Submission No. 29

Date Received 16

Uniting Church in Australia
Social Justice (WA)

The Uniting Church Centre
85 – 89 Edward St, Perth WA 6000
GPO BOX M952, Perth WA, 6843
t (08) 9260 9800
t 1300 736 692
f (08) 9378 2731
e social.justice@wa.uca.org.au
ABN 66 428 151 531

Committee Secretary
Joint Standing Committee on Migration
Department of House of representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600 Australia

RECEIVED
16 JUL 2008
BY: MIG

16 July 2008

Dear Committee Secretary,

Please find attached Submission to the Joint Standing Committee on Migration For The Inquiry Into Immigration Detention In Australia.

This is a Joint Submission of The Social Justice Board of The Uniting Church in Australia, WA Synod, Social Responsibilities Commission - Anglican Province of Western Australia, Catholic Social Justice Council - Archdiocese of Perth, Council of Churches of Western Australia (WA) Inc, Religious Society of Friends, Perth Meeting, Coalition for Asylum Seekers, Refugees and Detainees (WA) Inc (CARAD), Centre For Advocacy, Support & Education (CASE) For Refugee Inc, and Edmund Rice Institute for Social Justice, Fremantle.

There is one document attached and the document has (2) annexures.

Thank you for the opportunity to comment.

We will be happy to address the Joint Standing Committee in further oral Submissions.

Kind regards

Rosemary Hudson Miller
Associate General Secretary
Justice and Mission

Joint Submission Of

The Social Justice Board of The Uniting Church In Australia, WA Synod

Social Responsibilities Commission, Anglican Province of Western Australia

Catholic Social Justice Council, Archdiocese of Perth

Council of Churches of Western Australia (WA) Inc

Religious Society of Friends, Perth Meeting

Coalition Assisting Refugees and Detainees (WA) Inc

Centre For Advocacy, Support & Education (CASE) For Refugees Inc

Edmund Rice Institute for Social Justice, Fremantle

To The Joint Standing Committee on Migration For The

Inquiry Into Immigration Detention In Australia

16 July 2008

Council of Churches of WA (Inc)	Social Responsibilities Commission, Anglican Province of Western Australia	Board for Social Justice Uniting Church in Australia, WA Synod	Catholic Social Justice Council, Archdiocese of Perth
Edmund Rice Institute for Social Justice (ERISJ)	Coalition Assisting Refugees and Detainees (CARAD)	Centre for Advocacy, Support & Education (CASE) for Refugees	Religious Society of Friends (Quakers)

This submission responds to the invitation to address the terms of reference provided on the Joint Standing Committee on Migration website[1], namely:

A. The criteria that should be applied in determining how long a person should be held in immigration detention
B. The criteria that should be applied in determining when a person should be released from immigration detention following health and security checks
C. Options to expand the transparency and visibility of immigration detention centres
D. the preferred infrastructure options for contemporary immigration detention
E. options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing, Immigration Transit Accommodation (ITA) and community detention
F. options for additional community-based alternatives to immigration detention by:-

   a) inquiring into international experience;

   b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;

   c) comparing the cost effectiveness of these alternatives with current options.

Executive Summary

The following are the main points of this submission in summary form.

Terms of Reference A, B, D and F: Alternatives to Detention

1. The premise of this submission is that terms of reference A, B, D and F should be considered holistically under the rubric of the need to abolish automatic, universal mandatory detention (denoting closed, secure prison-like facilities) for asylum seekers. In its place should be a model of open *immigration reception and processing centres* (IRPCs) for short periods of determination, from which applicants are then moved to *supported community accommodation* (SCA) for cases that take longer periods to determine.

[1] http://www.aph.gov.au/house/committee/mig/detention/tor.htm

2. The current regime should be abolished because: (a) it is in breach of Australia's international obligations and is inconsistent with best practice internationally; (b) it is inhumane and results in harm to the physical and mental health of asylum seekers and hinders settlement or removal; (c) it is punitive; (d) it is based on an illegitimate goal of deterrence, which in any event is illusory; (e) it is not justified by "flight risk" (the risk of asylum seekers absconding); (f) it is not cost effective; and (g) it is therefore not *proportionate* to and *necessary* for reasonable objectives.

3. Australia should adopt the *UNHCR Revised Guidelines on Detention of Asylum Seekers* (February 1999) and have regard to the *European Union Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers* (27 January 2003)[2] to the extent that the latter deals with matters that the UNHCR Revised Guidelines do not.

Term of Reference A: How long should an asylum seeker be held in immigration detention?

4. In all cases, detention should be a last resort after due consideration of less restrictive alternatives.

5. It is acknowledged that in some exceptional cases detention is justified by reference to certain *criteria*, namely: where there are doubts about asylum seeker's identity, health and character status (*initial screening*); or to protect national security or public order; or to prevent the likelihood of absconding.

6. In these instances, detention should be for a set, limited and minimum period, which must be subject to independent or judicial review and may only be extended by judicial authority.

---

2 *Union Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers.*

7. Ordinarily, initial screening should occur at an IRPC, *albeit* perhaps with restrictions on freedom of movement.

Term of Reference B: Criteria for less restrictive arrangements

8. After initial screening, asylum seekers should be accommodated in open IRPCs with a minimum of restriction on freedom of movement for the balance of the determination of their application. If that determination is prolonged for more than a set period, of say 12 weeks, they should be placed within SCA.

9. After initial screening, the only further criteria for less restrictive arrangements should be compliance with case management, in the process determining of their claims and with reporting.

10. Children and vulnerable persons, such as pregnant women, persons with disabilities and the elderly should never be held in detention. Families should not be separated.

Term of Reference D: Infrastructure Options

11. IRPCs or SCA should be Government-run and funded, and co-ordinated with the state governments departments, particularly in health and education, pursuant to memoranda of understanding, and with community and church organisations and agencies.

12. IRPCs or SCA should be safe, comfortable and culturally appropriate places with necessary amenities and a minimum of restrictions necessary to process the asylum seeker's application.

13. Asylum seekers should have access to appropriate health, welfare, education and legal services, and should be able to participate in community, social, cultural and religious activities. Applicants whose applications are not determined within a period (of say three or six months) should have work rights.

14. Offshore detention and the "Pacific Solution" should be abolished. Detention should not be in isolated places or harsh conditions, but should occur at or in close proximity to international airports.

