



# Refugee Council of Australia

## **Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia**

### **Background to the Refugee Council of Australia**

The Refugee Council of Australia (RCOA) welcomes the opportunity to contribute to this inquiry into the role and operation of detention within Australia's migration system. RCOA is an umbrella organisation providing information on and advocacy for refugees and humanitarian entrants in Australia on behalf of its more than 125 organisational and 200 individual members. We work to develop and implement policies to improve refugee and humanitarian migration and settlement outcomes and ensure that they are consistent with Australia's international obligations.

### **Context for the present inquiry and RCOA's submission**

While we acknowledge the willingness of the Parliament to investigate the implementation the immigration detention framework, the Council notes that there have been numerous Parliamentary, Senate, federal statutory body, and Ministerial-initiated inquiries into immigration detention since the introduction of mandatory detention in 1992. Reports of these inquiries include:

- Joint Standing Committee on Migration (1992) *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control*. APH, Canberra.
- Joint Standing Committee on Migration (1994) *Asylum, Border Control and Detention*. APH, Canberra.
- Commonwealth Ombudsman (1997) *Final Report to the Department of Immigration and Ethnic Affairs of Investigation of Complaints Concerning Onshore Refugee Processing*. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (1997) *Revocation of Visas on Entry to Australia: Section 35A Report*. Commonwealth Ombudsman, Canberra.
- Senate Legal and Constitutional Legislation Committee (1997) *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No. 4) 1997; Migration Legislation Amendment Bill (No. 5) 1997*. APH, Canberra.
- Human Rights and Equal Opportunity Commission (1998) *1998-99 Review of Immigration Detention Centres*. HREOC, Canberra.
- Human Rights and Equal Opportunity Commission (1998) *Those Who've Come across the Seas: Detention of Unauthorised Arrivals*. HREOC, Canberra.
- Joint Standing Committee on Migration (1998) *Report of Inspections of Detention Centres throughout Australia*. APH, Canberra.
- Joint Standing Committee on Migration (1998) *Deportation of Non-Citizen Criminals*. APH, Canberra.
- Human Rights and Equal Opportunity Commission (2000) *Immigration Detention Centre Guidelines*. HREOC, Canberra.
- Joint Standing Committee on Migration (2000) *Not the Hilton: Immigration Detention Centres: Inspection Report*. APH, Canberra.

- Senate Legal and Constitutional References Committee (2000) *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*. APH, Canberra.
- Commonwealth Ombudsman (2001) *Own Motion Investigation into Immigration Detainees Held in State Correctional Facilities*. Report 06/2001. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2001) *Own Motion Investigation into Immigration Detention Centres*. Report 05/2001. Commonwealth Ombudsman, Canberra.
- Senate Legal and Constitutional References Committee (2002) *Migration Zone Excision: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and Related Matters*. APH, Canberra.
- Australian National Audit Office (2004) *Management of the Detention Centre Contracts-Part A*. ANAO, Canberra.
- Commonwealth Ombudsman (2004) *Complaint about Delay in the Processing of an Application for a Bridging Visa*. Report 05/2004. Commonwealth Ombudsman, Canberra.<sup>1</sup>
- Human Rights and Equal Opportunity Commission (2004) *A Last Resort? Report of the National Inquiry into Children in Immigration Detention*. HREOC, Canberra.
- Australian National Audit Office (2005) *Management of the Detention Centre Contracts-Part B*. ANAO, Canberra.
- Joint Standing Committee on Migration (2005) *Review of Audit Report No. 1 2005-2006: Management of Detention Centre Contracts - Part B*. APH, Canberra
- Joint Standing Committee on Migration (2005) *Report of the inspections of Baxter Immigration Detention Facility and Port Augusta Residential Housing Project, April 2005*. APH, Canberra.
- Mick J Palmer (2005) *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report*. DIMIA, Canberra.
- Commonwealth Ombudsman (2005) *Complaint by Mr Z about his Immigration Detention*. Report 02/2005. Commonwealth Ombudsman, Canberra.
- Nigel Comrie (2005) *Inquiry into the Circumstances of the Vivian Alvarez Matter*. Commonwealth Ombudsman, Canberra.
- Senate Committee on Legal and Constitutional Affairs (2005) *Provisions of the Migration Litigation Reform Bill 2005*. APH, Canberra.
- Australian National Audit Office (2006) *Management of the Tender Process for the Detention Services Contract*. ANAO, Canberra.
- Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents*. Report 01/2006. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report on Referred Immigration Cases: Mr T*. Report 04/2006. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report into Referred Immigration Cases: Mr G*. Report 06/2006. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report into Referred Immigration Cases: Mental Health and Incapacity*. Report 07/2006. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report into Referred Immigration Cases: Children in Detention*. Report 08/2006. Commonwealth Ombudsman, Canberra.

