



# UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

**Submission by the Office of the United Nations High Commissioner for Refugees  
*Inquiry into Australia's Immigration Detention Network***

**Joint Select Committee on Australia's Immigration Detention Network  
19 August 2011**

**UNHCR RECOMMENDATIONS**

- 1. The government's Key Immigration Detention Values, particularly the presumption against detention, should be explicitly incorporated into Australia's legal framework, and be implemented for all asylum-seekers, refugees and stateless persons throughout Australia.**
- 2. All efforts should be made to avoid the situation of protracted detention and possibility of indefinite detention.**
- 3. Greater legal safeguards need to be built into the Australian detention regime to ensure that children are not detained and that all actions taken in respect of children are in the best interests of the child.**
- 4. Any decision to detain a refugee, asylum-seeker or stateless person should be limited solely to the purposes authorized by international law and standards, and should be subject to review in accordance with international law and standards.**
- 5. Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned against the existence of any demonstrable and real risk to the community if released (on terms, if required).**
- 6. There is a need to review the practices relating to national security, including adverse national security assessments, in light of international examples in comparable jurisdictions with a view to enhancing the efficiency and fairness of such procedures.**
- 7. The procedures for assessing refugee status for 'offshore entry persons' should be as closely aligned as possible with onshore procedures and subject to appropriate legal frameworks and accountability, and due process.**
- 8. Asylum-seekers should not be detained beyond the purpose of assessing identity, health and security checks. Detention should not extend to a determination of the merits because this is not a legitimate ground for detention. In addition, detention imposes a barrier to communication, access, and creates psycho-social effects which limit an asylum-seeker's ability to engage in the refugee status determination process. Detention for the purpose of assessing refugee status, in the absence of any risk to the community, is an unlawful and impermissible basis for detention.**

## I. SUMMARY OF UNHCR'S COMMENTS

1. UNHCR has longstanding and well-known concerns about the mandatory detention of asylum-seekers and refugees who arrive in Australia in an 'unauthorized' manner.
2. UNHCR welcomed the introduction of the Key Immigration Detention Values,<sup>1</sup> but is concerned that they are not enshrined in law, nor are they being applied systematically to refugees, asylum-seekers and stateless persons throughout Australia, particularly in relation to 'irregular maritime arrivals'.
3. UNHCR considers that any decision to detain a refugee, asylum-seeker or stateless person should be limited to the purposes authorized by international law and standards, namely identity, health and security checks carried out expeditiously, and be subject to administrative or judicial review.
4. While UNHCR notes Australia's immigration legislation provides "as a principle that a minor shall only be detained as a measure of last resort"<sup>2</sup> and one of the Government's Key Immigration Detention Values specifies that "Children.....and, where possible, their families, will not be detained in an immigration detention centre"<sup>3</sup>, UNHCR is deeply concerned by the ongoing detention of children in Australia, especially unaccompanied minors. Australia's practice in this regard is inconsistent with the relevant provisions of the Convention on the Rights of the Child.<sup>4</sup>
5. UNHCR is also particularly concerned with the protracted or indefinite detention of asylum-seekers, refugees and stateless persons who are awaiting security clearances, who have received negative security assessments, or who cannot be returned, including stateless persons. Every effort should be made to resolve such cases in a timely manner, including through practical steps to identify and confirm the necessity of continued detention in conformity with general norms and principles of international human rights law, and to explore alternatives to detention.
6. Issues relating to national security, including adverse national security assessments, remain opaque and lacking appropriate accountability. They require closer attention and there are some international examples in comparable jurisdictions which could be considered as models and alternatives to the current practices.
7. The impact of long-term detention to the physical and psycho-social well-being of those detained is well-known and demonstrated most graphically by the recent information provided by the Department of Immigration and Citizenship on the rates of self harm, suicide and community violence in immigration detention facilities in Australia. These are a disturbing but predictable consequence of Australia's mandatory detention policy and practice.
8. In addition to concerns about the legality and human impact on vulnerable individuals of Australia's immigration detention policy and practice, UNHCR considers that detention in

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<sup>1</sup> Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, Seminar – Centre for International and Public Law, The Australian National University, 29 July 2008.

<sup>2</sup> Section 4AA of the Migration Act 1958 (Cth).

<sup>3</sup> *New Directions in Detention*, op.cit., Value 3.

<sup>4</sup> Article 37 (b), 20 (1) and 18 (1).

remote locations imposes significant barriers to the effective conduct of refugee status determination processes, including effective communication with legal representatives.

9. UNHCR considers that good alternatives to detention are already available in Australia and that they should be fully utilized.

## **II. UNHCR'S STANDING TO COMMENT**

10. UNHCR is responsible for supervising the application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('the 1951 Convention'), to which Australia is a Party. UNHCR's standing to comment is detailed further in Attachment A.
11. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to Joint Select Committee on Australia's Immigration Detention Network ("the Committee").

## **III. SCOPE OF THE SUBMISSION**

12. UNHCR's submission addresses issues in the Terms of Reference establishing the Joint Select Committee on Australia's Immigration Detention Network insofar as they affect refugees, asylum-seekers and stateless persons, and focuses specifically on their consistency with relevant international law and standards (as outlined in Attachment B).