15. Immigration officials, the Australian Federal Police and security intelligence agencies must be provided with sufficient resources to complete character and identity checks expeditiously.

Term of Reference C: Transparency and Visibility

16. The operation of detention facilities, IRPCs, SCAs and any form of accommodation or arrangements (eg. health and welfare) for asylum seekers should be entirely transparent.

17. Detention Centres and IRPCs should not be in isolated or off-shore places. By definition, supported community accommodation (SCA) is within existing Australian communities.

18. An *immigration inspectorate* should be established, empowered to enter any secure or restrictive immigration facility at any time, have direct access to asylum seekers who wish it, and be able to take, investigate and report on individual or group complaints and systemic issues. The immigration inspectorate should be able to make reports and recommendations to the Department (DIAC) and to Parliament, and should be able to liaise with other relevant state, territory or Federal agencies and non-government organisations.

19. The *media* should be able to access detention facilities and IRPCs responsibly, although asylum seekers' consent must be obtained if they are to be accessed and their security, privacy, confidentiality and culture or religion must be protected and respected.

Term of Reference E: Health Services

20. The current system of contracting such health services out to private entities, whereby the Department does not take responsibility for maintaining or providing access to health records or treatment, is not acceptable.

21. A proper, comprehensive system of health services should be implemented across all facilities and arrangements dealing with asylum seekers, including community accommodation.

22. Health services should primarily be provided by state health departments and agencies pursuant to memoranda of understanding with state governments within a regime that ensure the Federal Government and Department meets its duty of care to asylum seekers. The Department should have proper regard to independent professional advice.

Term of Reference F: Community Options

23. It is submitted that proper regard to international best practice demonstrates the viability, humanity and cost effectiveness of alternatives to detention. A comprehensive comparative survey of current international models is beyond this submission.

24. This submission draws principally on the *UNHCR Report on Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, which surveys 33 countries including Australia with information current to 31 March 2004, and has had regard to the *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the European Union Member States* (October 2006).

25. Further inquiry should be made about current alternatives to detention for asylum seekers in other countries.

The 1999 UNHCR Guidelines on detention of asylum seekers ('UNHCR Guidelines on Detention')[2] reaffirmed the general principle that asylum seekers should not be detained.[3] 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.' Human rights bodies have similarly emphasised that detention of asylum seekers should only occur as a measure of last resort, after other non-custodial alternatives have proven or been deemed insufficient in relation to the individual.[4]

UNHCR Report on Alternatives to Detention of Asylum Seekers and Refugees, April 2006[3]

Introduction

1. The parties to this submission collectively have extensive experience in dealing with asylum seekers in immigration detention centres, residential facilities and community care. This experience includes work in legal, advocacy, case management, care and accommodation and pastoral aspects over many years.

2. We fear that the present regime of mandatory detention of on-shore asylum seekers[4] was a politically expedient, reactionary (often xenophobic) and misconceived response to unjustified sense of Australia being overrun by "boat people", "queue jumpers" and even terrorists.

---

3 Protection Policy & Legal Advice Section, Department of International Protection, UNHCR, hereafter referred to as the "*UNHCR Report on Alternatives*". Footnote 2 refers to *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to Detention of Asylum Seekers*, February 1999, based on UNHCR Executive Committee (ExCom) Conclusion No. 44 (XXXVI) – 1986 on the detention of refugees and asylum seekers. Footnote 3 refers to definitions of "asylum seeker". Footnote 4 says "See, for example, Resolution of the UN Sub-Commission on Promotion and Protection of Human Rights regarding detention of asylum seekers, 2000/21; The UN Working Group on Arbitrary Detention recommendation that alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.' E/CN.4/1999/63/Add.3. See also Art 37(b) of the Convention on the Rights of the Child (CRC)." SEE also Art 7 of *European Union Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers* which is to similar effect.

4 The term "on-shore asylum seekers" refers of on-shore asylum seekers who have no visa, permit or other authorisation permitting them to be in Australia. It is acknowledged that asylum seekers who arrive on a valid visa are not detained.

3. The *World Council of Churches Global Ecumenical Network on Uprooted Peoples Punishing the Victims of Persecution: Churches Speak Out on Detention* (September 2005)[5] decried the increased use in many countries of arbitrary detention "to punish and deter" asylum seekers amid the official rationale of a need for increased national security in the wake of 9/11.

4. We have witnessed the prevalent suffering, inhumanity and shame of a system that has treated vulnerable people fleeing adversity and persecution as criminals to be deterred from seeking sanctuary in Australia. We are therefore grateful for the opportunity to make submissions on the proposed terms of reference.

5. We believe, however, that the retention and emphasis in the terms of reference on *detention* of asylum seekers is misconceived and limits proper consideration of a necessary fundamental shift to alternatives to detention.

6. The premise of this submission is the need to abolish automatic, universal mandatory detention for on-shore asylum seekers until they either get a visa or get deported (or indefinitely where there is nowhere to return them to).

7. By "detention" in this submission is meant conditions of involuntary and substantial deprivation of liberty and restriction of movement in a closed,

---

5 http://nat.uca.org.au/unitingjustice/resourcearchive/WCC-NCCA/DetentionStatement_WCC1005.doc. This report is referred to hereafter as *WCC Speaks on Detention*. The footnote to the title reads: "The Global Ecumenical Network (GEN) brings together regional and national ecumenical networks on uprooted people in Africa, Asia, Australia, North America, the Caribbean, Europe, Latin America, the Middle East, and the Pacific. Representatives of Roman Catholic organizations, some Christian world communions, and church-related agencies also participate. The GEN meets every year to review the global situation and future trends affecting uprooted people, to share information, and to determine church responses to the needs of uprooted people. Regional representatives from Africa, Asia, Australia, the Caribbean, Europe, Latin America, the Middle East, North America, and the Pacific gathered in Miami, Florida from September 9-11, 2005 to share concerns arising from church work in solidarity with uprooted people, with particular emphasis on the issue of detention of asylum seekers and migrants."

guarded and secure (prison or prison-like) facility, of the sort notoriously typified by Curtin, Port Hedland, Woomera and Baxter detention centres.[6]

8. We must adopt a model of open *immigration reception and processing centres* (IRPCs) for short periods of determination, from which applicants are then moved to *supported community accommodation* (SCA) for cases that take longer to determine.