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<sup>1</sup> This complainant was in immigration detention and aspects of this individual's complaint and the Ombudsman's report related to the impact of visa processing issues on the complainant's experiences of detention.

- Human Rights and Equal Opportunity Commission (2006) *Inspection of Immigration Detention Centres*. HREOC, Canberra.
- Senate Standing Committee on Legal and Constitutional Affairs (2006) *Migration Amendment (Review Provisions) Bill 2006*. APH, Canberra.
- Senate Standing Committee on Legal and Constitutional Affairs (2006) *Migration Amendment (Visa Integrity) Bill 2006*. APH, Canberra.
- Senate References Committee on Legal and Constitutional Affairs (2006) *Administration and Operation of the Migration Act 1958*. APH, Canberra.
- Senate Legislation Committee on Legal and Constitutional Affairs (2006) *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*. APH, Canberra.
- Australian National Audit Office (2007) *Preparations for the Re-tendering of DIAC's Detention and Health Services Contracts*. ANAO, Canberra.
- Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Detention Process Issues*. Report 07/2007. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Data Problems*. Report 08/2007. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship—Report into Referred Immigration Cases: Notification Issues (including cases affected by the Federal Court Decision in Srey)*, Report 09/2007. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship—Report into Referred Immigration Cases: Other Legal Issues*, Report 10/2007. Commonwealth Ombudsman, Canberra.
- Commonwealth Ombudsman (2007) *Lessons for public administration: Ombudsman investigation of referred immigration cases*. Report 11/2007. Commonwealth Ombudsman, Canberra.
- Human Rights and Equal Opportunity Commission (2007) *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities*. HREOC, Canberra.
- Commonwealth Ombudsman (2008) *Department of Immigration and Citizenship: Administration of Detention Debt and Write-Off*. Report 02/2008. Commonwealth Ombudsman, Canberra.

In addition, there have been hours of testimony presented by Department of Immigration staff at Senate Estimates Committee hearings, dozens of Commonwealth Ombudsman reviews of the individual cases of long-term detainees, reports by the Immigration Detention Advisory Group and the Detention Health Advisory Group, as well as a series DIAC internal reports published on the implementation of and modifications to detention policies.<sup>2</sup>

Further, as this Committee is no doubt aware, there have been a range of independent inquires, Australian NGO reports, stories of former and current detainees, medical reports, scholarly publications, longitudinal studies and *obiter dicta* from judicial officers and Refugee Review Tribunal members that have criticised various elements of Australia's immigration detention policies.

Supplementing these findings are those of international bodies regarding the manner in which Australia's immigration detention policies have systematically violated the country's human rights obligations at international law. Such criticisms have been repeatedly expressed in reports by organisations including:

- United Nations Committee against Torture;

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<sup>2</sup> See for instance, DIMIA (2004-05) *Managing the Border: Immigration Compliance*. DIMIA, Canberra; DIMIA (2007) *Palmer Report: Two Years of Progress*. DIMIA, Canberra.

- United Nations High Commissioner for Refugees;
- World Organisation against Torture (OMCT);
- International Detention Coalition;
- United Nations Economic and Social Council Working Group on Arbitrary Detention;
- Amnesty International; and
- Human Rights Watch.

The findings and recommendations of these inquiries, reports, studies and commentary based on meticulously compiled oral histories indicate that, among other shortcomings:

