Submission to the Senate Legal and Constitutional Affairs Committee on the

Migration Amendment (Immigration Detention Reform) Bill 2009

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Human Rights Law Resource Centre Ltd

Level 17, 461 Bourke Street

Melbourne VIC 3000

Australia

www.hrlrc.org.au

Rachel Ball, Emily Howie and Victoria Edwards
Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4432
F: + 61 3 8636 4455
E: rachel.ball@hrlrc.org.au
E: emily.howie@hrlrc.org.au
W: www.hrlrc.org.au

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**), Australia's first specialist human rights legal service, is an independent community legal centre.

The HRLRC aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. The HRLRC also aims to support and build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims by undertaking and supporting the provision of legal services, litigation, education, training, research, policy analysis and advocacy regarding human rights.

The HRLRC works in four priority areas:

(a) the development, operation and entrenchment of human rights legislation at a national, state and territory level;

(b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;

(c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the rights to adequate housing and health care; and

(d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

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1. Introduction

1.1 Scope of this Submission

2. On 25 June 2009 the Senate referred the Migration Amendment (Immigration Detention Reform) Bill 2009 (the ***Bill***) to the Senate Legal and Constitutional Affairs Committee (the ***Committee***) for inquiry and report.

3. The amendments in this Bill are said to 'seek to implement the Government's New Directions in Detention policy to increase clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship respond to unlawful non-citizens'.

4. This submission sets out:

   (a) the Government's New Directions in Detention Policy;

   (b) the importance of a human rights framework for immigration detention;

   (c) an analysis of the extent to which the amendments introduced by the Bill implement the Government's New Directions in Detention Policy and comply with Australia's obligations under international human rights law, in particular:

      (i) the new legislative principles (proposed new section 4AA)

      (ii) provisions requiring detention for 'unacceptable risk' (proposed new subsection 189(1));

      (iii) provisions concerning the detention of Children (proposed new section 4AA); and

      (iv) temporary community access permission provisions (proposed new section 194A).

   (d) the matters in the New Direction in Detention Policy that are not covered by the Bill or the Migration Act ;

   (e) the amendments required to Australia's immigration detention regime to ensure the implementation of Australia's obligations under international human rights law.

2. Executive Summary

5. The key issues identified by the HRLRC are that the Bill:

(a) perpetuates the policy of mandatory immigration detention, contrary to international human rights law which requires adequate and individualised justification for detention is in each case, and contrary to many of the values espoused in the Government's own policy;

(b) provides for some important new 'principles' in the legislation, whilst at the same time introducing substantive new operational provisions that fundamentally contradict those principles;

(c) does not prevent the detention of children in all closed detention facilities;

(d) does not apply in exclusion zones, most notably on Christmas Island, and therefore denies to all asylum seekers on Christmas Island any improvements introduced by the Bill;

(e) does not impose a time limit on immigration detention or require authorised officers to consider granting temporary community access permissions, and therefore detention can continue to be for long periods of time in circumstances where detention is unnecessary; and

(f) does not amend a system in which decisions to detain are not subject to independent judicial review.

2.1 Recommendations

6. The HRLRC makes the following recommendations:

Recommendation 1:

The Bill should be amended to ensure that it effectively amends the Migration Act in such a way that it reflects Australia's obligations under international human rights law.

Recommendation 2:

As well inserting principles into the Act in accordance with s 4AAA(2), the Bill should amend the detention provisions of the Migration Act itself to reflect, in substance, the principles that a non-citizen:

(a) must only be detained in a detention centre established under this Act as a measure of last resort; and

(b) if a non-citizen is to be so detained—must be detained for the shortest practicable time.

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, and act in accordance with, 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 or identity checks.

Recommendation 6:

People should not be kept in immigration detention because their visas have been cancelled under section 501 of the *Migration Act*.

Recommendation 7:

Item 3 of the Bill should be clarified to ensure that under no circumstances should children be kept in any form of detention, including Immigration Residential Housing.

Recommendation 8:

The Bill should:

- require an authorised officer to consider and determine whether or not to grant a temporary community access permission;
- clarify what is meant by 'risk to the Australian community' and ensure that such a clarification is in a manner that is consistent with human rights principles; and
- provide for a review of any decision of the authorised officer whether or not to grant a temporary community access permission.

Recommendation 9:

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

Recommendation 10:

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.