Reasons Why Mandatory Detention Should be Abolished

9. **The human and financial costs**: Besides the fact that the present regime of automatic mandatory detention for asylum seekers arriving without a valid visa or other authorisation is an arbitrary, non-reviewable abrogation of human rights, it is broadly acknowledged that it poses significant (and often long term and drastic) health risks to detainees. This increases the necessity for and cost of medical services and other support structures.

10. The adverse health effects often continue beyond detention and therefore, if a visa is granted, it hinders settlement, and places further burdens on support structures in the community. If a visa is refused, ill health makes removal from Australia and return to country of origin very difficult, and in several cases with which parties to this submission have been involved, prevents return.

11. According to many studies and surveys, detention is also less costs effective than non-detention alternatives. See for example the *UNHCR Report on Alternatives*, paras 166-172.

---

6 In the *UNHCR Revised Guidelines on Detention of Asylum Seekers* (February 1999), Guideline 1 defines detention as "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities and airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory." Guideline 1 goes on to state: "Persons who are subject to limitations on domicile and residency are not generally considered to be in detention. When considering whether an asylum seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should be assessed." We respectfully consider this a sensible definition and approach.

12. The present regime is therefore bad for asylum seekers and bad for broader Australia.

13. **Addressing flight risk:** Australian and international experience suggests that the general risk of asylum seekers absconding is not great. It is negligible for those in the country of their chosen destination and prior to receipt of a negative decision. The risk is higher for those who are in transit (seldom the case in Australia) or whose asylum application has been rejected. However, even in this latter category, the experience of UCA Hotham Mission, CARAD, Case for Refugees and others in Australia and abroad is that proper support, advice, advocacy and case management result in minimal incidences of absconding. Therefore the risk does not justify mandatory detention. The risk can be met with other measures such as curfews, reporting, posting bonds, bail or recognisance and case management.

14. Instead of assuming an asylum seeker presents a flight risk, it should be shown to exist in each case before detention is justified.

15. The **Hotham Mission Asylum Seeker Project** in **Melbourne** as at February 2004 was providing housing support and case management assistance to 250 asylum seekers on bridging visas in 33 properties. It reported extremely high levels of compliance, and no instance of absconding out of 200 cases between 2001 and 2003. Eighty five per cent of those who received negative decisions departed Australia voluntarily (the rest were detained for removal). The Project produced a study that concluded that the risk of absconding was met with less restrictive measures and positive support, including (a) compliance requirements like reporting; (b) living assistance linked to maintained contact with authorities; (c) risk assessments; and (d) comprehensive case management.[7]

[7] Hotham Mission Asylum Seeker Project "Welfare Issues and Immigration Outcomes for Asylum Seekers on bridging Visa E, Research and Evaluation" November 2003; Submission to National Inquiry into Children in Immigration Detention from Hotham Mission Asylum Seeker Project, HREOC, No. 174.

16. The *UNHCR Report on Alternatives* refers in its annexure on **Canada** to very high levels of asylum seeker compliance within non-detention models, such as Matthew House, where there were no curfews or security, and only 3 out of 300 had disappeared in 2003/2004. Sojourn House had only 3 out of 3600 disappearances.

17. The *UNHCR Report on Alternatives* found that the risk of absconding amongst asylum seekers before their determination was minimal, and even in the higher risk category of those facing detention, there were alternatives to detention. For example, in **Germany**, where rejected asylum seekers are not detained, but are subject to reporting and some restrictions on their movements, there was only a 5% failure to comply. This success was attributed to the provision of accommodation and material support. In **Canada** the Failed Refugee Project which counselled people on their limited prospects and discussed return in a dignified, case managed way, reported 60% success without the need to detain the person. Other bond or bail programs in Canada were even more successful.

18. The *UNHCR Report on Alternatives* also referred to **Belgium**, where in 2002, out of 12,589 persons ordered to leave after their applications were rejected, only 2,398 were detained, and only then because they had not complied with the order.

19. Similarly in **The Netherlands** (according to *UNHCR Report on Alternatives* annexure) rejected asylum seekers were not generally detained unless they failed to comply with a deportation order, or evidence indicated they would try to avoid expulsion. Detention was subject to judicial review after ten days, then every 28 days within the context of Dutch jurisprudence that detention could not exceed 6 months without very good justification. Non-detained rejected asylum seekers could be subject to twice daily reporting requirements.

20. **It is a legal right to seek asylum**: Asylum seekers are often fearful, traumatised and or vulnerable. Detention - with all its concomitants of small confined spaces, uniformed guards, locked doors and bars, no or few windows

or access to light and fresh air, especially in a foreign country and culture – is liable to exacerbate their vulnerable condition. This is not conducive to them communicating their claims to asylum effectively. Detention therefore hinders their right to seek asylum.

21. **Punishment and Deterrence:** Immigration reception and processing should not be construed as punitive, or have a punitive character. More broadly, asylum seekers should not be treated as criminals or as having broken the law. Likewise, deterrence is not a legitimate rationale for mandatory detention, nor is mandatory detention an effective deterrent, as shown by the increase in numbers of arrivals and applicants for asylum in Australia since its introduction in 1992.

22. **The burden on Australia is small in context**: Australia is a relatively wealthy country with a small influx of asylum seekers compared to many other countries with more humane programs for receiving asylum seekers. Even during the years of the highest influx of unauthorised arrivals, it was small compared to very many other countries.

23. For example, and leaving aside the very much larger figures in Africa and Asia, the following are figures of people in asylum seeker reception centres for some EU countries in 2005: Austria (28,364), Belgium (30,000), France (59,221), Netherlands (28,732), Sweden (17,530)[8] and the United Kingdom (51,221).[9] The then Minister for Immigration, Amanda Vanstone, said in June 2005 that there were 17 million refugees around the world.[10] In 2004, Australia received about 3, 100 asylum seekers.

---

[8] Sweden has 17.8 refugees per 1000 inhabitants compared to Australia's 3.0 per 1000: *Population Data Unit, UNHCR, Geneva, 7/2/2002*

[9] *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the European Union Member States* (October 2006)

[10] Minister's Foreword to the Department of Immigration's *Refugee and Humanitarian Issues – Australia's Response* (June 2005): http://www.immi.gov.au/media/publications/pdf/refhumiss-fullv2.pdf.

24. The following two pie charts illustrate graphically how small the numbers of asylum seekers received in Australia are compared internationally.[11]

25. Figure 1 shows comparisons of the major refugee hosting countries in 2003, although it does not include Africa, which has an enormous refugee population. Australia does not feature because the numbers are comparatively negligible.