- Detention has frequently been viewed by Department of Immigration officers as an option of first resort for individuals considered to be undocumented migrants.
- Individuals who should not otherwise have been detained, even within the terms of the legislation, have been held for long periods of time and in some cases deported.
- The punitive nature of immigration detention for individuals who migrate to Australia in an irregular manner has negligible impact as a means for deterring such irregular migration.
- The indefinite nature of detention creates discernible anxiety and associated trauma for detainees regarding the length of time it will take to resolve their cases.
- The capacity for the legislature to allow for and enforce indefinite detention for an individual who is not guilty of a criminal offence but merely for administrative purposes associated with migration regulation amounts to one of the most disturbing forms of arbitrary detention.
- There is significant loss of social and economic capital for the broader Australian community resulting from detaining migrants who have skills or are otherwise able to contribute positively to Australia.
- Detention facilities are very expensive to operate and are far less economically efficient than the implementation of more humane approaches to managing Australia's comparatively small number of irregular migrants.
- The privatisation of immigration detention facilities has reduced public transparency about and accountability in their operation.
- Investigations of some detainees' physical and mental health have demonstrated a causal link between their detention and the development and/or exacerbation of their health problems.
- Detainees have, on occasions, been subjected to assaults from other detainees and centre staff and have witnessed self-harming behaviour.
- There have been, at times, failures to provide adequate levels of or appropriate medical, dental and mental health care.
- Risks to detainees' and their families' safety have arisen from uninvited contact with representatives from countries against whom detainees may be making asylum claims.
- Detainees have experienced difficulties in accessing appropriate and affordable legal advice.
- Differential applications of detention policy depending on a migrant's mode of arrival have disadvantaged many migrants most in need of Australia's protection.
- There have been failures to appropriately accommodate the needs of children, families, pregnant women, and people with disability.
- Detention exiting procedures for detainees have failed to provide adequate levels of support.
- Detainees have been billed for the cost of their immigration detention, even when the legality of their detention has been questionable.

The Refugee Council has made submissions to nearly all of these inquiries, drawing Committees' and investigators' attention to the damaging effects of mandatory detention for asylum seekers and refugees, as well as highlighting the myriad alternatives that could be pursued. The comments of the Council contained in those earlier submissions, as well as many of the recommendations in the associated reports, remain relevant for the present inquiry and have not been reiterated in this submission. We would therefore urge this Committee to draw on the evidence, commentary and recommendations of earlier investigations.

We acknowledge that there have significant changes to the implementation of immigration detention policy in recent years, particularly since 2005. Much greater attention has been given since then to developing community alternatives to detention and to policy and procedural changes aimed at improving the safety, welfare and conditions of people in immigration detention. These changes are clearly reflected in the 70% drop in the past four years in the number of people held in immigration detention. Later in this submission, we comment on the achievements of the Community Care Pilot (CCP) launched in 2006, which has clearly demonstrated that, in the great majority of cases, community-based care arrangements are more conducive than detention to assisting in resolving a person's visa status.

While the Council recognises that the impacts of the immigration detention regime extend beyond its direct effects for refugees and asylum seekers, the comments contained in our submission are restricted to refugees, asylum seekers and stateless people. We would, however, strongly support the Committee's investigation of the role of detention for other undocumented migrants in Australia, including those individuals who have lived in the community but are facing deportation on character grounds.

Further, we note with some concern that, while this inquiry will examine the operation of mandatory immigration detention policies, the terms of reference of this investigation do not extend to a review of the existence of mandatory detention as a central element of the Australian Government's approach to dealing with unregulated migrants. In our view, this is problematic because so much of the evidence marshalled over decades both in Australia and abroad criticising immigration detention derives from a fundamental criticism of the use of detention as an underpinning tenet of migration regulation. Deprivation of liberty is one of the most powerful actions that can be taken by the state against an individual and is consequently reserved as punishment for egregious criminal behaviour or as a proportional means for protecting majority populations from a perceived risk posed by a minority. It is our submission that neither of these circumstances exist in relation to asylum seekers and refugees in Australia. These individuals have an internationally recognised human right to access territory to obtain protection and there is no evidence, especially given the small numbers of onshore arrivals, that such people pose any identifiable risk to the safety and security of the broader Australian population that requires a maximum security level response.

In addition, we would also encourage the Committee to consider the operation of onshore immigration detention facilities in concert with those that are located beyond Australia's territory, particularly those in countries in Asia-Pacific including Indonesia, Malaysia and Thailand. Such detention centres are operated within these countries with the political and in some cases financial support of the Australian government as part of its efforts to develop "regional solutions" to dealing with irregular migration flows. Many refugees and asylum seekers who are attempting to obtain protection from a country that has assumed protection obligations under the Refugee Convention, are prevented from doing so because they are arbitrarily detained in prison and prison-like facilities in non-Convention countries. Given that the Australian Government maintains that assisting its neighbours to build capacity to manage undocumented migrants is part of Australia's domestic approach to border security, and that a key aspect of this approach involves limiting access to Australia's territory by asylum seekers and refugees, the Australian Government has a responsibility to promote humane standards for the treatment of asylum seekers by our neighbours, especially when their detention in other countries is viewed as part of Australia's broader deterrence measures.