3. New Directions in Detention Policy

3.1 "Seven Key Immigration Values"

7. In setting out the New Directions in Detention Policy, the Minister for Immigration and Citizenship proposed "seven key immigration values". These values are as follows:[1]

   (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.

8. 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.

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

4. A Human Rights Framework for Immigration Detention

4.1 Immigration Detention and Human Rights

9. Australia has a long and distinguished legacy of commitment to international human rights law. Unfortunately, this reputation has been diminished in recent years and few policies have exemplified Australia's disengagement with international human rights law like those relating to immigration detention.

10. Significantly, the United Nations Human Rights Committee (***HRC***) has concluded on at least eight 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***).[2]

11. In March 2009 the HRC criticised the continued policy of mandatory immigration detention and recommended that Australia should:[3]

    (a) consider abolishing the remaining elements of its mandatory immigration detention policy;

    (b) implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008;

    (c) consider closing down the Christmas Island detention centre; and

    (d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.

12. In May 2009 the United Nations Committee on Economic, Social and Cultural Rights (the ***CESCR***) also expressed its concern at the effects of prolonged and indefinite periods of detention on the mental health of detainees, and criticised Australia's policy of mandatory detention policy, particularly detention on Christmas Island. The CESCR encouraged Australia to 'implement without delay its new "seven values" in policy and carry out the Australian Human Rights Commission's recommendations adopted in its 2008 Immigration Detention

[2] *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).

[3] Human Rights Committee, *Concluding Observations: Australia*, [23], UN Doc CCPR/C/AUS/CO/5, 2 April 2009.

Report, including the repeal of the mandatory immigration detention system and the closure of the Christmas Island detention Centre.'[4]

13. The Australian Government has recently stated its intention to re-engage with the United Nations system, and to be a regional and international leader in human rights.[5] The Government has consistently stated the importance, as part of its re-engagement with the international human rights community, of Australia playing a leadership role in human rights.[6]

14. In fact, the Australian government has relied upon its commitment to human rights as one of four key pillars of its Security Council bid. A DFAT overview of the candidacy states that 'Australia is a principled advocate of human rights for all' and is 'committed to the Universal Declaration of Human Rights and party to the major human rights treaties'. [7]

15. If Australia is to reclaim its place as a world leader in the promotion and protection of human rights, reforms must be made to Australia's immigration detention scheme 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***);[8]

    (c) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (***CAT***);[9]

    (d) *Convention Relating to the Status of Refugees* (***Refugee Convention***);[10] and

    (e) *Convention on the Rights of the Child* (***Children's Convention***).[11]

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[4] Committee on Economic, Social and Cultural Rights, 42nd Session, Geneva, 4 to 22 May 2009 *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights – Australia* (E/C.12/AUS/CO/4), [25].

[5] Active membership of the UN is one of the three pillars underpinning the Australian Government's approach to foreign policy: see *National Interest Analysis* [2008] ATNIA 31, 3 December 2008, in relation to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

[6] See for example, The Hon Robert McClelland, Attorney-General, 'Human Rights: A Moral Compass', speech delivered to the Lowy Institute for International Policy, Sydney, 22 May 2009.

[7] See DFAT Publication, 'Australia: Seeking Human Rights for All', http://www.dfat.gov.au/hr/hr_for_all.html.

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

[9] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, (entered into force 26 June 1987).

[10] *Convention Relating to the Status of Refugees,* 28 July 1951, (entered into force 22 April, 1954).

16. Since taking office, the Federal Government has shown a willingness to improve the human rights compliance of the immigration system through, for example, the abolition of the Temporary Protection Visa regime. Immigration detention practices have also shown a marked improvement, with the 2008 Australian Human Rights Commission Report on Immigration Detention reporting that there are fewer people in detention and the number of long-term detainees is decreasing.[12] Nevertheless, as the recent Concluding Observations of the two major UN treaty bodies show, Australia is still falling short of its obligations under international human rights law.

4.2 Lessons from Other Jurisdictions

17. 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: [13]

(a) a significant and beneficial, impact on the development of policy (the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures);

(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) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.

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[11] *Convention on the Rights of the Child,* 20 November 1989, (entered into force 2 September 1990).

[12] Australian Human Rights Commission, *2008 Immigration Detention Report*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html

[13] 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).

18. The Palmer Report concluded, among other things, that:

    (a) there are 'serious problems with the handling of immigration detention cases that stem from deep-seated cultural and attitudinal problems' within the Department;[14] and

    (b) immigration officials exercise extraordinary powers 'without adequate training… and with no genuine quality assurance and restraints on the exercise of those powers.'[15]

19. 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 Bill should be amended to ensure that it effectively amends the Migration Act in such a way that it reflects Australia's obligations under international human rights law.

