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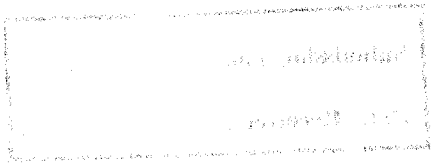
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# Submission to the Joint Standing Committee on Migration Review of Immigration Detention

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## Acronyms

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<i>Convention Against Torture</i>	CAT
Human Rights and Equal Opportunity Commission	HREOC
Human Rights Committee	HRC
Human Rights Law Resource Centre	HRLRC
<i>International Covenant on Civil and Political Rights</i>	ICCPR
<i>International Covenant on Economic, Social and Cultural Rights</i>	ICESCR
<i>Universal Declaration of Human Rights</i>	UDHR

## **1. Introduction**

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### **1.1 Scope of this Submission**

1. On 29 May, 2008 the Joint Standing Committee on Migration decided to inquire into immigration detention in Australia.
2. This submission is made by the Human Rights Law Resource Centre (**HRLRC**) and focuses on the need for Australia's immigration detention regime to ensure the full implementation of Australia's obligations under international human rights law.

### **1.2 About the HRLRC**

3. The HRLRC is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.
4. The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:
  - (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
  - (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
  - (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.
5. The HRLRC would like to thank SCALES Community Legal Centre, the Asylum Seekers Resource Centre and the Refugee and Immigration Legal Centre for their advice and assistance in the preparation of this submission.

## 2. Executive Summary

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### 2.1 Introduction

6. The HRLRC congratulates the Australian Government on its proposed reforms to Australia's immigration detention scheme as detailed on 29 July 2008.<sup>1</sup> These reforms signal a significant and positive departure from the previous government's immigration detention policies which constituted grave breaches of Australia's obligations under international human rights law.
7. Despite considerable improvements, the proposed immigration detention regime falls short of Australia's international obligations in a number of respects. The issues of concern are outlined in the remainder of this submission.
8. As Australia celebrates the 60<sup>th</sup> anniversary of the UDHR, the Government must commit to the full implementation of its international obligations through comprehensive and robust domestic legislation that reflects a human rights approach to immigration detention.
9. Further, the HRLRC considers that compliance with human rights standards should not be a matter of policy subject to the discretion of the Minister and departmental officers, but should be enshrined in legislation.

### 2.2 Recommendations

10. The HRLRC makes the following recommendations for reform:

**Recommendation 1:**

The Government should conduct a wholesale review of the *Migration Act 1958* and the *Migration Regulations 1994* insofar as they apply to immigration detention and ensure that these instruments adequately reflect Australia's obligations under international human rights law.

**Recommendation 2:**

The *Migration Act 1958* should be amended to reflect the following principles as contained in the Australian Government's "seven key immigration values" :

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<sup>1</sup> Chris Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System*, speech at Australia National University, Canberra, 29 July, 2008.

- Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).
- 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, should be subject to regular review.
- Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
- People in detention will be treated fairly and reasonably within the law.
- Conditions of detention will ensure the inherent dignity of the human person.

***Recommendation 3:***

Mandatory immigration detention should be abolished.

***Recommendation 4:***

Decision-makers responsible for deciding whether to place a person in immigration detention should be statutorily obliged to take into account the international human rights obligations contained in the international instruments to which Australia is a party.

***Recommendation 5:***

People should not be kept in immigration detention for the purpose of performing health checks.

***Recommendation 6:***

Detailed guidelines should be provided as to the meaning of "unacceptable risk to the community".

***Recommendation 7:***

Decisions to detain people in immigration detention should be subject to both independent merits and judicial review.

**Recommendation 8:**

The *Migration Act 1958* should impose a time limit on immigration detention. Detention should be a last resort, be imposed for the minimum period possible and be subject to regular independent review.

**Recommendation 9:**

Under no circumstances should children be kept in any form of detention, including Immigration Residential Housing.



### 3. A Human Rights Framework

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#### 3.1 Immigration Detention and Human Rights

11. Australia has a long and distinguished legacy of commitment to international human rights law. Unfortunately, this reputation has wavered in recent years and few policies have exemplified Australia's disengagement with international human rights law like those relating to immigration detention.
12. Significantly, the United Nations Human Rights Committee ('HRC') has concluded on at least seven occasions since 1997 that Australia's system of immigration detention constitutes a breach of various obligations under the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>2</sup>
13. If Australia is to reclaim its place as a world leader in the promotion and protection of human rights, reforms must be made in accordance with Australia's obligations under international human rights law, including the:
  - (a) ICCPR
  - (b) *International Covenant on Economic, Social and Cultural Rights (ICESCR)*;<sup>3</sup>
  - (c) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*;<sup>4</sup>
  - (d) *Convention Relating to the Status of Refugees (Refugee Convention)*;<sup>5</sup> and
  - (e) *Convention on the Rights of the Child (Children's Convention)*.<sup>6</sup>

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<sup>2</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976); *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (11 September 2007); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006).