The Council also notes that the terms of reference for this inquiry do not explicitly cover circumstances and procedures for removal from Australia of individuals who are determined to be unlawful. Many of these individuals will come into contact with immigration detention and there has been much controversy, particularly before the development of the CCP, surrounding the removal of individuals who have immigration or other legal proceedings pending, are medically unfit to travel, have been forcibly sedated or restrained to facilitate travel, have been separated from children and other family members upon removal, have been removed on false or incorrect

documents, and/or have been removed to situations where they (and their families) face grave danger or ongoing persecution. While RCOA's present submission does not address these issues directly, we are hopeful that the Committee will be mindful of the broader implications of immigration detention policy as it relates to removals and, in doing so, draw on the recommendations of existing reports and submissions covering these concerns.

### **Recently announced changes to immigration detention policies**

As the Committee is aware, in July this year, after the announcement of the terms of reference of this inquiry, the Minister for Immigration and Citizenship announced a series of guiding principles for the implementation of the government's mandatory immigration detention policy.

RCOA strongly supports this shift in public approach to immigration detention and notes that it is consistent with the practical measures adopted in recent years by DIAC and the previous Ministers for Immigration. In particular, RCOA is pleased that there has been a reiteration of the Australian Government's commitment that children will not be detained, that detention will be a measure of last resort and for the shortest possible time, and that such detention will be reasonable and lawful.

RCOA is further heartened by the additional commitments that immigration detention will not be a default compliance response to dealing with an undocumented arrivals, that there will be a presumption *against* detention, there will be express limitations on the circumstances in which detention will be viewed as appropriate, the risk of arbitrary detention being limited by periodic review of detention, and that the conditions of detention will "ensure the inherent dignity of the person". RCOA believes that within the overarching framework of maintaining mandatory detention, these principles signal a more sound approach to managing and accommodating irregular migrants and asylum seekers.

It is the Council's view that providing some legislative certainty, especially in relation to areas of minimum detention times, periodic review of detention, release mechanisms and presumption against detention, is necessary to promote confidence in Australia pursuing a more human rights focused response to asylum seekers, refugees and other irregular migrants.

### **Onshore versus offshore detention facilities**

The Council's reading of this inquiry's terms of reference indicates that this Committee will be exploring the operation of both Australia's onshore and offshore immigration detention facilities. It is the view of the Council that for too long there has been an undue and ultimately punitive distinction made between the facilities and services available to asylum seekers and irregular migrants who are detained in onshore immigration detention centres, as opposed to their counterparts in offshore centres.

Over the past six years, there has been a marked decrease in the numbers of asylum seekers and other individuals who are detained in Australia's onshore immigration facilities. This is in large part due to the changing international political climate and the substantial efforts of the Australian Government to restrict access to Australian territory by undocumented migrants through interception and interdiction activities in Australian territorial waters and in other countries, as well as greater use of alternatives to detention. While Australia's offshore immigration detention and processing centres in foreign countries have ceased operations, Australia is maintaining its policies of island excision and the use of its Christmas Island detention centres as the frontline mechanism for dealing specifically with unregulated boat arrivals.

Not only are asylum-seeking boat arrivals confronted with differential rights under Australian law – no access to judicial review of refugee status determination – they are met with markedly different conditions of detention. The opening of the new \$400 million detention centre on Christmas Island as an option for housing boat arrivals, with its maximum security areas, kilometres of wire fencing, difficulties in catering for complex health needs, problems accessing face-to-face legal advice, and

remoteness from local community supports, stands in stark contrast to the services and facilities available to undocumented migrants on the mainland.

The Australian Government has indicated that this new detention centre will be used only as a matter of last resort and that the temporary Christmas Island Detention Centre will be the primary detention facility for the management of unauthorised boat arrivals. The temporary centre located on Phosphate Hill was never intended to be used for an extended period of time and the nature of its construction is testimony to that decision. Despite being more accessible by the community and being improved by the removal of much of the perimeter fencing, significant upgrading of the centre is required to bring it up to a standard comparable with that required of detention centres on the mainland. These improvements would, unfortunately, add to the wastage of funds on detention facilities on Christmas Island, given the ready availability of more suitable alternatives on the mainland.

