



Refugee Council
of Australia

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE MIGRATION AMENDMENT (DETENTION REFORM AND PROCEDURAL FAIRNESS) BILL 2010

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees and the organisations and individuals who support them. It has more than 150 organisational and 550 individual members. RCOA promotes the adoption of flexible, humane and practical policies towards refugees and asylum seekers both within Australia and internationally through conducting research, advocacy, policy analysis and community education. RCOA consults regularly with its members and refugee community leaders, and this submission is informed by their views.

RCOA welcomes the opportunity to contribute to the inquiry into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (henceforth, the Bill). RCOA believes the Bill would address many of the key flaws of Australia's current immigration detention regime, namely: the use of detention as a measure of first rather than last resort; the lack of legal avenues through which detainees can challenge the grounds for their detention; the lack of transparency and fairness in the refugee status determination system for asylum seekers arriving through excised territories; and the indefinite and often prolonged nature of immigration detention. These issues are discussed in further detail below.

1. Amendments establishing asylum seeker principles

1.1. RCOA welcomes the asylum seeker principles outlined in Part 1 of the Bill. We wish to note that these principles closely reflect the Australian Government's own key immigration detention values, which stipulate that:

- *Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.*
- *Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.*
- *People in detention will be treated fairly and reasonably within the law.*
- *Conditions of detention will ensure the inherent dignity of the human person.¹*

1.2. Despite their introduction in 2008, these values still are not reflected in practice. In the absence of legislated time limits, immigration detention remains indefinite, often with serious consequences for the health and wellbeing of detainees. Avenues for seeking review of the length and conditions of detention remain inadequate. Detention is used as the only option

¹ www.immi.gov.au/managing-australias-borders/detention/about

available, not as a matter of last resort, for entire categories of asylum seekers. It is applied for a length of time well beyond what is necessary to ensure public safety and security. Conditions in detention, through the restrictions they place on autonomy and their negative impact on health and wellbeing, fail to ensure the inherent dignity of detainees. These issues are well-highlighted through the examples presented below.

Box 1(A): Delays in notifications leading to arbitrary detention

RCOA along with other organisations, including the Australian Human Rights Commission, has received reports of delays (from a few weeks to several months) in notifying asylum seekers in detention about decisions regarding their refugee status. As the Government asserts that people's time in detention is for administrative purposes, detaining them after their application for refugee status has been upheld and all necessary checks have been completed is arbitrary and often has the effect of prolonging detention indefinitely and unnecessarily. This contravenes the principle that immigration detention that is indefinite or arbitrary is unacceptable.

Box 1(B): Arbitrary and indefinite detention pending removal to a third country

At the time of writing, several hundred asylum seekers, some of whom have been detained since 16 May 2011, are detained on Christmas Island pending removal to a third country for processing. Currently, however, there is nowhere to which these people can be removed, as the agreements with the third countries in question (Malaysia and Papua New Guinea) have yet to be finalised. The detention of these asylum seekers is not for the purposes of conducting health, security or identity checks, as their protection claims are not being assessed in Australia. As such, these asylum seekers are being detained arbitrarily. Their detention is also indefinite, as it is uncertain if or when the proposed agreements with Malaysia and Papua New Guinea will come to fruition. This contravenes the principle that immigration detention that is indefinite or arbitrary is unacceptable.

Box 1(C): Effectiveness of Ombudsman review processes

At present, the only formal review mechanism available to people in long term detention is Ombudsman oversight. Over a number of years, the Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of individuals detained. Many such reports have recommended the individual be released from immigration detention. However, most have not been acted upon until the person is granted a substantive visa. There is nothing to compel DIAC or the Minister to act on the recommendations of the Ombudsman. In addition, the Ombudsman has no authority to interview and report on a person's detention until they have been detained for a period of more than six months. In light of these factors, it is questionable whether this review process effectively upholds the principle that the length and conditions of detention be subject to regular review.