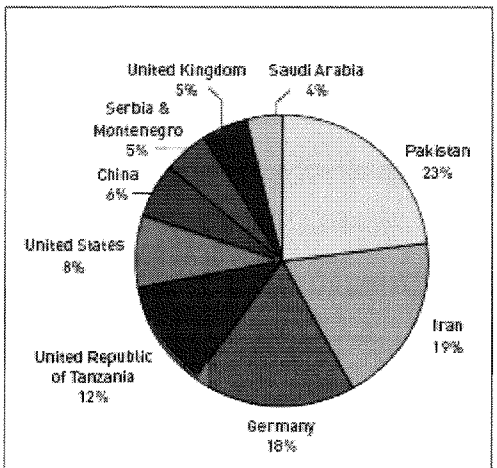

Figure 1—Major Refugee Hosting Countries in 2003

Source: UNHCR

Figure 2 shows Australia compared to the top ten industrialised asylum seeker countries in 2004.

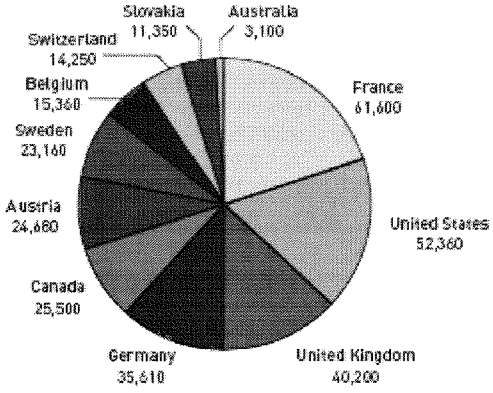

Figure 2—Asylum Seekers: Australia Compared to the Top 10 Industrialised Asylum Countries in 2004.

Source: UNHCR, 'Asylum Trends—2004 Annual'

[11] Both of these charts were created by UNHCR and were extracted from the Department of Immigration's *Refugee and Humanitarian Issues – Australia's Response* (June 2005)

26. **Out of step:** From our review of comparative literature, the Australian regime is at odds with most other countries, particularly those in the developed world, and is arguably amongst the harshest in the developed world. It is acknowledged that some countries are reported to be adopting more restrictive regimes, some of them following the example of Australia. As the *UNHCR Report on Alternatives* said "In 2002, UNHCR's Agenda for Protection urged '*States more concertedly to explore alternative approaches to the detention of asylum seekers and refugees...*'[12] *in response to the increasing use of detention of asylum seekers and refugees by host governments.*"

27. Australia should legislatively adopt the *UNHCR Revised Guidelines on Detention of Asylum Seekers* (February 1999) and have regard to the European *Union Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers* (27 January 2003)[13] to the extent that the latter deals with matters that the UNHCR Revised Guidelines do not.

Alternatives to Detention

28. Guideline 2 of the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to Detention of Asylum Seekers* (1999) provides:

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

---

12 UNHCR Agenda for Protection, June 2002, A/AC.96/965/Add1, p8.

13 *Union Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers.*

29. Art 7 of the *European Union Council Directive of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers* provides:

    1. Asylum seekers may move freely within the territory of the host Member State or within an area designated to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.
    2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order, or when necessary swift processing and effective monitoring of his or her application.
    3. When it proves necessary, for example for legal reasons or reasons of public order, member States may confine an applicant to a particular place in accordance with their national law…

30. Broadly, around the world there are three models or levels of dealing with asylum seekers: first, detention in closed, secure (sometimes prison or prison-like) facilities; secondly, accommodation in open reception and processing centres or hostel-like institutions with varying degrees of restriction on freedom of movement (such as curfews, reporting obligations); and thirdly, accommodation in the community with minimal restrictions, some reporting obligations and case management and support structures.

31. These regimes are not necessarily mutually exclusive and may represent points along a continuum. Many countries use a combination of all three. But best practice dictates an emphasis on applying the least restrictive arrangements in accordance with principles of *proportionality* and *necessity* to legitimate objectives of public order along a continuum from the first to the last, with regular, independent review of more restrictive arrangements.

32. Consistent with Australia's obligation as a signatory to the *1951 Refugee Convention* and the *1967 Protocol Relating to the Status or Refugees*, we urge the adoption of alternatives to detention in accordance with best practice as demonstrated by:

- international conventions (ICCPR, ICESCR, CRC, CAT)[14],
- *UNHCR Guidelines Revised Guidelines on Applicable Criteria and Standards relating to Detention of Asylum Seekers* (February 1999)[15],
- the *European Union Directive Laying Down Minimum Standards for the Reception of Asylum Seekers* (2003)[16] and
- countries such as Austria, Finland, Norway and Switzerland.

33. It is noted that prior to 1992, Australia did not have mandatory detention of asylum seekers provided for in the *Migration Act 1958* (the Act). Prior to amendments of 5 May 1992, the High Court held that the detention of asylum seekers was unlawful. Those amendments were in the context of efforts under Minister for Immigration Gerry Hand and the Hawke Government to detain Vietnamese and Cambodian asylum seekers in Port Hedland in a deliberate effort to isolate them from legal representation.[17]

34. It is also noted that in practical terms, notwithstanding the official position reflected in the current Act, some aspects of the proposals in this submission are presently in effect in the form of residential housing (although still detention) and community accommodation. Those aspects need to be expanded and improved, co-ordinated, formalised and properly funded. More financial assistance should be allocated to church groups and NGOs working in community care and accommodation options, and all stakeholders should continue to have a role. (See Infrastructure Options below)

---

[14] The principally relevant ones to which Australia is a signatory are: *International Convention on Civil and Political Rights* (1966); *International Convention on Economic, Social and Cultural Rights* (1966), the *Convention on the Rights of the Child* (1989); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). A list of some relevant articles appears in Annexure Two.

[15] Referred to hereafter as the *UNHCR Revised Guideline*. This Guideline is stated in the first footnote to be "addressed exclusively to the detention of asylum seekers" as the detention of refugees is generally covered by the 1951 Convention and Human Rights instruments.

[16] 2003/9/EC of 27 January 2003.

[17] Fr F. Brennan, *Tampering with Asylum*, University of Queensland Press (2003), pp 31-34.

