas also provide an alternative to detention by enabling people to reside legally in the community while they are applying for a permanent visa, appealing a decision related to their application, or waiting to depart Australia.

## 7.3 Problems with current alternatives to immigration detention

The joint authors have identified the following problems in relation to residence determinations and bridging visas.

### 7.3.1 Residence determinations

HREOC considers that residence determinations are the best of the current alternative detention arrangements, because they “offer freedom to engage in the community and provide relative autonomy to the individuals in question”.<sup>92</sup>

The joint authors support the HREOC recommendation that that the Minister or the Department should have “discretion to vary the conditions of residence determinations so that detainees can engage in meaningful activities such as further education and training leading to occupational qualifications, and work, if appropriate”.

The main problem arising in relation to residence determinations is eligibility. As far as the joint authors are aware, the eligibility criteria for referral to the Minister for residence determinations are specified under draft *Guidelines on the*

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<sup>92</sup> HREOC, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (2007), 17.

*Minister's Detention Intervention Powers* (ss197AB and 195A of the *Migration Act*). It is unclear whether these draft guidelines have yet been finalised.

The *Observations of Mainland Immigration Detention Facilities* Report sets out the following circumstances under which a detainee may be referred to the Minister for a residence determination:

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

The joint authors consider these criteria to be unduly restrictive. Further, the discretionary nature of the power results in a lack of transparency, so that it is difficult to identify why some detainees qualify and others do not.

The joint authors hope that the recent announcement of the government's seven key immigration values will impact on the operation of the residence determination scheme, subject to our proposals set out below for additional community-based alternatives to immigration detention.

### **7.3.2 Bridging visas – work and other entitlements**

A bridging visa is a temporary visa granted to people who are in the process of applying for a longer-term visa or making arrangements to leave Australia. Bridging visas also come with various conditions and restrictions, depending on the class of the visa and the circumstances of the visa holder. Conditions and restrictions can include prohibition on work and study; inability to access social security; and inability to access Medicare. The most commonly criticised of the bridging visas is Bridging Visa E.<sup>93</sup>

HREOC report that as a result of these restrictions, many asylum seekers and refugees face poverty and homelessness: "Without the ability to support themselves through work or social security, they are entirely dependent on community services for their basic subsistence."<sup>94</sup>

The prohibition on work often arises as a consequence of the "45 day rule", which denies work rights to persons who apply for protection outside of 45 days of arrival in Australia.<sup>95</sup> The joint authors agree with the assessment of the Asylum Seeker Resource Centre (ASRC) that "the rule arbitrarily makes judgments about the genuineness of an applicant's asylum claim" and that "the rule is based on the erroneous assumption that bona fide asylum seekers will

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<sup>93</sup> See Parliamentary Library, *Asylum seekers on Bridging Visa E*, 13 June 2007, no. 13, 2006–07, ISSN 1832-2883.

<sup>94</sup> HREOC, *The impact of bridging visas restrictions on human rights: Factsheet* (2008), available at [http://www.humanrights.gov.au/human\\_rights/immigration/bridging\\_visas\\_factsheet.html](http://www.humanrights.gov.au/human_rights/immigration/bridging_visas_factsheet.html).

<sup>95</sup> Migration Regulations 1994 (Cth), r 051.6.

apply for asylum as soon as possible after their arrival in Australia”.<sup>96</sup> The joint authors urge the government to reform this provision.

The joint authors support the ASRC submission to the Department that the “current Bridging Visa regime is so complex that it is difficult for any outsider to make sense of it” and we endorse the ASRC recommendation that “there should be a single Bridging Visa with full work rights and Medicare entitlements for asylum seekers at all stages of the refugee determination process (including judicial review and humanitarian consideration)”.<sup>97</sup> The joint authors do not support the use of Bridging Visa E in its current form as an acceptable alternative to detention.

The joint authors consider that reform of the bridging visa regime could be supported by the following additional community-based alternatives to immigration detention.