Box 1(D): Detention used as a measure of first resort

Australian law provides for mandatory detention of “unlawful non-citizens” and does not currently allow for judicial consideration of the need for detention in individual cases. Asylum seekers who arrive in Australia without a visa are detained as a matter of course before other options have been exhausted. This contravenes the principle that detention is only to be used as a last resort.

Box 1(E): Long-term detention

Australian law does not currently impose time limits on detention and the Government may (and does) detain people in immigration detention indefinitely. As of 20 May 2011, there were 6,729 people in immigration detention. More than 4,500 of those people had been detained for longer than six months, and more than 1,800 people had been detained for longer than 12 months. It is difficult to see how these long periods of detention can be necessary for the purposes of conducting health, security and identity checks. This contravenes the principle that detention is only to be used for the shortest practicable time.

Box 1(F): Inconsistencies in service provision between IAAAS providers

There is inconsistent quality in representation offered by providers of the Immigration Advice and Application Assistance Scheme (IAAAS). It is not the role of IAAAS providers to refer an individual on to another legal provider if judicial review is an option. Some providers will do this; others will not. Given that there are strict time limits for application, it is not known how many people miss out on this opportunity simply because no agency has a formal responsibility to refer them on. A system that relies on chance to ensure that asylum seekers can access their legal rights can hardly be described as “fair”. This contravenes the principle that people in immigration detention must be treated fairly.

Box 1(G): Treatment of pregnant asylum seekers

RCOA is repeatedly informed of instances of pregnant asylum seekers being treated in a manner which contravenes the principle that the inherent dignity of a person in immigration detention must be upheld.

Mrs A is in immigration detention. She is pregnant and in need of appropriate clothing, including bras. Mrs A has to put this request in writing to Serco and is told by them it is a matter for DIAC. When Mrs A writes to DIAC with the same request she is told to contact Serco. Mrs A does not receive a bra and wears her husband’s tracksuit pants because she has no clothing that will fit her as she and her baby grow. She does not leave her room in case these tracksuit pants fall down. The situation is exacerbated by the remote location of Christmas Island. In other centres, this undignified bureaucratic process would be bypassed not with a better system, but with visitors providing the bra and clothing.

Mrs B is pregnant. She is airlifted from Christmas Island to Perth for medical treatment. There, she miscarries and is taken back to detention. Her medical files are provided to IHMS who do not pass on the information to DIAC. Mrs B is transferred to detention in Villawood, but no DIAC officer is advised of what she has been through until she tells an officer in person.

Box 1(H): Substandard provision of health care to detainees

It is not uncommon for detainees to experience difficulty in accessing their own medical records. Often records are not transferred when a detainee moves from one detention facility to another, or from detention into the community. This can have a range of negative consequences. For example, detainees may be administered with the same immunisations twice; detainees may have to reiterate their medical history many times to different personnel, often being asked to repeat distressing information (in relation to sexual violence, for example); and detainees may have a limited understanding and information about the state of their health, potentially leading to an escalation of health problems.

Mrs C was detained on Christmas Island and taken for blood tests because of repeated fainting. Neither Mrs C nor DIAC were provided with the results by IHMS. Mrs C was simply told that she was “stressed”. Months later, when Mrs C was granted a Protection Visa and released, she visited a doctor and learned that she was severely deficient in iron.

Mr D arrived at his Independent Merits Review (IMR) interview and advised his lawyer that he didn’t feel well. He revealed what appeared to be an infection on his nipple. When the lawyer asked if he had reported this to IHMS staff, Mr D responded that he had and he was told to “have a Panadol and a drink of water”. Two weeks later Mr D was hospitalised with an infected boil.

On paper, there are procedures which enable a detained person to obtain their medical information. In reality, however, this is difficult to achieve for many. With no real access to their own health information, no way to make decisions regarding their own health and no opportunity to challenge the information they are provided about their own wellbeing, people in immigration detention are denied basic dignity. The mental health impacts of this can be immense as people question what is wrong with them, doubt themselves, worry, are left in physical pain and do not have a sense that their health is being cared for. This contravenes the principle that the inherent dignity of a person in immigration detention must be upheld.