35. The *National Council of Churches in Australia Submission to the Senate Inquiry into the Administration of the Migration Act* (November 2005, page 16):[18] "supports the urgent introduction of a community release scheme so that all asylum seekers, not just families with children, can be removed from the toxic environment of detention centres into the community, based on adequate case management and with proper entitlements (work rights, Medicare and supplementary government income support, if required). Such well-researched, economical and practical alternatives exist."[19]

Detention as a last resort

36. It is acknowledged that where a person presents a demonstrable risk of absconding after rejection of their claim for asylum, or in cases of extradition or deportation for criminal reasons, or in cases where there is a reasonable basis to suspect the person poses a risk to national security or public order, detention may be justified.

37. Similarly, restrictive temporary arrangements may be justified by and be limited to the period necessary for an **initial assessment** upon arrival in Australia (or detection if the person becomes an "unauthorised non-citizen" after arrival) where there are reasonable doubts as to the person's claimed identity, health and character status.

---

[18] http://www.ncca.org.au/__data/page/56/NCCA_Submission_-_Senate_Inquiry_into_the_Admin_of_Migration_Act.pdf. Hereafter referred to as the *NCCA Submission to the Senate Inquiry into the Administration of the Migration Act.*

[19] The NCCA Submission (p16) referred to the Justice for Asylum Seekers (JAS) "The Better Way" model (endorsed by the NCCA) and the Uniting Church's Hotham Mission Asylum Seeker Project "case management" experience. The NCCA submission (pp16-17) also referred to the following NCCA policy statements on alternatives to detention: "UN Report shows need for a new Debate over Detention says National Church Group", Media Release 19-12-02; "Churches Call for New Refugee Approach" Media Release August 2003; "Churches Challenge All Political Parties to Support New Initiative on Refugee Policy", 1-7-03 re "Make the Right Choice" call by A Just Australia; "Arbitrary Detention the Problem says National Church Group" Media Release 6-6-02 relating to visit of the Head of the UN Working Group on Arbitrary Detention; Asylum Seeker and Refugee Children in Australia: NCCA Statement of Concern; NCCA Policy Document 2001, noting sections on "A Humane Alternative to Mandatory Detention" (pages 7 to 9), "Children in Detention" (Pages 10 to 13) and "Asylum Seekers in the Community (non-detained)", pages 19 to 20.

38. Guideline 3 of the *UNHCR Revised Guidelines* dealing with "Exceptional Grounds for Detention" should be referred to in support of this point of the submission.

39. However, in most cases initial assessment should not require detention for any significant time or at all. The practices of some other countries should be adopted which provide for limited initial detention, for example for 24 to 72 hours, with any further detention only available on judicial review. A person subjected to such detention should be able to seek judicial review.[20]

40. Guideline 5 of the UNHCR Revised Guidelines "Procedural Safeguards" is referred to.

41. As the *NCCA Submission to the Senate Inquiry into the Administration of the Migration* (page 17) said: "decisions about the necessity for detention should be in the hands of an independent review authority, with powers to enforce its decisions rather than just make recommendations to the Minister. Under the changes introduced by the *Migration Amendment (Detention Arrangements) Act* 2005, notably the role of the Commonwealth Ombudsman and the Immigration Departmental Committee, and the Palmer Inquiry's recommendations to create various advisory and monitoring bodies, the ultimate decision-making power still rests with the Minister for Immigration. Previous recommendations by independent advisory or investigative bodies, such as the Human Rights and Equal Opportunity Commission (HREOC) and the United Nations Special Representative on Arbitrary Detention, were ignored by the then Minister for Immigration. An independent body with the power to enforce its decisions about the need to detain or otherwise act in the best interests of the well-being of detainees is needed."

---

[20] Annexed is a comparative table adapted from *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the European Union Member States* (October 2006) pp 91-92 showing the maximum duration of detention presenting States in an ascending order.

42. The *UNHCR Report on Alternatives* annexes summaries of the asylum seeker regime in 34 countries, of which the following examples present commendable, although imperfect, examples from which Australia should adopt the best practices:

42.1 In **Denmark** asylum seekers can be detained for a maximum of three days and if they are not then referred to an open accommodation centre, they must be brought before a court. The court will only order further detention where less restrictive means are insufficient. Detainees have a right to seek review by a court. In 2001, out of 12,043 asylum seekers, only 666 were detained.

42.2 In **Finland** detention is only resorted to if the entry was illegal or the person is awaiting deportation ***if*** it is shown that the person is likely to abscond, commit a crime or their identity needs investigation. Where an asylum seeker is detained the local court must be notified and the person brought before the court within 4 days. If the person is not released within two weeks, and after very two weeks of detention, the court will of its own initiative review the detention, order less restrictive measures, such as release to register at a local reception centre or Red Cross. The person may be required to report at the centre regularly if they chose not to stay there. The Finish Refugee Advice Centre told *UN Report on Alternatives* that police ordered detention in 10 to 15% of cases, and detention lasted an average of 3 to 5 weeks. Generally asylum seekers have freedom of movement and receive welfare payments. Anecdotal evidence was that asylum seekers were unlikely to abscond.

42.3 In **France** asylum seekers are not generally detained while their claims are pending except initially whilst determining whether their claim is manifestly unfounded. If their claim is not determined within 20 days they must be admitted on an 8 day permit, which then becomes one month permit, then a three month permit with requirements to register. There are open centres which have some requirements for permission to leave, and after two to three months, they are moved to social homes.

42.4 Similarly, in **Germany**, asylum seekers are referred to initial reception centres, with some restrictions on their movements, in principle only for three months. As a rule asylum seekers are not detained. In 2002 only 2.7% of 71,127 applicants were detained, and in 2003 it was 3.3% of 50,563. Upon arrival they may be held in transit up to a maximum of 19 days whilst it is determined whether their claim is manifestly unfounded. Pre-deportation detention can only be ordered by a court where the person fails to comply with an order to leave, where deportation will occur in the near future, and then only for a maximum of two weeks. This may be extended and the average is five to six weeks. Prolonged detention to pressure a person to leave is not permitted. So return centres were created, which are open, but have reporting requirements.

42.5 In **Ireland** there is no general policy of detaining asylum seekers, but it is available where there is a reasonable suspicion the person is a threat to national security, or has committed a serious crime or has destroyed travel/identity documents without reasonable cause. They may not be detained for more than 21 days before being brought before a court where they have access to a lawyer. A rejected asylum seeker will only be detained if they fail to comply with an order to leave, and only for a maximum of 8 weeks. All asylum seekers are housed in reception centres for the first two weeks, then assigned to one of 63 accommodation centres with free movement, but subject to reporting requirements. There was reported to be a 70% or higher compliance rate.