#### **7.4 Overview of international community-based alternatives to immigration detention**

The UNHCR report encountered the following alternatives to detention in the course of its research:

- (a) Release with an obligation to register one’s place of residence with the relevant authorities and to notify them or to obtain their permission prior to changing that address;
- (b) Release upon surrender of one’s passport and/or other documents;
- (c) Registration, with or without identity cards (sometimes electronic) or other documents;
- (d) Release with the provision of a designated case worker, legal referral and an intensive support framework (possibly combined with some of the following, more enforcement oriented measures);
- (e) Supervised release of separated children to local social services;
- (f) Supervised release to (i) an individual, (ii) family member/s, or (iii) non-governmental, religious or community organisations, with varying degrees of supervision agreed under contract with the authorities;
- (g) Release on bail or bond, or after payment of a surety (often an element in release under (f));
- (h) Measures having the effect of restricting an asylum-seeker’s freedom of movement (that is, de facto restrictions) – for example, by the logistics of receiving basic needs assistance or by the terms of a work permit;
- (i) Reporting requirements of varying frequencies, in person and/or by telephone or in writing, to (i) the police, (ii) immigration authorities, or (iii) a contracted agency (often an element combined with (f));
- (j) Designated residence in (i) State-sponsored accommodation, (ii) contracted private accommodation, or (iii) open or semi-open centres or refugee camps;
- (k) Designated residence to an administrative district or municipality (often in conjunction with (i) and (j)), or exclusion from specified locations;
- (l) Electronic monitoring involving “tagging” and home curfew or satellite tracking.<sup>98</sup>

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<sup>96</sup> Asylum Seeker Resource Centre submission in relation to Bridging Visas (2006), available at [http://www.asrc.org.au/uploads/File/ASRC\\_Bridging\\_Visa\\_submission\[1\].doc](http://www.asrc.org.au/uploads/File/ASRC_Bridging_Visa_submission[1].doc).

<sup>97</sup> Ibid.

<sup>98</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 80.

## 7.5 Preferred community-based alternatives to immigration detention

Following successful identification, health and security checks (during an initial period of immigration detention, whether in an Immigration Detention Centre or Immigration Residential Housing) the joint authors recommend that:

- (a) there is community release of asylum-seekers with reasonable reporting conditions;
- (b) if an asylum seeker is deemed to be a flight risk, then bail, bond or a surety sureties options should be considered; and
- (c) if the asylum-seeker is destitute or having difficulty integrating into the community, then accommodation at an open Reception Centre (as defined in 7.6.3.1) be made available.

Asylum-seekers who have made applications for protection in Australia should be granted a bridging visa (subject to reforms identified above in section 7.3.2) and thereafter be considered “lawfully” within the territory.<sup>99</sup>

In accordance with these recommendations, we have provided an overview of the following three community-based alternatives to immigration detention:

- (a) Community release with reporting requirements;
- (b) Community release with bail, bond or sureties; and
- (c) Designated residence in open centres or semi-open centres.

The following analyses each measure in terms of practical effectiveness. Practical effectiveness is primarily measured in terms of factors that prevent absconding and those which ensure compliance with asylum procedures.<sup>100</sup> While there is a general lack of official statistics,<sup>101</sup> international experience indicates that there are higher rates of compliance while asylum seekers are waiting for a final decision in destination countries such as Australia,<sup>102</sup> as compared to transit countries.<sup>103</sup>

The UNHCR Report indicates that destination countries should be able to implement effective alternatives to detention, including release into the community.<sup>104</sup> These alternatives ought to be implemented until a protection visa is granted or until the final avenue of appeal is exhausted.<sup>105</sup>

### 7.5.1 Community release with reporting requirements

#### 7.5.1.1 Definition

“Reporting requirements” require asylum seekers to report to designated authorities on a regular basis (whether police, immigration authorities or a contracted agency), either in person, by telephone or in writing. Reporting requirements are often used in conjunction with bail or bond requirements.