- 1.3. RCOA therefore welcomes the enshrinement in law of the principles outlined in Part 1 of the Bill as a crucial step towards addressing the gap between stated Government policy on detention and actual practice.

Recommendation 1:

RCOA recommends that the amendments set out in Part 1 of the Bill be accepted.

2. Amendments repealing mandatory detention

- 2.1. According to the Australian Government’s stated policy on immigration detention, detention of persons who arrive without authorisation is an administrative measure necessary for the purposes of conducting health, identity and security risks. Currently, however, asylum seekers who arrive without authorisation are detained for the entire duration of the status determination process. The Australian Government’s failure to implement a detention policy based on risk management has resulted in thousands of men, women and children being detained needlessly, often to the serious detriment of their health and wellbeing and at an enormous and avoidable cost.

Box 2(A): Security assessments reveal low risks

In a recent submission² to the Parliamentary Joint Committee on Intelligence and Security Review of Administration and Expenditure in Australian Intelligence Agencies, RCOA drew attention to the fact that, of the 39,527 security assessments made in 2009-10 relating to visa applications (including Protection Visa applications), only 19 adverse findings were made across all visa categories. While each case is understandably assessed on its individual merits, it is clear that, in the vast majority of cases, there is simply no need for ongoing detention.

- 2.2. RCOA has long argued that asylum seekers should be detained only as a measure last resort, not as standard practice, and therefore welcomes items 2, 3 and 4 in Part 2 of the Bill repealing the policy of mandatory detention. However, RCOA acknowledges that in certain cases, short periods of detention may be necessary for the purpose of establishing identity and carrying out health and security checks. Where detention is deemed necessary, asylum seekers should be detained only for the period necessary for these checks to be completed, unless an individual poses an identifiable security or public order risk.

Recommendation 2:

RCOA recommends that the amendments set out under Items 2, 3 and 4 in Part 2 of the Bill be accepted.

3. Amendments facilitating judicial review of detention decisions

- 3.1. The pervasiveness of unnecessary immigration detention stems in part from the lack of avenues through which asylum seekers can successfully challenge the grounds for their detention. Current review mechanisms for the length and conditions of detention have proven insufficient in this regard. At present, detainees have their cases reviewed by a senior DIAC officer every three months to ensure that their continued detention is justified. RCOA believes that there is an inherent conflict of interest in having DIAC review its own decisions to detain.
- 3.2. Detainees also have their detention reviewed by the Commonwealth Ombudsman every six months. As outlined above, however, the Ombudsman's review process has proven to be ineffective in securing the release of persons for whom there is no demonstrable need for continued detention. As a consequence, the Ombudsman's review process can indirectly have a negative impact on detainees.

Box 3(A): Impact of unsuccessful requests for release on detainees

Anecdotal evidence provided by RCOA's membership indicates that these Ombudsman reviews can provide false hope to detained individuals. Interviews are thorough and the person is able to access a copy of the report pertaining to them. A recommendation by a formal Commonwealth body for release can be seen as a "shining light" for a person subjected to long-term detention. In reality, however, detainees are very often faced with the reality that nothing changes. They remain detained with no explanation or information as to when they may be released. The mental health implications of this can be devastating.

² refugeecouncil.org.au/resources/submissions/1103_ASIO_sub.pdf

3.3. Additionally, due to an absence of legal protections regulating the length and conditions of detention, detainees often face insurmountable hurdles when pursuing justice through Australia's legal system, even in cases where it has been irrefutably established that their detention is indefinite, arbitrary or has caused serious harm, as the following case study demonstrates.

Box 3(B): Plaintiffs M168 to M175 of 2010 v Minister for Immigration and Citizenship

This High Court case concerned an application to secure the release of young Afghan asylum seekers from immigration detention. At the time of the decision, the plaintiffs had been detained for almost a year, during which time their mental health had deteriorated significantly. While acknowledging that there was "strong and uncontested evidence" that the minors are at serious risk of psychological and other harm while in detention, the High Court ruled that the plaintiffs had not been able to establish that their detention was unlawful.