42.6 In **Spain** illegally present asylum seekers may be subject to detention for no more than 72 hours without judicial order, and then to 40 days. Once admitted to the assessment procedure they can chose to stay in accommodation centres. They receive pocket money and can work after 6 months.

42.7 In **Belgium**, after six weeks in a reception centre, asylum seekers are usually assigned to an accommodation centre, but can make application to live with friends or family. Even those in accommodation centres can

leave for six weeks each year. The centres are not staffed at night. There is financial support provided every two weeks, education courses and counselling, all of which ensure compliance.

42.8 In **Sweden** detention is possible for those in an "accelerated 'safe country' or manifestly unfounded" category. A decision to detain must be made after six hours by the Immigration Board Alien Appeals Board or Ministry of Foreign Affairs. The legislation imposes a 48 hour limit on detention for the purposes of checking status. If it is believed that deportation will occur or there are doubts about the person's identity ***and*** there is a risk of absconding, committing crime or placing national security at risk, they may be detained for up to 14 days. The asylum seeker has a right of appeal to the local court. They can be released on a case by case basis as a part of the review of the necessity for detention, subject to surrender of travel/identity documents and reporting requirements. Authorities are obliged to impose the least restrictive means necessary in each case. An asylum seeker is detained in an investigation centre for the first few weeks. They are given an identity card. They are then assigned to a reception centre and community accommodation is considered. There are flats for families and groups of asylum seekers. They may receive financial and training courses.

42.9 In **Norway** there is provision for detention for establishing an asylum seeker's identity, which is limited to 12 weeks and subject to independent and automatic review, *but it is rarely used.* Where it is used, it will not be affirmed by the court if it determines that less restrictive alternatives are available. Instead transit reception centres are used for initial interviews for up to one month, and then the asylum seeker is assigned to a regular reception centre for accommodation if they are not self sufficient. They receive financial support and a temporary work permit. In 2003, six per

cent, or 1,016 out of 16,505 claims failed, were withdrawn or absconded.[21]

43. The Perth Immigration Detention Centre at the Perth Domestic Airport should be refurbished for the purpose of short term detention, where it is necessary, to ensure it is comfortable and appropriate to its primary requirement, namely to carry our urgent initial screening and transition the person to an IRPC. Similar facilities should be at or proximate to other Australian international airports.

44. In all cases, detention should be a last resort after due consideration of less restrictive alternatives.

45. There should not be any use of electronic tagging, as is used in some countries, including the USA, UK, and considered in others, such as Canada. Tagging has considerable negative connotations, not least of which is its association with criminals.

46. Ordinarily, initial screening should occur at an IRPC, *albeit* with the minimum necessary restrictions on freedom of movement. The *UNHCR Report on Alternatives* annexure on **Austria** reports that every asylum seeker is received in an **open** "initial reception centre", provided with an asylum procedure card and dispersed to accommodation centres. Those not in need of assistance can live where they choose, but have reporting obligations at the nominated centre (the same applies in Belgium). The threat of detention for failing to comply and the receipt of full social assistance ensure compliance in most cases. In 2005 Austria had 28,364 asylum seekers.[22]

---

[21] In the Philippines, detention is also the exception, and generally asylum seekers are not subject to any restrictions. They may stay in open centres run by UNHCR or NGOs.

[22] It is acknowledged that the regime in Austria has become stricter under the pressure of right wing, anti-immigration parties since 2006, during which time asylum seeker applications dropped 30% in 2006 and 10% in 2007: *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the European Union Member States* (October 2006)

47. Children and minors (aged less than 18 years), the elderly, the disabled and other vulnerable persons, such as pregnant women and persons suffering trauma, should never be held in detention. Families should not be separated. See *UNHCR Revised Guidelines* Guideline 6 and 7; *EU Minimum Standards* Arts 8, 17, 18, 19 and 20.

Term of Reference B: Criteria for less restrictive arrangements

48. This term of reference is largely dealt with in the preceding paragraphs. However, the following points should be added.

49. Care must be taken to avoid institutionalisation as a result of prolonged restrictive living conditions. Belgium has a policy of moving asylum seekers out of accommodation centres after six months for the express purpose of avoiding institutionalisation.

50. After initial screening (whether in detention or restrictive accommodation centre), asylum seekers should be accommodated in *open* IRPCs with a minimum of restriction on freedom of movement for the balance of the determination of their application. If that determination is prolonged for more than a set period, of say 6 or 12 weeks, they should be placed within SCA.

51. In the IRPCs, asylum seekers should be subjected to the minimum of restrictions necessary to process their applications, and then only for the shortest possible time. The environment should be comfortable, culturally appropriate, safe and healthy with the bare necessity of restrictions on freedom of movement. For example, there may be reporting requirements and/or a curfew.

52. Asylum seekers should have access to appropriate health, welfare, education and legal services, and should be able to participate in community, social, cultural and religious activities. Applicants whose applications are not determined within a period (of say three or six months) should have work

rights, as for example in Spain, Sweden and Norway.[23] See *UNHCR Guidelines*, Guideline 10, and *UE Minimum Standards* Arts 11 and 12.

53. Appropriate social security should be afforded to ensure an adequate standard of living for asylum seekers and their families.

Term of Reference D: Infrastructure Options

54. All detention facilities, IRPCs and SCAs should be run and funded by government agencies. Although community housing and facilities might be partly or substantially managed by the NGO sector, NGOs should not be saddled with the financial burden of accommodating and providing for asylum seekers.

55. There should be broad co-operation, in the operation of immigration detention, IRPCs and SCAs, between Federal and state or territory agencies and community agencies dealing with asylum seekers in general. The Department should be open to working with other appropriate agencies.

56. State agencies and ministers should have responsibility for the provision of services where appropriate, rather than the Federal Minister, for example in relation to guardianship of unaccompanied minors or child protection issues, education and health.

57. The respective responsibilities of state, territory and Federal agencies need to be clarified in memoranda of understanding.

58. IRPCs could be hostel like accommodation providing access to kitchen facilities, leisure and fitness facilities and entertainment.

[23] In fact, the according to the *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for Reception of Asylum Seekers in the European Union Members States* (Oct 2006, p8), most EU countries allow work rights to asylum seekers.

59. Supported community accommodation should be comprised of houses or flats of suitable size and location, having regard to transport and other amenities.