It should also be noted that discussion regarding alternatives to detention must be mindful of the difficulties in implementing such policies on Christmas Island as opposed to on the mainland. The remoteness and isolation of the island from mainland Australia, the limited resources available for residents as well as visitors, the limited access to complex health facilities, minimal torture and trauma counselling, the lack of public transport facilities and overstretched community support networks, mean that the prerequisites for successful implementation of alternatives to detention do not exist.

#### **Recommendation 1**

While initial reception of irregular migrants including asylum seekers may occur in Australia's offshore territories, this should be time-limited with the intention that these individuals should be processed on the mainland. Where detention or alternatives to detention are considered appropriate for asylum seekers, these arrangements should be made available in mainland facilities.

#### **Recommendation 2**

All irregular migrants should have equal access to and protection under Australian law for fair and judicially reviewable determinations of their migration applications, including applications for refugee status determination and protection.

### **Initial detention of asylum seekers**

While international law does not prevent the detention of asylum seekers, it does provide a useful framework for how detention in these circumstances should work. Article 31 of the Refugee Convention establishes that no penalties should be imposed on refugees (or asylum seekers) on account of their unauthorised entry and that there should be no unnecessary restriction on their movement while their status is being regularised. Necessity is the key here, and whether it is necessary to detain should take into account "whether it is reasonable to do so and whether it is proportional to the objectives to be achieved".<sup>3</sup> The 1999 *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (The Guidelines) further state that "as a general principle asylum seekers should not be detained". The Guidelines promote a presumption against detention, with detention only being used in exceptional circumstances and for particular reasons as outlined in UNHCR ExCom Conclusion No. 44 (XXXVII).

The main grounds for detaining an asylum seeker as accepted by UNHCR are to verify an individual's identity and to establish the nature of the person's asylum claim.<sup>4</sup> RCOA supports initial

<sup>3</sup> UNHCR (1999) *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*. UNHCR, Geneva.

<sup>4</sup> UNHCR (1999) *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*. UNHCR, Geneva, Guideline 3 (i).

time-limited detention for the purposes of identity verification and initial interview, noting that in accordance with the Guidelines, detention should be exclusively for the purposes of a preliminary interview and not continued through any additional aspect of the refugee determination process.

Under the revised principles of detention outlined by the Minister, detention of asylum seekers is intended to continue beyond health and identity checks to cover the time it takes to obtain a security check. While the Council accepts the need to safeguard the security of the broader Australian community, the agencies responsible for security vetting often take many months, sometimes years, to conduct security checks. This timeframe is likely to be further extended as the Australian Security Intelligence Organisation, Australian Federal Police and Australian Secret Intelligence Service take on greater responsibilities for providing security clearances for more and more members of the Australian public. It would be a shame if such persistent delays on the part of security agencies operated in such a way as to undermine the operation of the general principles of a presumption against detention and detention for the shortest possible time.

A number of different countries impose time limits on detention. RCOA encourages the Committee to examine models adopted in countries including Sweden and Canada, which provide not only for time-limited immigration detention primarily for identification purposes, but for regular (administrative and judicial) reviewability of detention decisions. RCOA recommends a system of legally enforceable time limits based on these models, acknowledging the right of individuals at international law to access territory and apply for protection visas, and the adverse impacts that detention has on individuals' mental and physical health.

**Recommendation 3**

RCOA supports the Minister's commitment that there be a presumption against detention for asylum seekers. Where detention is viewed as necessary for the purposes of establishing identity and conducting health checks, this should be limited to a period of two weeks. Should health or identity checks not be conclusive within the two-week period, detention may be extended by further, discrete two-week periods up to a maximum of sixty days.

**Recommendation 4**

Where authorities allege that an asylum seeker poses an identifiable security or public order risk, asylum seekers may be detained beyond the initial detention for a further two months which may then be extended by a further two months. Asylum seekers in this situation should be afforded every procedural fairness protection to ensure that they are able to challenge adverse security findings.

**Recommendation 5**

Asylum seekers detained as a result of allegations that they pose a security or public order risk should receive prioritised processing of their cases.

**Recommendation 6**

No asylum seeker, including those who are in the process of being removed from Australia, should be detained beyond six months. This time limit should cover the entire time spent in detention, even if such incarceration has been interspersed with periods of time spent in the community. If longer detention is determined to be appropriate due to security or public order risks, alternatives to immigration detention should be adopted for this individual.