3.4. RCOA therefore welcomes items 5, 6 and 7 in Part 2 of the Bill enabling detainees to apply for an order of release if there are no reasonable grounds for continued detention. The establishment of this mechanism would ensure that length and conditions of detention would be subject to regular review (in line with the Australian Government's key detention principles) and help to prevent persons who pose no identifiable security or public order risk from being detained unnecessarily.

3.5. Amendments facilitating judicial review and key recommendations relating to those amendments are discussed further in Section 5 of this submission.

4. Amendments repealing excised offshore places provisions

4.1. RCOA has repeatedly highlighted the iniquity of maintaining a separate system of processing for asylum seekers arriving without authorisation. Since the November 2010 High Court decision which extended access to judicial review to all asylum seekers, the key difference between the offshore and mainland determination processes has been a lack of transparency in the former. The excision policy arbitrarily denies access to a reviewable, legally-bound system of refugee status determination for some asylum seekers, which in turn impedes access to protection and undermines the integrity of Australia's asylum processes.

Box 4(A): Questionable credibility of offshore assessment process

Statistics recently published by DIAC reveal a remarkably high overturn rate for decisions made under the offshore determination process as compared to the mainland process. During the first six months of 2010-11, on average 78.6 per cent of decisions made under the offshore process were overturned on review, compared to just 23 per cent over the same period for the mainland process. This trend raises serious questions about the credibility of decisions made under the offshore process and clearly highlights the need for greater oversight of this process.

4.2. RCOA rejects the assertion by the Australian Government that the excision policy is necessary to maintain border security, reduce "unauthorised arrivals" to Australia and deter people smuggling.³ There is indeed an urgent need to address the conditions which compel asylum

³ www.immi.gov.au/media/fact-sheets/81excised-offshore.htm

seekers to engage in irregular movement. However, it is completely unacceptable to deliberately impede access to protection and disqualify some asylum seekers from fair and reasonable treatment as a means of achieving this goal.

- 4.3. RCOA wishes to note an additional, and particularly worrying, consequence of the excision policy. In line with Government policy regarding excision, the priority of the Australian Customs and Border Protection Service is to prevent unauthorised vessels from arriving on the Australian mainland. As such, surveillance around excised territories, such as Christmas Island, is considered to be a lower priority. This can have potentially dire consequences for irregular maritime arrivals (IMAs) who first arrive in these territories, as was tragically demonstrated when the SIEV 221 foundered off Christmas Island in December 2010 with many lives lost.

Box 4(B): Suspected Illegal Entry Vessel (SIEV) 221

The internal review of the SIEV 221 tragedy conducted by the Australian Customs and Border Protection Service⁴ indicates that the vessel was not detected until it had come within 500 or 600 metres of the Island. As noted in the following excerpt from the internal review, there was limited surveillance at Christmas Island at the time of the tragedy due to the priority of preventing IMAs from reaching the Australian mainland:

“The general concept of operations is to intercept all known IMAs within Australia’s contiguous zone and, in accordance with government policy, to transfer the potential irregular immigrants to Christmas Island for processing of their claims. The priority is to prevent a mainland arrival over one which would occur on an excised offshore island...

“Being an excised offshore island, there was no planned aerial surveillance of Christmas Island during the period of the incident.”

- 4.4. RCOA therefore welcomes Part 3 of the Bill repealing the provisions relating to excised offshore places as a crucial step towards restoring the integrity of Australia’s asylum processes and ensuring that all asylum seekers have access to a fair and credible system of status determination, regardless of their method of arrival.

Recommendation 3:

RCOA recommends that the amendments set out in Part 3 of the Bill be accepted.