60. Within detention, IRPCs and SCAs asylum seekers should have prompt and adequate access to counselling, health and social services, visitors, case management and legal advice as soon as possible after their arrival.

61. The special needs of children must be attended to, especially when accommodated in IRPCs to ensure they are not exposed to a harmful environment. They should be able to attend school in the community (*UNHCR Revised Guidelines*, Guideline 6) and asylum seekers generally should be able to participate in community activities, such as attending religious, cultural and social activities.

62. Unaccompanied children should be held in special, appropriate foster care accommodation with appointed guardians (*UNHCR Revised Guidelines*, Guideline 6).

63. IRPCs or SCA should be safe, comfortable and culturally appropriate places with necessary amenities and a minimum of restrictions necessary to process the asylum seeker's application. There should be compliance with *UNHCR Revised Guidelines*, Guideline 10, and *EU Minimum Standards* Arts 13 and 14.

64. Detention facilities and IRPCs should not be located in isolated areas or harsh conditions. SCA is by definition within existing Australian communities.

65. There should be no off-shore detention. The "Pacific Solution" should be abandoned. In the *World Council of Churches Speak Out on Detention* Report (September 2005),[24] while noting that Australia "has recently seen some welcome changes and pragmatic flexibility in its detention policy, including the release of families with children from detention and greater measures for

[24] http://nat.uca.org.au/unitingjustice/resourcearchive/WCC-NCCA/DetentionStatement_WCC1005.doc. referred to above.

review and release of 'long term detainees'", the WCC said: "However, detention is still far from a last resort and the 'Pacific solution' remains in force, with excision of thousands of islands from Australia's migration zones and a policy of transferring new boat arrivals to Pacific island detention and processing centers... **Churches are concerned that the global trend towards exporting borders increases detention and undermines refugee protection.** Countries like Australia, Italy and the United States are already using offshore detention and processing centers, where the accountability transparency and responsibility for protection is weak and unclear; where refugee status determination systems lack capacity and expertise; where there is little access to legal counsel to help prepare asylum applications; and no right to judicial review of decisions. Existing and potentially available offshore processing centers include: the excised Christmas Island and Pacific-based centers on Nauru and Manus Island, Papua New Guinea (for Australia)..."

66. With respect to the legislative excising of migration zones, we refer to the *NCCA Submission to the Senate Inquiry*, p20: "Under international law, it has always been clear that any domestic law redefining migration zones cannot override the obligations Australia has entered into under the 1951 Refugee Convention. Article 27 of the Vienna Convention on the Law of Treaties plainly states that *'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'*. In excising sovereign Australian territory, the Commonwealth Government also failed to properly consider the undertaking it made when signing the International Covenant on Civil and Political Rights *'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.'* (Article 2)."

67. As noted in the *NCCA Submission to the Senate Inquiry*, p24: "Official Government figures estimated the cost of setting up and running the detention centres in the Pacific at $96 million in 2001-02. Later reports, however, stated that the Cabinet had been told it would cost up to $500 million. As such, the NCCA believed the resources being employed to administer the Pacific

solution lacked proportion in comparison to the resources it had allocated to supporting countries of first asylum. In 2001, for example, Australia's total allocation to the countries surrounding Afghanistan, Australia's largest source country for asylum seekers, was just AUD $21.3 million."

68. The disingenuousness of excising Australian territory so as to deny responsibility for those held in the "Pacific Solution" is exposed by the fact that Australian immigration officials were processing the applications in PNG and Nauru.

69. Immigration staff should be comprehensively trained in working appropriately with culturally and linguistically diverse (CALD) people, and people surviving torture or trauma or dealing with grief.

70. Immigration officials, the Australian Federal Police and security intelligence agencies must be provided with sufficient resources to complete character and identity checks expeditiously. Resources should be more rationally and economically directed toward expediting the process of moving an asylum seeker into the community than on detention. Our experience has been that significant delays with AFP and other agency clearances have held up resolution of claims for extended periods of time.

Term of Reference C: Transparency and Visibility

71. The operation of detention facilities, IRPCs, SCAs and any form of accommodation or arrangements (eg. health and welfare) for asylum seekers should be entirely transparent.

72. Detention Centres and IRPCs should not be in isolated or off-shore places. By definition, SCA is within existing Australian communities.

73. There should be a specific, independent inspectorate (immigration inspectorate) of detention facilities, IRPCs, SCA's and of all accommodation

and arrangements for asylum seekers. The Western Australian Inspectorate of Custodial Services provides a good model.

74. The *immigration inspectorate* should be empowered to enter any secure or restrictive immigration facility at any time, have direct access to asylum seekers who wish it, and be able to take, investigate and report on individual or group complaints and systemic issues. The immigration inspectorate should be able to make reports and recommendations to the Department (DIAC) and to Parliament, and should be able to liaise with other relevant state, territory or Federal agencies and non-government organisations.

75. The *media* should be able to access detention facilities and IRPCs responsibly, although asylum seekers' consent must be obtained if they are to be accessed and their security, privacy, confidentiality and culture or religion must be protected and respected.

Term of Reference E: Health Services

76. The current system of contracting such health services out to private entities, whereby the Department does not take responsibility for maintaining or providing access to health records or treatment, is not acceptable.

77. A proper, comprehensive system of health services should be implemented across all facilities and arrangements dealing with asylum seekers, including community accommodation.

78. Health services should primarily be provided by state health departments and agencies pursuant to memoranda of understanding with state governments within a regime that ensure the Federal Government and Department meets its duty of care to asylum seekers. The Department should seek and have proper regard to state health department and independent professional advice in the care, treatment and accommodation of asylum seekers.

Term of Reference F: Community Options

79. It is submitted that proper regard to international best practice demonstrates the viability, humanity and cost effectiveness of alternatives to detention.

80. A comprehensive comparative survey of current international models is beyond this submission. Nevertheless, this submission draws principally on the *UNHCR Report on Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, which surveys 33 countries including Australia with information current to 31 March 2004, and has had regard to the *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the European Union Member States* (October 2006).