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 003 U.N.T.S. 3 (entered into force January 2, 1976).

<sup>4</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, (entered into force 26 June 1987).

<sup>5</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, (entered into force 22 April, 1954).

<sup>6</sup> *Convention on the Rights of the Child*, 20 November 1989, (entered into force 2 September 1990).

14. A human rights approach is supported by the Australian Labor Party's *National Platform and Constitution* which states that 'Labor will adhere to Australia's international human rights obligations and will seek to have them incorporated into the domestic law of Australia'.<sup>7</sup>

### 3.2 Lessons from Other Jurisdictions

15. Adherence to human rights standards is not just an issue of compliance with international law; a human rights approach can also promote good policy outcomes. The experience in comparative jurisdictions, such as the United Kingdom, is that the use of a human rights framework can have a significant positive impact on public sector culture and the development and interpretation of laws. Some of the benefits of using a human rights approach to develop laws and policies include:<sup>8</sup>
- (a) a 'significant, but beneficial, impact on the development of policy';
  - (b) enhanced scrutiny, transparency and accountability in government;
  - (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
  - (d) 'new thinking' as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
  - (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
  - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.
16. The Palmer Report concluded, among other things, that:

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<sup>7</sup> Australian Labor Party, *2007 National Platform and Constitution*, adopted by the 44th National Conference in Sydney on 27–29 April 2007, < <http://www.alp.org.au/platform/index.php> > at 27 June 2008, 206-226.

<sup>8</sup> See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

- (a) there are 'serious problems with the handling of immigration detention cases than stem from deep-seated cultural and attitudinal problems' within the Department,<sup>9</sup> and
  - (b) immigration officials exercise extraordinary powers 'without adequate training... and with no genuine quality assurance and restraints on the exercise of those powers.'<sup>10</sup>
17. In light of this, the HRLRC submits that a human rights approach to the review of immigration detention will not only ensure that Australia's international obligations are fulfilled, but will also assist to develop laws and policies that will contribute to a fair and efficient immigration system.

**Recommendation 1:**

The Government should conduct a wholesale review of the *Migration Act 1958* and the *Migration Regulations 1994* insofar as they apply to immigration detention and ensure that these instruments adequately reflect Australia's obligations under international human rights law.

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<sup>9</sup> MJ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report*, (July, 2005) [17].

<sup>10</sup> *Ibid*, [9].

#### 4. Legislative Protection

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##### 4.1 “Seven Key Immigration Values”

18. In setting out the proposed reforms to Immigration Detention, the Minister for Immigration and Citizenship proposed “seven key immigration values”. These values are as follows:<sup>11</sup>
- (a) Mandatory detention is an essential component of strong border control.
  - (b) To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
    - (i) all unauthorised arrivals, for management of health, identity and security risks to the community;
    - (ii) unlawful non-citizens who present unacceptable risks to the community; and
    - (iii) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
  - (c) Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
  - (d) 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.
  - (e) Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
  - (f) People in detention will be treated fairly and reasonably within the law.
  - (g) Conditions of detention will ensure the inherent dignity of the human person.
19. As stated above, many of these values represent advances in the promotion and protection of human rights in Australia. Specifically, points (c) – (g) constitute important steps towards the improvement of Australia’s compliance with international human rights law.
20. As yet, the Government has not released details of the extent to which the “seven key immigration values” will be incorporated in legislation. The HRLRC believes that it is vital

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<sup>11</sup> Chris Evans, above n 1.

the protections and principles outlined in (c) – (g) be recognised in legislation and not be a matter of policy subject to discretion.

#### 4.2 Entrenchment of Human Rights under International Law

21. Article 2 of the ICCPR states that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

22. In addition, Australia must comply with its obligations under all human rights instruments in good faith, and cannot justify any failure to comply with them on the existence of contrary domestic law, or on arguments based on claims to sovereignty.<sup>12</sup>

23. The HRLRC submits that the effective implementation of Australia's international human rights obligations requires legislative entrenchment.