**Recommendation 7**

Grounds for detention of asylum seekers and the time limitations should be codified in legislation.

Currently families and children (minors) are only detained as a last resort and alternatives to initial detention are adopted in these cases. RCOA believes that similar arrangements should be made for other groups of vulnerable people, including pregnant women, torture and trauma victims and those at risk medically or psychologically. UNHCR Guidelines recommend that detention of people

who fit into these categories only occur with a certification by a qualified medical practitioner that detention will not adversely affect these individuals' health and well-being.<sup>5</sup>

**Recommendation 8**

RCOA supports the sentiment expressed by the Minister that minors and their families only be detained as a measure of last resort. We recommend that this principle be codified in the *Migration Act 1958*.

**Recommendation 9**

In addition to children and families, alternatives to detention should be explored for other vulnerable groups including those who are at risk medically or psychologically. Detention should only be used for this category of asylum seeker where an independent medical practitioner has certified that detention will not adversely affect this individual's health and wellbeing.

**Reviewable detention**

The UNHCR Guidelines state that for the detention of asylum seekers to be lawful it must be "subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances". Detention needs to be reviewable to both safeguard the rights of detainee and ensure public confidence in the system. Without independent review the system lacks transparency and the government places itself at risk of a major incident like the detention of Cornelia Rau, Vivian Alvarez Solon or Mr T.

Where reasons for detention and time limits are incorporated into law, there is an opportunity to put in place a system of automatic administrative review. It makes sense that detention be subject to review at the first decision to detain and then again at each point where the detention is to be extended. The review should be undertaken by an independent administrative body and in accordance with the Guidelines related to procedural safeguards, the asylum seeker or their representative should be able to attend and challenge the necessity of the detention.

All unregulated migrants, including asylum seekers, who are detained should have the decision to detain them explained to them along with their rights to have detention decisions review. Where necessary such advice should be provided using the services of an interpreter. Asylum seekers should have access to a legal representative to assist them in exercising their rights in relation to their detention. In this regard, the current Immigration Advice and Application Assistance Scheme (IAAAS) should be expanded to include representation for individuals challenging their detention.

Decisions of administrative bodies to detain should also be subject to judicial appeal, regardless of whether that detention is occurring on the mainland or in offshore facilities.

**Recommendation 10**

All decisions to detain an individual on account of their unresolved migration status should be reviewable by an independent administrative body at each decision to detain or extend detention, regardless of the place where such detention is occurring. Asylum seekers and others who are detained for immigration purposes should have a right to attend reviews and challenge the purported necessity for their detention at each review.

**Recommendation 11**

Immigration detainees should have access to legal advice and representation in relation to their detention. For asylum seekers, access to legal advice should be provided free of charge and should be incorporated within the existing IAAAS.

<sup>5</sup> UNHCR (1999) *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*. UNHCR, Geneva, Guideline 7.

### **Recommendation 12**

All administrative decisions to detain an individual whose immigration status has not been resolved, regardless of where such detention is taking place, should be subject to judicial review.

## **Transparency of immigration detention centres**

Many of the concerns regarding the provision of detentions services relate to the commercial nature of their administration. The contracting of detention services to private operators has had a significant impact on both real and perceived transparency. Commercial in confidence requirements have shielded detention centres from the level of public scrutiny required to ensure that detainees have their rights respected and their dignity maintained as well as the level of confidence that the general Australian public can have about the extent to which the government is adequately discharging its duty of care to detainees. The most effective way in which transparency of and accountability of detention centre operations can be ensured is through returning them to public sector control and operation. The Australian National Audit Office reports on the maladministration of immigration detention centre contracts have also indicated that it would be arguably more economically efficient for detention centres to be operated within the public sector.

As well as detainees having access to review, it is important that the management and operation of detention centres continue to be subject to external scrutiny by external bodies like the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman. Monitoring bodies should be able to make enforceable recommendations. The Council welcomes the recent decision by the Australian Government to sign the Optional Protocol to the Convention against Torture. We note that becoming a party to the Protocol means that all of Australia's detention facilities, including immigration detention centres, will be open to inspection by the Committee against Torture for potential breaches of international human rights obligations, and that an individual will now be able to make complaints about her or his detention direct to the Committee against Torture. This is a positive development and the Council is hopeful that the Australian Government will facilitate the smooth operation of this valuable review mechanism.