20. Parts 4-7 below set out an analysis of the extent to which each of the following amendments proposed by the Bill implement the Government's New Directions in Detention Policy and comply with Australia's obligations under international human rights law:

    (a) the new legislative principles (proposed new section 4AA);

    (b) provisions requiring detention (proposed new section 4AAA and subsection 189(1) of the Bill);

    (c) provisions concerning the detention of Children (proposed new section 4AA of the Bill); and

    (d) the new temporary community access permission provisions (proposed new section 194A of the Bill).

Each of these amendments is now discussed in turn.

[14] MJ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report*, (July, 2005) [17].

[15] Ibid, [9].

5. New Legislative Principles: proposed new s 4AAA

5.1 Proposed new legislative principles

21. Item 1 of the Bill provides for the following new principles to be inserted into the Migration Act that set out the purpose of detention and that detention is a measure of last resort and should be for the shortest practicable time:

> 4AAA Immigration detention
>
> (1) The Parliament affirms as a principle that the purpose of detaining a non-citizen is to:
>
> (a) manage the risks to the Australian community of the non-citizen entering or remaining in Australia; and
>
> (b) resolve the non-citizen's immigration status.
>
> Note: Resolving the non-citizen's immigration status would result in either a visa being granted to the non-citizen or the non-citizen being removed or deported.
>
> (2) The Parliament affirms as a principle that a non-citizen:
>
> (a) must only be detained in a detention centre established under this Act as a measure of last resort; and
>
> (b) if a non-citizen is to be so detained—must be detained for the shortest practicable time.

22. The HRLRC supports the principle included in subsection 4AAA(2).

23. The principle in subsection 4AAA(1) is problematic because it is ambiguous as to what constitutes 'risks to the Australian community of the non-citizen entering or remaining in Australia'. It is also problematic insofar as it supports detention in order to manage those 'risks' and resolve immigration status, which in many circumstances may well be inconsistent with:

(a) the principles included in subsection 4AAA(2);

(b) the New Directions in Detention Policy (particularly values (c) – (f)); and

(c) Australia's international human rights obligations (for the reasons set out below in parts 6.2 and 6.3).

5.2 Problems with the Proposed New Principles

24. It is unclear exactly what effect the inclusion of these principles will have on the Migration Act, apart from providing a tool for statutory interpretation. That is, the principles will presumably guide the interpretation of ambiguous legislative provisions. To the extent that the principles can be applied (and are not internally inconsistent) this may be a positive amendment (save for the application of the principle in subsection 4AAA(1) in some circumstances).

25. The problem therefore is that the inclusion of the principles that the HRLRC supports will in many ways be futile and some of the amendments in the Bill seem to run counter to the principles enunciated. Despite the inclusion of the principles, the Migration Act (as amended by the Bill), will still provide for mandatory detention for prolonged periods of time, without review and on arbitrary grounds. The principles are ineffectual where the substantive operational provisions in the Migration Act (as amended by the Bill) unambiguously contravene the principles.

26. In addition to enunciating the principles supported by the HRLRC, the Bill should amend the Migration Act itself to comply with the principles espoused.

Recommendation 2:

As well inserting principles into the Act in accordance with s 4AAA(2), the Bill should amend the detention provisions of the Migration Act itself to reflect, in substance, the principles that a non-citizen:

(a) must only be detained in a detention centre established under this Act as a measure of last resort; and

(b) if a non-citizen is to be so detained—must be detained for the shortest practicable time.

6. Requirements to Detain: Subsection 189(1)

6.1 The Proposed Regime

27. The Migration Act establishes a scheme whereby an 'unlawful non-citizen' — that is a non-citizen who does not hold a valid visa[16] — must be detained[17] until such time as they are removed from Australia, deported, or granted a visa.[18] If none of the three triggers for release eventuates, detention can be indefinite.

[16] *Migration Act* ss 13 and 14.

[17] *Migration Act* s 189.

[18] *Migration Act* s 196.

28. Subsection 189(1) narrows mandatory detention so that it applies only to those (i) who 'present an unacceptable risk to the Australian community', (ii) have bypassed or been refused immigration clearance, or (iii) have had their visa cancelled because they used a false visa or other document when in immigration clearance.