#### 4.3 Recommendations

##### **Recommendation 2:**

The *Migration Act 1958* should be amended to reflect the following principles:

- Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).
- 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, must be subject to regular review.
- Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
- People in detention will be treated fairly and reasonably within the law.
- Conditions of detention will ensure the inherent dignity of the human person.

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<sup>12</sup> *Vienna Convention on the Law of Treaties* arts 26 and 27.

## 5. Immigration Detention

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### 5.1 Mandatory Detention under the Proposed Regime

24. Since 1992, Australia has maintained a policy of indefinite mandatory detention of asylum seekers. The *Migration Act 1958* (Cth) establishes a scheme whereby an 'unlawful non-citizen' — that is a non-citizen who does not hold a valid visa<sup>13</sup> — must be detained<sup>14</sup> until such time as they are removed from Australia, deported, or granted a visa.<sup>15</sup> If none of the three triggers for release eventuates, detention can be indefinite.

25. The first of the Australian Government's new "seven key immigration values" is that "[m]andatory detention is an essential component of strong border control."<sup>16</sup> The second principle limits mandatory immigration detention to the following three groups:

- (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.

26. The HRLRC considers that mandatory detention constitutes a violation of international human rights law. Human rights principles require that deprivation of liberty be necessary and proportionate, with the onus being on the state to justify the necessity and proportionality of such detention.<sup>17</sup> Therefore, adequate and individualised justification for detention is required in each case.

27. In setting out the Australian Government's new approach to immigration detention, Minister Chris Evans stated that:<sup>18</sup>

persons will be detained only if the need is established. The presumption will be that persons will remain in the community while their immigration status is resolved.

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<sup>13</sup> *Migration Act* ss 13 and 14.

<sup>14</sup> *Migration Act* s 189.

<sup>15</sup> *Migration Act* s 196.

<sup>16</sup> Chris Evans, above n 1.

<sup>17</sup> See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19]. See also P Hogg, *Constitutional Law of Canada* (2004) 795-6

<sup>18</sup> *Ibid.*

28. The HRLRC supports this approach in principle, but believes that it is inconsistent with mandatory detention.

## 5.2 International Law

29. Immigration detention *per se* is not prohibited by international law. However, several international treaties to which Australia is a party impose limitations on the scope of acceptable immigration detention arrangements.

### (a) ICCPR

30. Article 9(1) of the ICCPR states that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

31. This prohibition applies to all deprivations of liberty including those for the purposes of immigration control, requiring that detention be necessary, reasonable, proportionate, reviewable and for the shortest period possible.<sup>19</sup> Article 9(1) is based on Article 9 of the UDHR which also prohibits arbitrary detention.<sup>20</sup>

32. In its General Comment No. 31 the HRC stated that:<sup>21</sup>

States must demonstrate the necessity [of limitations on human rights] and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

33. Article 7 of the ICCPR, which prohibits torture or cruel, inhuman or degrading treatment or punishment, also imposes limits on the use of immigration detention. This prohibition is examined in more detail below in relation to the CAT.

### (b) Refugee Convention

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<sup>19</sup> Human Rights Committee, *General Comment No 8 on Article 9* (30 June 1982).

<sup>20</sup> *Universal Declaration of Human Rights* art 9 ('No one shall be subjected to arbitrary arrest, detention or exile'). See further Office of the United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (February 1999) at [1] ('**UNHCR Revised Guidelines**'); Office of the High Commissioner of Human Rights, *Fact Sheet No 26 on the UN Working Group on Arbitrary Detention*, at part IV(B); Commission on Human Rights, *Resolution 1991/42* (5 March 1991); Commission on Human Rights, *Resolution 1997/50* (5 November 1997).

<sup>21</sup> Human Rights Committee, *General Comment 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

34. Article 31 of the Refugee Convention prohibits States from imposing penalties on refugees who enter, or are present, in their territory without authorisation, merely because of their illegal entry or presence.<sup>22</sup>

35. The Refugee Convention also prohibits States from imposing restrictions on refugees' freedom of movement, other than those restrictions 'which are necessary'.<sup>23</sup> Any restrictions must only apply until the refugee's status is regularised or until they obtain admission into another country.

(c) CAT

36. Articles 2 and 16 of CAT oblige States parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture (Article 2) and cruel, inhuman or degrading treatment or punishment (Article 16).