5. Amendments restoring fair process and procedural fairness

- 5.1. In a similar manner to those outlined in Part 3 of the Bill, RCOA welcomes the amendments outlined in Part 4 of the Bill as an important measure for restoring integrity and fairness to Australia’s asylum processes. These amendments would ensure that principles of administrative law, such as the right to procedural fairness and the right to know the reasons for a decision, are taken into account in key decisions relating to immigration status. The amendments would also increase transparency in decision-making by enabling external oversight of these decisions.
- 5.2. RCOA supports the Law Council of Australia’s recommendations regarding the amendments proposed in Part 4, namely: ensuring that appropriate training and guidance is provided to

⁴ <http://www.customs.gov.au/webdata/resources/files/110124CustomsInternalReview.pdf>

primary decision makers, to ensure that they are aware of the types of matters they are required to take into account; ensuring that these amendments do not result in further delays in the resolution of a person's immigration status, particularly if the person is being held in immigration detention; and ensuring that appropriate resources are applied in response to the impact these amendments will likely have on the workload of administrative review tribunals and the federal courts.

6. Amendments relating to the duration of detention

- 6.1. The indefinite and often prolonged nature of immigration detention is one of its most costly and destructive elements. Indefinite detention has been shown to cause or exacerbate mental health problems among asylum seekers, many of whom have already experienced serious trauma. This has been clearly (and tragically) demonstrated over the past year, with the rise in long-term detention mirrored by an increasing incidence of mental health issues and cases of self-harm and suicide among detainees.
- 6.2. Prolonged indefinite detention has also been a major factor in precipitating unrest in Australia's detention facilities, both in the past and more recently at the Villawood and Christmas Island facilities. While RCOA does not condone the recent violence, it is clear that indefinite detention plays a key role in creating the "pressure-cooker" environment in which unrest is more likely to occur.
- 6.3. In preparing this submission, RCOA has received advice from counselors from Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) agencies about some of the elements and effects of prolonged detention on traumatised people, as well as some real-life examples that demonstrate the deleterious effects of detention.
- 6.4. The traumatic events which characterise the refugee experience are often experienced again while in immigration detention in Australia. The threat to future safety, uncertainty about a visa outcome (and return to an unsafe place) and the witnessing of self-harm all contribute to anxiety, feelings of helplessness and a loss of control.

Box 6(A): Re-traumatisation caused by prolonged indefinite detention

Mr E was initially philosophical about his asylum application but, after nine months without any news, his anxiety is increasing. There is an emotional decline as he begins to ruminate on his visa application. Mr E describes himself as 'rotten fruit'; he feels that he pollutes the other detainees because when they ask how long he's been [in the detention centre] and he tells them the truth, he depresses them. He tries to keep his spirits up so as to not depress the others, but it is clear his sense of identity is affected by the waiting. As with other detainees who wait for a long time for any news, it's hard for him to believe that it is not personal. He feels for some reason the government is making him wait, while others go out. This is a logical thought when you consider that Mr E's government did very personally persecute him. He has experience of this before so it feels like it is happening all over again.

- 6.5. Re-traumatisation is not the only psychological impact of prolonged indefinite detention. Detainees may experience a range of mental health issues, including cognitive problems, difficulties regulating their emotions, becoming a different person than the one originally detained (and therefore, behaving in a way that is not characteristic or normal) and resorting to acts previously not considered (self-harm, destroying property).

6.6. It is worth noting that trauma survivors never expect to live very long, so time is particularly important to them. The two most harmful characteristics of detention on sufferers of pre-arrival trauma are boredom and uncertainty. The first step in treating all trauma is to re-establish safety, and this is not possible with clients that have no control or sense of expectation from their future. It is also not possible for people to monitor and manage symptoms in an environment where they have nothing else to do but think about their past or obsess on their current predicament.

Box 6(B): Indefinite detention hampers recovery from trauma

Mr F has a very limited view of the future. His experience of simply having to survive has meant he had no picture of his future and almost has not dared to think about it. He reports often feeling hopeless and despairing. This limited view later also turns out to include almost no idea about Australia. When the counsellor showed a map of Australia to Mr F, it was the first time he realised (geographically) where he was. He had no idea he was in the West and he was stunned to discover the location of Christmas Island. The helpful intervention for Mr F's trauma is distraction; when he can tell that all the memories of the past are building up, it helps to get up and do something else, to change his thinking. Unfortunately, detention compounds this, as there is little to occupy his time.