29. The amendments contained in proposed new subsection 189(1) are inconsistent with the government's commitment to detain non-citizens as a measure of last resort and for the shortest practicable period (proposed new subsection 4AAA(2) of the Bill and value (e) of the New Directions in Detention Policy).

30. As stated above, the HRLRC supports the approach contained in subsection 4AAA(2) in principle, but mandatory detention – even in the narrowed form as proposed in the Bill – is fundamentally inconsistent with the principles in subsection 4AAA(2). For example, unauthorised boat arrivals are likely to be detained on the basis that they have bypassed immigration clearance, yet the vast majority of boat arrivals are found to be refugees and pose no discernable threat to the community.

31. The system of mandatory detention proposed by the Bill is also inconsistent with Australia's obligations under international law. The following sections set out the relevant international law, and then address how the proposed system of mandatory detention in subsection 189(1) contravenes those principles.

6.2 International Law

32. Immigration detention 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

33. 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.

34. 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.[19] Article 9(1) is based on Article 9 of the UDHR which also prohibits arbitrary detention.[20]

[19] Human Rights Committee, *General Comment No 8 on Article 9* (30 June 1982).

35. In it's General Comment No. 31 the HRC stated that:[21]

> 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.

36. 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 (below).

(b) Refugee Convention

37. 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.[22]

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

(c) CAT

39. 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).

[20] *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).

[21] 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).

[22] *Refugee Convention* art 31.

[23] *Refugee Convention* art 31(2). .

40. 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:[24]

> 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.

6.3 Problems with the Proposed Regime

(a) Mandatory Immigration Detention

41. Mandatory immigration detention, including the regime for mandatory detention that is provided in proposed new subsection 189(1), constitutes a violation of each of the international human rights law principles set out above. As set out above, 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.[25] Therefore, adequate and individualised justification for detention is required in each case. The amendments contained in Section 189(1) are inconsistent with this principle, for the reasons given in parts (b) to (d) below.

42. The amendments in Section 189(1) are also inconsistent with the principles in proposed new section 4AAA(2) and with the government's New Directions in Detention Policy, which requires government only to detain non-citizens as a measure of last resort and for the shortest practicable period.

(b) Detention for the purposes of health checks

43. The HRLRC considers that the mandatory detention for the purposes of performing health checks is contrary to the requirement that limitations on human rights be necessary, proportionate and reasonable.

44. 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.

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

[25] 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

45. 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.

(c) Detention for the purposes of identity checks

46. The HRLRC considers that detention for the purposes of performing identity checks may, in many cases, constitute arbitrary detention in violation of article 9 of the ICCPR. It is often difficult for asylum seekers to provide concrete proof of identity.[26] In many cases, this difficulty is linked to the circumstances that compelled them to flee their countries and seek asylum.

47. Legislation should not allow for the protracted detention of asylum seekers simply because they lack genuine identity documents. Rather, asylum seekers should be afforded the benefit of the doubt in this regard.

(d) Detention where a person is deemed to be an "unacceptable risk to the community" on the basis of a s.501 visa cancellation

48. The HRLRC considers that detention of people whose visas have been cancelled under section 501 of the *Migration Act* and are awaiting deportation 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;

(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.

49. 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.

6.4 Recommendations

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

[26] See the Refugee & Immigration Legal Centre's submission to the Joint Standing Committee on Migration's inquiry into immigration detention (2008) available at: http://www.aph.gov.au/House/committee/mig/detention/subs/sub130.pdf

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, and act in accordance with, 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 or identity checks.

Recommendation 6:

People should not be kept in immigration detention because their visas have been cancelled under section 501 of the *Migration Act*.

7. Children in Detention

7.1 Proposed regime

51. The HRLRC congratulates the Australian Government on its commitment not to detain children in immigration detention, as reflected in proposed new section 4AA of the Bill which amends the Migration Act to ensure that:

    (a) If a minor is detained as a measure of last resort, the minor must not be detained in a detention centre established under the Migration Act; and

    (b) If a minor is to be detained (including in accordance with a residence determination), an officer must, for the purposes of determining where the minor is detained, regard the best interests of the child as a primary consideration.

52. The HRLRC also commends the Government on the inclusion of 'persons suspected of being a minor' in the definition of 'a minor' (Item 2).

53. However, the HRLRC remains concerned that these provisions allow for children to be held in closed detention facilities in contravention of Australia's obligations under international law.