37. In its recent review of Australia's compliance with CAT, the Committee against Torture recommended that Australia consider abolishing its policy of mandatory immigration detention and stated that:<sup>24</sup>

Detention should be used as a measure of last resort only and a reasonable time limit for detention should be set; furthermore, non-custodial measures and alternatives to detention should be made available to persons in immigration detention.

(d) Children's Convention

38. Under the Children's Convention, the detention of children 'must be used only as a measure of last resort and for the shortest appropriate period of time'.<sup>25</sup> The Children's Convention also imposes a positive duty to ensure that children asylum seekers receive appropriate protection and humanitarian assistance.<sup>26</sup> This requirement is in addition to Principle 5(2) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* ('**UN Body of Principles**'),<sup>27</sup> which recognises the need for special measures in respect of children in detention generally, and requires that their necessity always be subject to review by a competent judicial or other authority.

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<sup>22</sup> *Refugee Convention* art 31.

<sup>23</sup> *Refugee Convention* art 31(2).

<sup>24</sup> UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture : Australia*, 22 May 2008. CAT/C/AUS/CO/3.

<sup>25</sup> *Children's Convention* art 37(b).

<sup>26</sup> *Children's Convention* art 22(1).

<sup>27</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988.



39. The UN High Commissioner for Refugees has recognised that, in relation to children specifically, their detention is especially undesirable, and that it should only ever be used as a 'measure of last resort, and for the shortest period of time.'<sup>28</sup>

### 5.3 Problems with the Proposed Regime

(a) *Detention for the purposes of health checks*

40. The HRLRC considers that the mandatory detention of unauthorised arrivals for the purposes of performing health checks is contrary to the requirement that limitations on human rights be necessary, proportionate and reasonable.
41. Other new arrivals to Australia are not detained for this reason. Where health checks are required for authorised arrivals they are regularly performed after people have been living in the community for months.
42. In this context it is manifestly unnecessary and disproportionate for unauthorised arrivals to be detained while health checks are completed. Detention in this context would also constitute discrimination under Articles 2 and 26 of the ICCPR.

(b) *Detention where a person is deemed to be an "unacceptable risk to the community"*

43. Without further guidance on the question of what is meant by "unacceptable risk to the community" it is not possible to assess whether detention for this reason is consistent with human rights standards.
44. Minister Evans has stated that people may be categorised as an "unacceptable risk to the community" include people who have "criminal or terrorist links or those whose identity is unknown."<sup>29</sup>
45. The HRLRC is particularly concerned about the detention of people whose visas have been cancelled under section 501 of the *Migration Act* and are awaiting deportation. The HRLRC considers that detention in such cases may constitute a violation of several of Australia's human rights obligations in addition to Article 9, including:
- (a) Article 14(7) ICCPR: right not to be tried or punished again for an offence for which one has already been finally convicted;

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<sup>28</sup> *UNHCR Revised Guidelines* [1] and [Guideline 6].

<sup>29</sup> Evans, above n 1.

- (b) Article 17 ICCPR – right not to be subjected to arbitrary interference with privacy, family or home; and
  - (c) Article 23(1) ICCPR - right to protection of the family unit.
46. It is important to recall that people who are subject to deportation on the basis of a section 501 visa cancellation have generally served their sentence for the crime they committed and have been found eligible for release by a state-based parole board. We note that the core competency of a parole board is the determination of whether a person poses a risk to the community. In contrast, the Department of Immigration does not have expertise in this area.
- (c) *Access to judicial review*
47. The previous Australian Government implemented a consistent and sustained policy over a number of years to drastically scale back the remedies available to detained persons and to minimise the scope of judicial and other review available in relation to administrative decisions made under the Act.
48. In the second reading speech before the Senate in relation to the *Migration Legislation Amendment (Judicial Review) Bill 1998* (Cth), the Parliamentary Secretary for the Minister noted that the purpose of the bill was 'to give legislative effect to the government's election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances.'<sup>30</sup>
49. The ability to challenge the lawfulness of detention is an important safeguard against arbitrary detention. The ICCPR requires that detainees be able to challenge the lawfulness of their detention before a court.<sup>31</sup> Similarly, Principle 11(1) of the UN Body of Principles requires that 'a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.'
50. The Office of the High Commissioner for Human Rights has stated that a deprivation of liberty is not arbitrary if it results from a final decision taken by a domestic judicial institution and is in accordance with domestic law.<sup>32</sup> However, as it currently stands, mandatory immigration detention does not satisfy this requirement.