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<sup>99</sup> See Article 12, ICCPR; *D & E v Australia*.

<sup>100</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 86.

<sup>101</sup> *Ibid*, para 89.

<sup>102</sup> *Ibid* para 90.

<sup>103</sup> *Ibid* para 91.

<sup>104</sup> *Ibid*, para 91.

<sup>105</sup> *Ibid*.

### 7.5.1.2 Relevant international experience

In France, Luxembourg and South Africa asylum seekers are required to present themselves in person to renew their identity documentation. Depending on the frequency with which an asylum seeker must renew his or her papers, this may form a *de facto* reporting requirement.<sup>106</sup>

In Canada, the USA, Japan and Thailand asylum seekers have the obligation to report regularly to the police or immigration authorities.<sup>107</sup> In some countries, for example the United Kingdom, the provision of state support is linked to reporting requirements, thereby increasing their effectiveness.<sup>108</sup>

Research undertaken by Hotham Mission in Melbourne from 1995-97 found there was 100 per cent compliance with reporting requirements.<sup>109</sup>

### 7.5.1.3 Recommendations regarding reporting requirements as an alternative to detention in Australia

For asylum seekers deemed a low to moderate flight risk, we recommend:

- (a) that Australia adopt a reporting system whereby asylum seekers are required to report in person to a designated authority, in a reasonable location which is accessible to the asylum seeker and at a reasonable frequency, such as once a month;<sup>110</sup> and
- (b) that Australia consider linking the provision of income support to reporting conditions if there is a concern about compliance.

### 7.5.2 Bail, bond or surety

Use of bail, bond or surety, as defined below, is only proposed where an asylum-seeker is deemed to be a flight risk. The joint authors recommend that this assessment be made by the Federal Magistrates Court (FMC) (see further below).

#### 7.5.2.1 Definitions

In this section, definitions of bail, bond and surety are taken from the 2006 UNHCR Report.

*“Bail”*: a financial deposit placed with the authorities in order to guarantee the asylum seeker’s future attendance for interviews during the processing of his or her case. The sum of money is returned if the asylum seeker appears as required or it is otherwise forfeited.

*“Bond”*: a written agreement, sometimes with sureties, guaranteeing the faithful performance of acts and duties, which may, in the case of an asylum

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<sup>106</sup> Ibid para 103.

<sup>107</sup> Ibid para 104.

<sup>108</sup> Ibid para 102.

<sup>109</sup> Ibid para 104.

<sup>110</sup> See also Joint Standing Committee on Migration, above n 24, recommendation 13.

seeker, include future attendance at interviews, inquiries and/or removal proceedings, and/or regular reporting requirements.

“*Surety*”: a person vouches for the appearance of an asylum seeker and agrees to pay some or the entire agreed amount if the asylum seeker absconds. No amount is required to be paid upfront.<sup>111</sup>

The right to apply for bail, bond or surety is often linked to supervision of the applicant by an individual resident or citizen, usually a family member or an organisation, and reasonable reporting requirements.

#### 7.5.2.2 Relevant international experience

In Canada, if an asylum seeker’s identity has been established and other criteria have been met, an independent adjudicator mediates between the immigration department and the asylum seeker to establish conditions of release.<sup>112</sup> For example, the state-funded Toronto Bail Program offers to supervise those who have no family or other guarantor, requesting the release of a detainee, without bond, into its supervision. The supervision includes regular reporting and unannounced visits.<sup>113</sup> The Bail Program has an extremely high rate of success with both asylum seekers and others who are not in need of international protection but who would otherwise be considered a high flight risk.<sup>114</sup> Homeless shelters in Toronto offer their address for asylum seekers who have nowhere to live. The shelters offer support, including legal counsel, and operate a curfew but no other supervision. The compliance rate is extremely high, with two shelters reporting more than 99% compliance.<sup>115</sup>