6.7. The perception of “illegality” bestowed upon asylum seekers arriving by boat and persons in detention has a direct impact on detainees’ sense of justice (or injustice, as is the case) and contributes to a loss of trust. FASSTT agencies have advised RCOA that counsellors treating asylum seekers who have faced prolonged detention struggle to establish trust, as the client sees the counsellor as part of the Australian Government regime that detains them.

6.8. The ongoing mental health issues experienced by many former detainees hamper their successful settlement and increase their need for post-arrival support and rehabilitation. Through working with former detainees, the settlement sector has observed a drastic difference between the settlement experiences of persons who have spent shorter periods of time in detention and persons who have spent extended periods in detention. Those detained for shorter periods of time moved quickly into employment, accommodation and many even joined recreational and social clubs.

6.9. In the case of those who have spent extended periods in detention, however, there are reports of clients experiencing a sleep-wake cycle reversal (suffering insomnia and an inability to sleep at night), which impacts on their ability to settle successfully, including finding work. While former detainees may have a strong desire to work, they may be unable to because they are suffering from a range of depressive and anxiety problems. People have developed a distrust of government agencies and other services because they feel like their detention and how they were treated through the refugee determination process was arbitrary. There can be a greater level of distrust in former detainees seeking service support, including mental health and torture and trauma services.

Box 6(C): Settlement experiences of long-term detainees

“Another impact of long-term detention is how restless people are when they come out. They have a dream that things will be better somewhere else, so they move someplace, it does not work out, and they move somewhere else. They are moving all over Australia searching for this ‘good settlement’ that they have spent lengthy time in detention dreaming about.

“You can’t take a person that fights for survival and then hold them down.”

- 6.10. Indefinite detention also has an enormous financial cost. At the same time that there has been a dramatic increase in long-term detention, the costs of detention have tripled. The 2011-12 Budget includes allocations of more than \$800 million for detention expenses. Added to the direct costs of maintaining detention facilities are the costs of providing ongoing support to persons requiring treatment for mental health issues caused or exacerbated by their experiences in detention. This expense is particularly difficult to justify given that, as outlined above, for the vast majority of asylum seekers there is no demonstrable reason for ongoing detention.
- 6.11. RCOA has repeatedly called for time limits on detention to be codified in law. We recommend that detention of asylum seekers should be restricted to a maximum of 30 days, during which time an analysis of identity, health and security risks can be undertaken. Any attempt to detain an asylum seeker for more than 30 days should be subject to independent judicial review. RCOA acknowledges that there may be occasions where a court may determine that longer periods of detention are necessary. Even in these cases, however, 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.
- 6.12. RCOA therefore generally welcomes the amendments outlined in Part 2, which establish a 30-day time limit on detention subject to judicial review; and the amendments outlined in Part 5 of the Bill, aimed at ending indefinite detention. However, we wish to add several qualifications to this support. Firstly, while the Bill stipulates that a person must not be detained for more than 30 days except in accordance with the orders set out in 195C (2-5), RCOA agrees with the recommendation made by the Law Council of Australia that further details should be provided either in the Bill itself or the Explanatory Memorandum to help clarify how these provisions might be operationalised. RCOA strongly endorses the Law Council’s recommendations in relation to guidance criteria for both DIAC officials and magistrates making determinations about continued detention of a person.
- 6.13. Secondly, RCOA is concerned that the provisions of the Bill relating to judicial oversight do not place any limits on the length of detention authorised by a magistrate, nor does the Bill stipulate any limits on the number of times a continued detention order could be sought. As a result, while these provisions insert a much needed level of judicial oversight in respect of immigration detention that continues beyond 30 days, it does not prescribe any ultimate limits on the period a person can be detained under Section 189. RCOA fully endorses the recommendations made by the Law Council of Australia which advise amendments to prescribe a maximum period for a continued detention order (such as 60 or 90 days) and a requirement for a new application to be made at the expiry of this period.