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<sup>30</sup> Commonwealth of Australia, *Parliamentary Debates*, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

<sup>31</sup> *ICCPR* art 9(4).

<sup>32</sup> Office of the High Commissioner for Human Rights, *Fact Sheet No 26 on the UN Working Group on Arbitrary Detention*, at part IV(B).

51. Judicial oversight must also be able to consider whether the circumstances of detention comply with international law. In *Baban v Australia*, the HRC stated that:<sup>33</sup>

[J]udicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.

52. In *A v Australia*, the HRC noted that 'every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed'.<sup>34</sup> Furthermore, judicial review of the lawfulness of detention must be, in its effects, real and not merely formal.<sup>35</sup>

53. The HRC and the report of the United Nations' Working Group on Arbitrary Detention ('**Working Group Report**') have both expressed concern about the lack of adequate judicial review of immigration detention in Australia.<sup>36</sup> The Working Group Report noted that, although avenues for judicial review exist, 'it is unlikely that these remedies are effective in ordinary immigration detention cases', due to the difficulty of detainees obtaining, and being able to pay for, legal representation.<sup>37</sup> In *Baban v Australia*, the HRC was highly critical of the fact that, in that case,<sup>38</sup>

judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and ... the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant.

54. In order to comply with international human rights law, any form of immigration detention must be subject to judicial review.

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<sup>33</sup> UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) at [7.2].

<sup>34</sup> UN Doc CCPR/C/59/D/560/1993 (3 April 1997) at [9.4].

<sup>35</sup> *Ibid* at [9.5].

<sup>36</sup> Commission on Human Rights, Economic and Social Council, United Nations, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Visit to Australia*, UN Doc E/CN.4/2003/8.Add 2 (24 October 2002). See also Report of Justice P N Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, *Mission to Australia 24 May to 2 June 2002: Human Rights and Immigration Detention in Australia*.

<sup>37</sup> *Working Group Report* at page 8.

<sup>38</sup> UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) at [7.2].

(d) *Time limits*

55. In the absence of a time limit for immigration detention, there is a risk that detention will become indeterminate. Indeterminate immigration detention constitutes a violation of rights under the ICCPR. It may also lead to violations of additional rights, such as the right to physical and mental health and the right to family.
56. This was recognised in the Working Group Report which recommended that:<sup>39</sup>
- a reasonable time limit for detention should be set, after which the person would be given a bridging visa and lodged with family or friends, or in a reception centre located in an urban area.
57. The HRLRC reiterates the Working Group's recommendation in this respect.

(e) *Children in Detention*

58. The HRLRC congratulates the Australian Government on its commitment not to detain children in immigration. We reiterate the need for this commitment to be enshrined in legislation.
59. The HRLRC is concerned that the Government has suggested that children and their families may be kept in Immigration Residential Housing (IRH). IRH is family-style housing. When detained in IRH, people are not free to come and go as they please, and must be accompanied by detention staff when they visit external sites.
60. While IHR is not detention in name, it imposes significant limitations on the rights set out in section 5.2 above. The HRLRC therefore considers that the detention of children in IRH is inconsistent with Australia's obligations under CRC, including the child's right to life and development;<sup>40</sup> freedom from arbitrary or unlawful interference with his or her privacy or family;<sup>41</sup> the highest attainable standard of health;<sup>42</sup> education;<sup>43</sup> and freedom from torture or other cruel, inhuman or degrading treatment or punishment.<sup>44</sup> The CRC also provides that:<sup>45</sup>

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<sup>39</sup> *Working Group Report*, p. 19.

<sup>40</sup> CRC, art. 6.

<sup>41</sup> CRC, art. 16.

<sup>42</sup> CRC, art. 24.

<sup>43</sup> CRC, art. 28.

<sup>44</sup> CRC, art. 37.

<sup>45</sup> CRC, art 22.

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

61. The HRLRC considers that any form of immigration detention of children is inconsistent with the attainment of these rights.

#### 5.4 Recommendations

62. The HRLRC makes the following recommendations in relation to the use of immigration detention:

***Recommendation 3:***

Mandatory immigration detention should be abolished.

***Recommendation 4:***

Decision-makers responsible for deciding whether to place a person in immigration detention should be statutorily obliged to take into account the international human rights obligations contained in the international instruments to which Australia is a party.

***Recommendation 5:***

People should not be kept in immigration detention for the purpose of performing health checks.