In the United Kingdom, asylum seekers can apply for bail. However, there is no automatic right to a bail hearing and the difficulties having access to legal advice mean it is not available for many detainees.<sup>116</sup> Non-compliance rates are low and families with children are even less likely to abscond due to incentives to remain in a system which provides, for example, free health care and education.<sup>117</sup>

In Latvia, bail supervision is promoted as an alternative to pre-trial detention. In this model the local municipality is used to supervise bail.<sup>118</sup>

Rates of compliance following supervised release on parole of selected detainees, including asylum seekers, with the intention to increase their rate of appearance, were researched in the United States by the Vera Institute of Justice from 1997-2000. For those placed in “regular supervision”, which included support services, referral, reminder letters and phone calls, there was

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<sup>111</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 92.

<sup>112</sup> *Ibid* para 93.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid*, para 94.

<sup>116</sup> *Ibid* para 95.

<sup>117</sup> *Ibid*, para 96.

<sup>118</sup> *Ibid* para 98.



an 84% appearance rate. Those with “intensive supervision” had a similar appearance rate. The Vera Institute concludes that asylum seekers do not need detention or intensive support to ensure compliance.<sup>119</sup>

High rates of compliance in Canada, the United Kingdom and the United States may be because they are considered destination countries rather than transit countries.

### **7.5.2.3 Recommendations regarding bail, bond and surety as alternatives to detention in Australia**

Following successful identification, security and health checks, where an asylum seeker is considered to be a flight risk, we recommend that:

- (a) Australia adopts a bail and/or bond system of community release where both legal advice and legal aid is provided to all detainees who require it;
- (b) decisions on the granting of bail should be made on a case by case basis by the Federal Magistrates Court (FMC) (see further below) to establish conditions of release;
- (c) decisions should be reviewable in an independent and timely appeal process; and
- (d) bail conditions should be imposed on an individual basis according to the asylum seeker’s financial position.

If asylum seekers cannot afford bail, we recommend that:

- (e) non-governmental agencies provide volunteer sponsors/sureties and a fixed place of accommodation which asylum seekers can offer at bail hearings, similar to the Toronto Bail Program described above.

### **7.5.2.4 Further comments in relation to the proposed role of the FMC in granting bail**

Presently, the FMC does not have jurisdiction to entertain a bail application. Parliament could invest the FMC with these powers however under s71 of the Constitution. We note that the FMC already has wide jurisdiction in quite disparate federal areas, including family law, copyright, companies, bankruptcy and migration law.

The joint authors propose that the imposition and supervision of bail by the FMC could operate on a similar basis to the state-based criminal justice system with respect to bail.

Where the Department identifies an asylum-seeker as a flight-risk, we propose that following identification, security and health checks a detainee should be eligible for a bail hearing, pending the Commonwealth’s decision as to refugee status. The FMC should be able to set conditions such as reporting and bail or bond where deemed necessary to ensure appearance.

The FMC should be charged on a case-by-case basis to balance the interests of (a) the liberty of the individual with (b) the Commonwealth’s interest in ensuring that the asylum-seeker does not abscond. This procedure would require the Department to justify to a court, why, in any particular case, bail is necessary.

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<sup>119</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 99.

### **7.5.3 Directed residence in open or semi-open Reception Centres**

#### **7.5.3.1 Definition**

The UNHCR 2006 Report defines a “Reception Centre” as a collective centre where asylum seekers may stay temporarily soon after arrival or application. In this section we have used the term Reception Centre to refer to accommodation where asylum seekers may reside for either the partial or full duration of the asylum procedure.<sup>120</sup>

#### **7.5.3.2 Relevant international experience - Sweden<sup>121</sup>**

In Sweden, Refugee Reception Centres refer to several groups of self-catering apartments situated nearby a central office reception. Asylum seekers must report to this central office every month to receive financial support and information about the progress of their visa application and to allow caseworkers to make further risk assessments.