Recommendation 4:

RCOA recommends that:

- a) *The Bill should be amended to include a clear time limit restricting immigration detention to a period of no longer than six months.*
- b) *The recommendations regarding the operationalisation of judicial oversight and the prescription of a maximum period for a continued detention order as set out in the submission of the Law Council of Australia be adopted.*
- c) *Subject to the above amendments, the amendments set out under Items 5, 6 and 7 in Part 2 of the Bill and in Part 5 of the Bill be accepted.*

7. ASIO assessments

- 7.1. RCOA wishes to draw the Committee's attention to an issue which is not addressed by the legislation under review but which has serious implications for asylum seekers in detention.
- 7.2. One of the key factors leading to long-term detention is the time taken by the Australian Security Intelligence Organisation (ASIO) to complete security assessments. Delays in completing these assessments have led to recognised refugees spending prolonged and indefinite periods in detention, often with serious consequences for their health and wellbeing.

Box 7(A): The reality of waiting for ASIO clearance

Mr G, a Rohingya asylum seeker, was detained on Christmas Island for 15 months. He had been advised that his claim for protection had been upheld, but he had not received security clearance from ASIO. As his detention became increasingly prolonged, Mr G he asked to be sent to Malaysia, where his three children aged two, five and seven were living in the care of two other refugee families. The Australia Government would not bring his children to Australia, nor would it release Mr G from detention. In desperation, he attempted suicide by wrapping himself in a burning bed sheet. After brief treatment in hospital, Mr G was returned to detention.

- 7.3. RCOA acknowledges that the Bill would to some extent mitigate the risk of such prolonged periods of detention occurring. However, we remain concerned that even if the Bill is passed, refugees may continue to be subjected to prolonged and unnecessary detention pending the completion of security assessments, as ASIO is not required by legislation to complete security assessments for asylum seekers within a specified time period. Additionally, those who receive negative assessments face indefinite detention while their status is resolved, a process which again is not subject to legislated time limits.
- 7.4. Neither the *Australian Security Intelligence Organisation Act 1979* nor the *Migration Act* requires that a person be detained while awaiting security clearance from ASIO. Indeed, few of the 4.1 million temporary visitors to Australia each year are subject to a full security assessment before being issued with a visa. Temporary visitors are, however, routinely subject to a Movement Alert List (MAL) check, a far quicker assessment which typically takes a few hours at most. Among those subject to MAL checks are asylum seekers who arrive on temporary visas and are allowed to live in the community while their refugee status is determined. If a person who enters on a temporary visa is found to be a refugee, a full security assessment is completed prior to the granting of a Protection Visa. There is no obvious reason why this same process cannot be applied to asylum seekers who are now

subject to detention – that is, conditional release be allowed once a person is identified, a MAL check is completed and health checks concluded.

Recommendation 5:

RCOA recommends that:

- a) *Australian Government policy be altered to ensure that release from detention is no longer conditional upon the completion of a full ASIO security assessment, but instead upon the completion of a Movement Alert List check in conjunction with identity and health checks.*
- b) *ASIO be required, by legislation, to complete security assessments for asylum seekers within a maximum time period. When this time period is exceeded, the security assessment should be subject to a process of independent oversight and an explanation for the delay provided immediately to the affected individual.*
- c) *Alternatives to detention be considered for individuals who have received adverse security assessments, based on risk management principles.*