### **Recommendation 13**

Existing review mechanisms covering the conditions and operation of detention centres should be supported and strengthened, in particular by providing for some enforceability of recommendations by Australian statutory bodies such as Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman.

## **Provision of detention services and detention health services**

As noted above, the Council welcomes the current Minister's policy commitment that the principle covering the conditions of detention be modelled on that in the UNHCR Guidelines which provides that "conditions of detention for asylum seekers should be humane with respect shown for the inherent dignity of the person". RCOA suggests that the additional criteria contained in the UNHCR document provide further guidance for crafting of general detention standards:

- initial screening to identify trauma or torture victims;
- segregation of men and women, adults and children (except when related);
- separate detention facilities for asylum seekers – if not the case then separation from convicted criminals or prisoners on remand;
- opportunities for detainees to receive visits – where possible in private;
- access to medical treatment and psychological counselling;
- physical exercise through recreational activities;
- opportunities to continue further education or vocational training;
- opportunities to exercise their religion and receive a diet in keeping with their religion;
- access to basic necessities; and
- access to a complaints mechanism.

RCOA supports the recommendations contained in the submissions of asylum seeker support agencies to this inquiry as well as the recommendations of the Immigration Detention Advisory Group, the Detention Health Advisory Group, the Royal Australian and New Zealand College of Psychiatrists who have visited Australia's immigration detention centres and examined current and former detainees. The Council also urges the Committee to turn its mind to the discussions, recommendations and reports regarding the development of appropriate conditions of detention produced by NGOs both in Australia and internationally.

In addition, RCOA wishes to emphasise the importance of ensuring access to free legal advice to all detainees not solely in relation to challenging their ongoing detention, but also for assisting in the resolution of their migration status.

### **Community-based alternatives to detention**

The Council would again like to draw the Committee's attention to the existing literature on possible models for alternatives to detention as well as the financial cost effectiveness of such alternatives when compared with traditional detention centres. RCOA is pleased that there has been increasing recognition of not only the financial savings that can be made through pursuing alternatives to detention, but their positive mental health impacts, and the capacity for such alternatives to resolve individuals' immigration status in a mutually satisfactory and supported manner, with low levels of absconding. To that end, RCOA has worked closely with other non-government organisations and the Department of Immigration and Citizenship in recent years to develop and implement community-based alternatives to detention.

The Council strongly supports the continuation and expansion of the Community Care Pilot (CCP) as the best approach for ensuring supported release of individuals with unresolved migration statuses into the community. RCOA anticipates that the Committee will avail itself of the recent evaluation of the CCP which highlights the benefits of the scheme. It is the Council's view that better resourcing of the CCP and its continued development in collaboration with asylum seeker service providers, asylum seekers, UNHCR and the International Organisation for Migration, will propel it to the status of being the preferred model for community release for almost all prospective detainees. The CCP is particularly useful for individuals with complex needs, especially of the medical or psychological kind.

For those individuals who have existing community connections or who otherwise do not require the level of support provided by the CCP, granting a Bridging Visa with work rights is the preferred option. The Council and its members have expressed concern on many occasions about the situation of many asylum seekers living in the community who are not permitted to work and have no access to basic health services. It is important, as the Australian Government moves to expand community-based alternatives to detention, that steps are taken to ensure that people are not left destitute while their visa status is determined.

The success of community-based alternatives should, the Council believes, encourage the Australian Government to rethink the role of Immigration Residential Housing (IRH) facilities and the Immigration Transit Accommodation Centres (ITAC). While these facilities provide a higher standard of accommodation and are less restrictive than immigration detention centres, they still operate as detention environments, even more so where they are adjacent to detention centres. Extended periods in an IRH facility (or an ITAC if that were to occur) can lead to a detainee becoming quite isolated, as well as restrict the person's access to health and other services. Such detention arrangements should be used for minimal periods only and used rarely, limited to situations where no community-based alternative is available.

#### **Recommendation 14**

The Community Care Pilot should be continued and expanded, as the preferred model for supporting vulnerable people during the visa determination process.

**Recommendation 15**

The current Bridging Visa arrangements should be reviewed, to ensure that asylum seekers living in the community are able to support themselves and access health services while their visa status is determined.

**Recommendation 16**

The use of Immigration Residential Housing facilities and Immigration Transit Accommodation Centres should be restricted to situations where no viable community-based alternative is available.

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