81. Further inquiry should be made about current alternatives to detention for asylum seekers.

Earlier NCCA Recommendations Reiterated

82. The parties to this submission refer to and reiterate the recommendations made in the *National Council of Churches in Australia Submission to the Senate Inquiry into the Administration of the Migration Act* (November 2005). The NCCA's recommendations are very similar to the ones contained in this submission, but it is worth quoting them:[25]

Detention recommendations:

2. The NCCA recommends that the Australian Government builds on, and goes beyond the changes advocated or already achieved by the *Migration Amendment (Detention Arrangements) Act* 2005 and the Palmer inquiry to provide more fundamental alternatives for asylum seekers, incorporating at the minimum:
   a. The adoption of a community release scheme open to all asylum seekers (unless there are strong, justifiable reasons to continue detention), based on

[25] http://www.ncca.org.au/__data/page/56/NCCA_Submission_-Senate_Inquiry_into_the_Admin_of_Migration_Act.pdf

adequate case management and with proper entitlements, namely work rights, Medicare and supplementary income support, if required;

b. Guidelines setting out grounds for detention and provision that decisions about detention be subject to independent, enforceable (perhaps judicial) review;
c. Abandoning the holding of asylum seekers in remote centres in Australia or in the Pacific. This necessitates the closure of Baxter, not proceeding with the use and proposed extension of the Christmas Island centre and ending the Pacific Solution;
d. Adoption of case management for detainees and legislating for minimum standards for detention centres;
e. Greater care and concern around decision-making and the process of return of rejected asylum seekers to their home countries and monitoring of returned asylum seekers; and
f. Adoption of a more integrated, whole-of-government approach with greater program and policy co-ordination across government portfolios and with non-government organisations' contribution in this process. Such an approach is relevant to formulating creative policies both in Australia and internationally to achieve effective protection for refugees, asylum seekers, others of concern to the UNHCR and internally displaced people.

...

Asylum Seekers in the Community

5. The NCCA recommends that asylum seekers in the community be granted the right to work, Medicare and, if necessary, government income support while they apply for protection in Australia. Also, the NCCA recommends that a case worker model of support be introduced for asylum seekers, both in the community and in detention.
6. The NCCA recommends the easing of exemptions on the continuation of the Asylum Seekers Assistance Scheme (ASAS) benefits after a Refugee Review Tribunal (RRT) decision, especially for single mothers who cannot work and therefore have no means of support.

ANNEXURE ONE

The following is adapted from *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the European Union Member States* (October 2006) pp 91-92 shows the maximum duration of detention presenting States in an ascending order [further comments by the parties to this submission added in square brackets].

ESTONIA: 48 hours or more by a judgment of the Administrative Court

AUSTRIA: 48 hours if the applicant has to be brought to the initial reception centre; 72 hours if the applicant has left the initial reception centre or has not complied with the asylum procedure; as short as possible in the case of an expulsion procedure with a maximum of 10 months over a period of two years in compliance with specific conditions

FRANCE: 8 days maximum in a waiting zone; for the duration of the examination of the asylum application in detention centres

PORTUGAL: 7 days at the border

LATVIA: 10 days or at most for the duration of the asylum procedure

SWEDEN: not more than 2 x 72 hours for persons under 18 years of age ; not more than 2 weeks for persons over 18

GERMANY: 19 days in the case of a specific procedure at the airport; sometimes longer for unaccompanied minors under the age of 16 as a legal guardian has to be assigned to them.

ITALY: 20 days in the case of a possible detention; 20 days + 10 days in the case of a mandatory detention

CYPRUS: In principle 32 days but possible until the end of the asylum procedure and until an expulsion decision has been taken

NETHERLANDS: Asylum seekers who have been refused entry: - 48 hours (accelerated procedure) + 6 weeks (= internal guideline, not a maximum which can be enforced through legal proceedings) in case it appears impossible to reach a decision within 48 hours because

more research is needed; - 48 hours (accelerated procedure) + 6 months (or longer) when the asylum request has been rejected within the accelerated procedure

POLAND: up to 3 months if an alien applies for refugee status being detained because of illegal entry

LUXEMBOURG: 3 months with the possible extension of a further 3 months without exceeding 12 months in the case of an identification problem

SLOVENIA: 3 months with the possibility of an extension of a month, but this time limit is sometimes surpassed in practice

GREECE: 3 months in principle

CZECH REPUBLIC: 3 months for minors; 6 months for adults

BELGIUM: 5 months with a possible extension up to 8 months in certain cases

SLOVAKIA: 6 months

SPAIN: Maximum 7 days at the border [then 40 days upon judicial order]

HUNGARY: 12 months.

MALTA: 12 months with a maximum of 18 in case of an appeal when the application for asylum has been rejected

FINLAND: No maximum duration [however, detention is only resorted to if the entry was illegal or the person is awaiting deportation if it is shown that the person is likely to abscond, commit a crime or their identity needs investigation. Where an asylum seeker is detained the local court must be notified and the person brought before the court within 4 days. If the person is not released within two weeks, and after very two weeks of detention, the court will of its own initiative review the detention, order less restrictive measures, such as release to register at a local reception centre or Red Cross. The person may be required to report at the centre regularly if they chose not to stay there. The Finish Refugee Advice Centre told UN Report that police ordered detention in 10 to 15% of cases, and detention lasted an average of

3 to 5 weeks. Generally asylum seekers have freedom of movement and receive welfare payments. Anecdotal evidence was that asylum seekers were unlikely to abscond.]

UNITED KINGDOM: No maximum duration

LITHUANIA: Initial detention by police can be for up to 48 hours. Further duration is set in each case by the judge without a maximum duration

The authorised duration is most often linked to the legal justification of the detention or the place of detention (France, Portugal). The longest period of detention last up to 12 months in Hungary and Malta but three Member States do not provide for any maximum period (United Kingdom, Finland and Lithuania).

ANNEXURE TWO

International Obligations

In addition to those set out in the 1951 Refugee Convention and its Optional Protocol, the following international obligations are also relevant:

• the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR);

• the right not to be arbitrarily detained (article 9(1) of the ICCPR); and

• the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10(1) of the ICCPR).

• protects children from torture and other cruel, inhuman and degrading treatment and punishment (article 37(a) of CRC);

• proscribes arbitrary detention (article 37(b) of CRC);

• provides that children deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 37(c) CRC);

- The widest possible protection and assistance to the family as the fundamental group unit of society, with particular protections being afforded to children and mothers (article 10 ICESCR);
- The right to work balanced with the right to social security (articles 6 and 9 ICESCR);
- The right to an adequate standard of living (article 11 ICESCR);
- The right to take part in cultural life (article 15 ICESCR);
- All rights to be enjoyed without discrimination as to birth or national origin, or other status (article 2(2) ICESCR)