8. Alternatives to detention

- 8.1. The implementation of the reforms outlined in the Bill will necessitate exploration of alternatives to the current detention regime. RCOA acknowledges that a detailed exploration of these alternatives is beyond the scope of this inquiry. However, we wish to draw the Committee’s attention to two recent research reports which can provide guidance for designing and implementing alternatives to detention which effectively balance risk management with fair and humane treatment.
- 8.2. The United Nations High Commissioner for Refugees (UNHCR’s) Legal and Protection Policy Research Series released a new report⁵ on alternatives to detention in April 2011. Entitled *Back to Basics: The Right to Liberty and Security of Person and Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, the report includes a review of international law that governs immigration detention and the alternatives and provides an overview of existing and possible alternatives to detention (with options drawn from empirical research). These alternatives are examined carefully and presented with opportunities for shared features able to be replicated in other countries or jurisdictions.
- 8.3. The International Detention Coalition (IDC) recently launched a handbook⁶ aimed at preventing unnecessary immigration detention throughout the world and outlining good practice examples of alternatives to detention. The handbook also introduces the Community Assessment and Placement (CAP) model, a conceptual model which identifies a range of mechanisms currently in use that enforce immigration law without a heavy reliance on detention. The model highlights effective management of individuals in the community and assists governments to make informed decisions on appropriate placement, management and support options for refugees, asylum seekers and migrants.
- 8.4. RCOA believes that it is important that consideration be given to the implementation of alternatives at an early stage. Failure to do so may result in the “alternatives” provided being inappropriate or failing to meet the needs of asylum seekers, or in a drawn-out process of implementation which may prolong the detention of vulnerable groups. This risk has been clearly demonstrated by the recent process of moving children out of detention.

⁵ Available at www.unhcr.org/refworld/docid/4dc935fd2.html

⁶ Available at idcoalition.org/handbook

Box 8(A): Alternatives to detention for children

The Australian Government's key detention values, introduced in mid-2008, stipulate that children and, where possible, their families, will not be detained in an immigration detention centre. While children have not been held in detention "centres" since this time, many have been held in detention-like conditions in "alternative" secure facilities within the immigration detention network, where they are kept under guard and had no freedom of movement. Until recently, large numbers of children – at some stages over 1,000 – were held in these facilities, often for prolonged periods.

In October 2010 – more than two years after the its key detention values were introduced – the Government announced that it would begin the process of moving children into alternative community-based detention arrangements. It was announced in June 2011 that a majority of children (62 per cent) had been moved into community detention. While this is certainly a positive outcome for these children, the fact that the remaining 38 per cent of detained children continue to be held in detention-like conditions even eight months after the expansion of community detention began is of serious concern.

The expansion of community detention arrangements for children is a commendable reform. However, the fact that this process has been so prolonged clearly highlights the importance of forward planning to ensure that appropriate alternatives to detention can be provided in a timely manner, to minimise the risk of harm to vulnerable groups.

8.5. RCOA would be happy to provide further input on alternatives to detention as required.

Recommendation 6:

RCOA recommends that, in light of the amendments proposed by the Bill, consideration be given to the development and implementation of alternatives to detention at an early stage.

9. Summary of recommendations

Recommendation 1:

RCOA recommends that the amendments set out in Part 1 of the Bill be accepted.

Recommendation 2:

RCOA recommends that the amendments set out under Items 2, 3 and 4 in Part 2 of the Bill be accepted.

Recommendation 3:

RCOA recommends that the amendments set out in Part 3 of the Bill be accepted.

Recommendation 4:

RCOA recommends that:

- d) The Bill should be amended to include a clear time limit restricting immigration detention to a period of no longer than six months.*
- e) The recommendations regarding the operationalisation of judicial oversight and the prescription of a maximum period for a continued detention order as set out in the submission of the Law Council of Australia be adopted.*
- f) Subject to the above amendments, the amendments set out under Items 5, 6 and 7 in Part 2 of the Bill and in Part 5 of the Bill be accepted.*

Recommendation 5:

RCOA recommends that:

- d) Australian Government policy be altered to ensure that release from detention is no longer conditional upon the completion of a full ASIO security assessment, but instead upon the completion of a Movement Alert List check in conjunction with identity and health checks.
- e) ASIO be required, by legislation, to complete security assessments for asylum seekers within a maximum time period. When this time period is exceeded, the security assessment should be subject to a process of independent oversight and an explanation for the delay provided immediately to the affected individual.
- f) Alternatives to detention be considered for individuals who have received adverse security assessments, based on risk management principles.

Recommendation 6:

RCOA recommends that, in light of the amendments proposed by the Bill, consideration be given to the development and implementation of alternatives to detention at an early stage.