7.2 International Law

54. 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'.[27] The Children's Convention also imposes a positive duty to ensure that children asylum seekers receive appropriate protection and humanitarian assistance.[28] 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**'),[29] which recognises the need for special measures in respect of children in detention generally, and requires that their detention always be subject to review by a competent judicial or other authority.

55. 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.'[30]

(a) Children in Detention

56. The problems with mandatory immigration detention set out in Part 5 of this submission apply equally to the detention of children. Proposed new subsection 189(1) does not protect children from a scheme whereby detention is neither a measure of last resort or for the shortest period of time.

57. The HRLRC is concerned that the Migration Act, as amended by the Bill, would continue to allow that children and their families may be kept in Immigration Residential Housing (***IRH***). IRH is family-style housing, however 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.

58. While IRH is not detention in name, it imposes significant limitations on the rights of children. The HRLRC therefore considers that the detention of children in IRH is inconsistent with Australia's obligations under the Children's Convention, including the child's right to life and

[27] *Children's Convention* art 37(b).

[28] *Children's Convention* art 22(1).

[29] Adopted by General Assembly resolution 43/173 of 9 December 1988.

[30] *UNHCR Revised Guidelines* [1] and [Guideline 6].

development;[31] freedom from arbitrary or unlawful interference with his or her privacy or family;[32] the highest attainable standard of health;[33] education;[34] and freedom form torture or other cruel, inhuman or degrading treatment or punishment.[35] The Children's Convention also provides that:[36]

> 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.

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

Recommendation 7:

Item 3 of the Bill should be clarified to ensure that under no circumstances should children be kept in any form of detention, including Immigration Residential Housing.

8. Temporary Community Access Provisions: Proposed new section 194A

60. Proposed new section 194A provides for an 'authorised officer' to grant a temporary community access permission. According to the Explanatory Memorandum:

> The purpose of new section 194A is to provide that an authorised office [sic] may grant a temporary community access permission to allow a person that is in immigration detention, but not covered by a residence determination, to be absent from the place of detention for a period of time specified in the permission for the purpose(s) specified in the permission. The amendments also provide that an authorised officer may only grant a temporary community access permission if it is considered it would involve minimal risk to the Australian community.

[31] CRC, art. 6.

[32] CRC, art. 16.

[33] CRC, art. 24.

[34] CRC, art. 28.

[35] CRC, art. 37.

[36] CRC, art 22.

> Further, the amendments specify the requirements that must be met to grant a temporary community access permission. This includes how a temporary community access permission must be made, who it must be given to and that the conditions specified by the authorised officer are to be complied with by the person subject to the permission.

61. In some respects proposed new section 194A is welcome insofar as it provides a mechanism for allowing greater scope for detention in the community.

62. However, an authorised officer is expressly *not* bound to consider whether to grant a temporary community access permission (section 194A(4)). This means that even where it would only involve a minimal risk to the Australian community for a detainee to be living in the community, that detainee can be held in detention simply because an authorised officer fails to consider that person's circumstances. Further, there is no mechanism whereby an authorised officer can be required to assess whether a temporary community access permission is appropriate in the circumstances. If the government believes, in principle, that detention in the community is appropriate in circumstances where it would pose a minimal risk to the Australian community, then the legislation should *require* authorised officers to consider whether to exercise their power under proposed new section 194A. This would also be consistent with the government's policy of ensuring that detention is a measure of last resort.

63. Insofar as proposed new section 194A does not provide for review or an enforcement mechanism for persons to be released into the community who pose only a minimal risk, it is inconsistent with the following values in the New Directions in Detention policy:

- 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.
- 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.

64. Further, the provisions begs the questions as to what guidance will be given to authorised officers about the meaning of 'minimal risk to the Australian community'? For example, if that risk is assessed using the criteria set out in proposed new subsubsection 189(1), it would be problematic for the reasons set out in part 6.3 above.

65. To the extent that the temporary community access permission provisions perpetuate a system of non-reviewable mandatory detention of asylum seekers, the provisions are also inconsistent with international human rights principles for the reasons set out in part 6.2 above.

66. Rather than provide for temporary community access persmissions to be granted, the Migration Act should reflect, in all aspects, the presumption that people are to be detained in the community and that detention is truly a measure of last resort.

Recommendation 8:

The Bill should:

- require an authorised officer to consider and determine whether or not to grant a temporary community access permission;
- clarify what is meant by 'risk to the Australian community' and ensure that such a clarification is in a manner that is consistent with human rights principles; and
- provide for a review of any decision of the authorised officer whether or not to grant a temporary community access permission.