***Recommendation 6:***

Detailed guidelines should be provided as to the meaning of "unacceptable risk to the community".

***Recommendation 7:***

Decisions to detain people in immigration detention should be subject to both independent merits and judicial review.

**Recommendation 8:**

The *Migration Act 1958* should impose a time limit on immigration detention. Detention should be a last resort, be imposed for the minimum period possible and be subject to regular independent review.

**Recommendation 9:**

Under no circumstances should children be kept in any form of detention, including Immigration Residential Housing.

## 6. Conditions of Detention

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### 6.1 Proposed System

63. In recent years the conditions of immigration detention in Australia have been a shameful blight on the country's human rights record. In 2002, the Working Group reported that '[t]he conditions of detention are in many respects similar to prison conditions'.<sup>46</sup> Some of the major areas of concern have been:
- (a) inadequate access to health care;
  - (b) use of solitary confinement;
  - (c) inadequate access to education, recreation and religious facilities; and
  - (d) inadequate access to legal assistance.
64. The Australian Government has announced that people in immigration detention will be treated "fairly and reasonably within the law" and that "conditions of detention will ensure the inherent dignity of the human person" are met. These objectives are welcomed and, if met, will result in a marked improvement in the conditions of immigration detention in Australia.
65. We also note that the Australian Government has stated its intention to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. This is a particularly welcome development, as it will enable 'spot checks' of immigration detention centres by both domestic and international monitoring bodies.
66. Finally, the comments made by the HRLRC in regard to conditions of detention are intended to be read in light of the other recommendations contained in this submission, particularly: the abolition of mandatory detention; the adoption of a human rights approach to decisions relating to detention; and the imposition of time limits on immigration detention. If a human rights approach is implemented, it is expected that only on very rare occasions will a person be subject to immigration detention.

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<sup>46</sup> Ibid, 7.

## 6.2 International Law

67. The rights contained in each of the international human rights instruments to which Australia is a party are potentially relevant to the conditions of immigration detention. Some of the most significant rights in this context include:

- (a) the highest attainable standard of physical and mental health;<sup>47</sup>
- (b) education;<sup>48</sup>
- (c) protection of the family;<sup>49</sup>
- (d) special protection for children;<sup>50</sup>
- (e) adequate standard of living, including food, clothing and housing;<sup>51</sup>
- (f) freedom from torture, inhuman or degrading treatment or punishment;<sup>52</sup>
- (g) to be treated with humanity and with respect for the inherent dignity of the human person;<sup>53</sup>
- (h) the right to a fair hearing;<sup>54</sup>
- (i) equality before the law;<sup>55</sup>
- (j) freedom of religion;<sup>56</sup>
- (k) liberty and security of the person;<sup>57</sup> and
- (l) privacy.<sup>58</sup>

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<sup>47</sup> ICESCR, art. 12.

<sup>48</sup> ICESCR, art. 13.

<sup>49</sup> ICESCR, art. 10(1).

<sup>50</sup> ICCPR, art. 24.

<sup>51</sup> ICESCR, art. 11.

<sup>52</sup> ICCPR, art. 7 and CAT.

<sup>53</sup> ICCPR, art. 10.

<sup>54</sup> ICCPR, art. 14.

<sup>55</sup> ICCPR, art. 26.

<sup>56</sup> ICCPR, art. 18.

<sup>57</sup> ICCPR, art. 9

<sup>58</sup> ICCPR, art. 17.



68. The HRLRC consider that each of these rights should be taken into account when designing a system of immigration detention.
69. In addition Article 10 imposes a positive obligation on the state towards persons who are particularly vulnerable because of their status as persons deprived of liberty. In accordance with this article, persons deprived of their liberty may not be:<sup>59</sup>

subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

70. Article 31 of the Refugee Convention (mentioned above in relation to mandatory detention) is also relevant to conditions of detention. Article 31 states that contracting states “[s]hall not impose penalties, on account of their illegal entry or presence, on refugees...”.
71. The HRLRC reiterates its earlier submission that the effective implementation of international obligations in this instance requires a legislative guarantee of the government’s commitment to comply with human rights standards.

### **6.3 Recommendations**

72. The HRLRC refers to and reiterates recommendation 2, which provides that the Government should ensure through a system of legislative checks and balances that its commitments that people in detention will be treated “fairly and reasonably within the law” and that “conditions of detention will ensure the inherent dignity of the human person” are met.

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<sup>59</sup> Human Rights Committee, *General Comment 21, Article 10* (Forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994).