During their stay in the Refugee Reception Centre, asylum seekers are assigned a caseworker who is trained in standard occupational health and safety procedures, conflict resolution and motivational counselling. The caseworker educates the detainee about his or her rights and acts to ensure that those rights are not infringed during detention. Caseworkers are also responsible for granting financial support (where appropriate), facilitating mediation between the detainee and lawyers, informing the detainee of decisions relating to his or her case and preparing the asylum application.

If it appears that the application process will exceed four months, the asylum seeker is entitled to gain employment during the application period (to pay for food and accommodation in the Refugee Reception Centre) through use of a general identity card. This alternative to detention is therefore cost-effective for government compared to publically funded detention.

The UNHCR reports that the abscondment level in Sweden has remained relatively low. Between January and September 2003, of 23,507 asylum claims received by Sweden, and 22,314 claims processed, only 2,810 were classed as “annulled”. This latter figure represents the upper limit to the number of asylum seekers who could have absconded during the course of the procedure, but also includes voluntary returnees and cases closed for other miscellaneous reasons.<sup>122</sup>

Sweden, like Australia, is a destination country (not a transit country) and therefore detainees are unlikely to jeopardise their asylum application by absconding.

#### **7.5.3.3 Relevant international experience – Lithuania and New Zealand**

The Lithuanian asylum-seeker accommodation facility, the Pabrade Foreigners Registration Centre, is structured to house both detainees and non-detainees, therefore being both a place of detention and an alternative to detention. Despite the segregation between detainees and non-detainees, all detainees are provided with similar services. Detainees can only exit the

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<sup>120</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 108.

<sup>121</sup> See generally Grant Mitchell, above n 55.

<sup>122</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 111.

Centre with permission and an escort, whereas non-detainees can leave unsupervised for up to 72 hours on notifying the management.<sup>123</sup>

A model jointly accommodating detainees and non-detainees is also found in New Zealand at the Mangere Accommodation Centre. In this centre asylum-seekers who are undergoing detention are housed alongside housing quota refugees (those resettled from overseas via UNHCR). Detainees must request permission to leave the centre during the day (and must be supervised) and cannot stay away overnight. Housing quota refugees must notify the management of any intended absence and can stay away overnight. Breach of these rules can result in a transfer to remand prison.<sup>124</sup> Since September 2001, only one out of 159 detained asylum seekers has absconded and there have been no detainees transferred to a remand prison.<sup>125</sup>

#### **7.5.3.4 Recommendations regarding use of Reception Centres as alternatives to detention in Australia**

Following successful identification, security and health checks, if the asylum-seeker is destitute or having difficulty integrating into the community, we recommend that Australia adopts:

- (i) an open Reception Centre style of accommodation where security is less stringent compared to initial identification detention and where detainees have access to a multitude of resources; and
- (ii) a caseworker system as employed in Sweden in order to respect detainees' human rights and dignity and to empower them by education about their rights and detention processes.

### **8 Options for additional community-based alternatives to immigration detention by comparing the cost effectiveness of these alternatives with current options**

Minister Evans notes that in 2006/7 it cost some \$200 million to operate Australia's immigration detention system and acknowledges that "the cost of long-term detention and the case against the current system are compelling".<sup>126</sup>

The joint authors note that many significant reports have concluded that community-based alternatives to detention are significantly less expensive than detention in an Immigration Detention Centre, including:

- UNHRC Alternatives to Detention Report;
- Australian Democrats Budget Report May 2004;<sup>127</sup> and
- A Just Australia, Oxfam Australia and Oxfam Novib Report, *A price too high: the cost of Australia's approach to asylum seekers* (2007).

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<sup>123</sup> UNHCR *Alternatives to Detention* Report, above n 22, para 115.

<sup>124</sup> Ibid para 119.

<sup>125</sup> Ibid

<sup>126</sup> Minister's Speech, above n 1, 13.

<sup>127</sup> Australian Democrats, *Immigration Budget Paper* (2004), available at <http://www.democrats.org.au/docs/2004/0030/ImmigrationBudget04.pdf>

The joint authors urge the government to undertake cost modelling of community-based alternatives to detention and to provide for these alternatives in the next Budget.