9. The matters in New Directions in Detention Policy that are *not* covered in legislation

67. Apart from the matters already discussed, there are three key values enshrined in the New Directions in Detention Policy that, for the same reasons provided above, have not been reflected in the Bill, namely:

> …
>
> 4. 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.[37]
>
> …
>
> 6. People in detention will be treated fairly and reasonably within the law.
>
> 7. Conditions of detention will ensure the inherent dignity of the human person.[38]

[37] Note that this value reflects Australia's obligations under Article 9(1) of the ICCPR.

[38] Note that these values reflect Australia's obligations under Article 7 of the ICCPR (with respect to freedom from torture, inhuman or degrading treatment or punishment), Article 10 if the ICCPR (with respect to the right to be treated with humanity and with respect for the inherent dignity of the human person), Article 14 of the ICCPR (with respect to the right to a fair hearing), and Article 9 of the ICCPR (with respect to liberty and security of the person).

68. Whilst we welcome the enunciation of these values and acknowledge that they mark a positive step forward in Australia's immigration detention policy, we are keen to ensure that such values are enshrined in legislation in order to give them the full force that they deserve.

69. Policies that are not enshrined in legislation are left subject to the exercise of executive discretion. It is vital that these values be legislatively entrenched in order to ensure the effective implementation of Australia's international human rights obligations.[39] To this end, we note that Australia is obliged, by Article 2 of the ICCPR, to give effect to these obligations in domestic law.[40]

10. Other Amendments Required for Human Rights Compliance

70. In order for Australia's immigration detention system to comply with Australia's obligations under international human rights law, the HRLRC recommends that amendments need to be made in the following areas which are not addressed in either the Government's policy or in the Bill:

(a) application in migration exclusion zones;

(b) access to judicial review; and

(c) time limits on immigration detention.

10.1 Migration Exclusion Zones

71. The Australian Government employs a policy of territorial 'excision' for the purposes of immigration. The Government is currently detaining hundreds of spontaneous arrivals in immigration detention centres on Christmas Island, including a new detention centre that 'looks and feels like a high-security prison'.[41]

72. For reasons that are not explained or justified, the limited protections afforded by proposed new subsection 189(1) do not apply to people who arrive in 'excised' territory. Instead, such

[39] See footnotes 37 and 38 above.

[40] Article 2(2) of the ICCPR requires State parties 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'.

[41] Australian Human Rights Commission, *2008 Immigration Detention Report: Summary of Observations following Visits to Australia's Immigration Detention Facilities* (2008), available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html.

arrivals 'may' be detained under section 189(3). Decisions to detain and to continue to detain made under this section are not subject to any regulatory or judicial oversight. Those people who arrive in an excised zone are not required to meet the criteria in section 189(1) and detaining officers are not required to make reasonable efforts to ascertain identity or heath, security or character risks as required for arrivals in the migration zone under section 189(1B).

73. Treatment of spontaneous arrivals in this way is discriminatory. It applies a harsh approach to those who are often the most vulnerable.

10.2 Access to judicial review

74. 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.

75. 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.'[42]

76. 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.[43] 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.'

77. 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.[44] However, as it currently stands, mandatory immigration detention does not satisfy this requirement.

[42] Commonwealth of Australia, *Parliamentary Debates*, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

[43] *ICCPR* art 9(4).

[44] Office of the High Commissioner for Human Rights, *Fact Sheet No 26 on the UN Working Group on Arbitrary Detention*, at part IV(B).

78. 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:[45]

> [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.

79. 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'.[46] Furthermore, judicial review of the lawfulness of detention must be, in its effects, real and not merely formal.[47]

80. 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.[48] 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.[49] In *Baban v Australia*, the HRC was highly critical of the fact that, in that case, [50]

> 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.

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

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[45] UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) at [7.2].

[46] UN Doc CCPR/C/59/D/560/1993 (3 April 1997) at [9.4].

[47] Ibid at [9.5].

[48] 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*.

[49] *Working Group Report* at page 8.

[50] UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) at [7.2].

10.3 Time limits

82. 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.

83. This was recognised in the Working Group Report which recommended that:[51]

> 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.

84. The HRLRC reiterates the Working Group's recommendation in this respect.

Recommendation 9:

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

Recommendation 10:

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.

[51] *Working Group Report,* p. 19.