## **IV. KEY IMMIGRATION DETENTION VALUES**

*(l) Compliance with the Government's immigration detention values within the detention network.*

13. UNHCR welcomed the *New Directions in Detention* policy announced by the then Minister for Immigration and Citizenship on 29 July 2008.<sup>5</sup> This policy intended to amend the broad policy parameters of immigration detention in Australia and to implement the Government's commitment to 'fundamentally change the premise underlying detention policy', particularly the commitment to seven Key Immigration Detention Values, which are intended to inform all aspects of the Department of Immigration and Citizenship (DIAC) Detention Services.
14. In this regard, UNHCR particularly welcomed the Government of Australia's commitment to:
  - (i) use immigration detention centres only as a last resort;
  - (ii) detain in immigration detention centres for the shortest practicable time;
  - (iii) not detain children at all in immigration detention centres and, elsewhere, only as a measure of last resort;

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<sup>5</sup> UNHCR, Submission No 46 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, 5 August 2009, 6 [24].

- (iv) create a presumption against detention and introduce an individualized assessment, where the onus rests on the detaining authority to detain only on specific and limited grounds;
  - (v) ensure that the length and conditions of detention are subject to regular review; and,
  - (vi) treat people in detention fairly and reasonably consistent with the inherent dignity of the human person.
15. UNHCR also welcomed the then Immigration Minister's intention to codify the Key Immigration Detention Values in legislation by enactment of the Migration Amendment (Immigration Detention Reform) Bill 2009.<sup>6</sup>
  16. UNHCR notes that the Bill lapsed in 2010 and has not been re-introduced.
  17. Despite previous assurances of the Government of Australia that the *New Directions in Detention* policy would apply to territories excised from the migration zone, UNHCR is concerned that the Key Immigration Detention Values have not been systematically applied in territories excised from the 'migration zone' or to persons arriving in excised territories.
  18. UNHCR recalls the then Minister's Second Reading Speech on the Migration Amendment (Immigration Detention Reform) Bill 2009 which stated that '[u]nlawful non-citizens, including offshore entry persons, in excised offshore places will continue to be subject to the existing detention and visa arrangements of the excision policy'.<sup>7</sup>
  19. While noting the discretionary nature of the power to detain in an excised offshore place under current legislation,<sup>8</sup> UNHCR is disappointed that the Key Immigration Detention Values have not been explicitly and systematically applied to refugees, asylum-seekers and stateless persons throughout Australia, including those defined as Irregular Maritime Arrivals (IMAs) and subject to the regime of 'offshore processing'.
  20. UNHCR is of the view that the codification and implementation of the Immigration Detention Values to all refugees, asylum-seekers and stateless persons in Australia would serve to resolve many of the concerns outlined in this submission.

**Recommendation 1:**

UNHCR considers the Government's Key Immigration Detention Values, particularly the presumption against detention, should be explicitly incorporated into Australia's legal framework, and be implemented for all asylum-seekers, refugees and stateless persons throughout Australia.

**V. LENGTH OF DETENTION**

***(b) The impact of length of detention and the appropriateness of facilities and services for asylum seekers;***

<sup>6</sup> Senator Chris Evans, 'Detention values to be enshrined in law' (Media release, 25 June 2009).

<sup>7</sup> Second Reading Speech – Senate, Migration Amendment (Immigration Detention Reform) Bill 2009, 12.

<sup>8</sup> *Migration Act 1958* (Cth), ss 189 (3) and (4).

**(q) *The length of time detainees have been held in the detention network, the reasons for their length of stay and the impact on the detention network.***

21. Within the current policy settings of mandatory detention in Australia, UNHCR is deeply concerned that many refugees, asylum-seekers and stateless persons are in protracted or indefinite detention.
22. The most recently available immigration detention statistics published by the Australian Government indicate that, as at 20 May 2011, there were 6,729 people in immigration detention, including 5,117 in immigration detention on the mainland and 1,612 in immigration detention on Christmas Island. UNHCR notes that 67.5 per cent of people – comprising refugees, asylum-seekers, stateless persons and failed asylum-seekers – had been held in immigration detention for six months or longer.<sup>9</sup>
23. UNHCR is aware of many asylum-seekers, refugees and stateless persons being in detention for more than two years with unresolved security clearances.
24. The impact of long-term detention to the physical and psycho-social well-being of those detained, many of whom are survivors of torture and trauma, is well-known and demonstrated most graphically by the recent information provided by the Department of Immigration and Citizenship to the Joint Select Committee on the rates of self harm, suicide and unrest in immigration detention facilities in Australia.<sup>10</sup> These are a disturbing but predictable consequence of Australia's mandatory detention policy and practice.<sup>11</sup>
25. During its immigration detention visits, UNHCR has observed first hand that not only the length of detention, but uncertainty about the length of the detention is particularly worrying for asylum-seekers, especially for refugees subject to prolonged waits due to outstanding or negative security assessments, stateless persons and others who cannot be removed for legal or practical reasons.
26. Evidence suggests that the ability of refugees to integrate successfully when released into the community is also impeded if long periods of detention have been endured.<sup>12</sup> This appears to be inevitable for many, given that most asylum-seekers in detention will ultimately be determined to be refugees.
27. Again, evidence suggests that the ability of failed asylum-seekers to make rational and informed decisions to depart the country of asylum voluntarily is eroded if they are made whilst in protracted detention. Conversely, those who have been released into the community tend to fare better, enjoy better psycho-social health, and are able to take more rational decisions as to their future, including departing Australia. Recent research has found that over 90 per cent

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<sup>9</sup> DIAC, Detention Operations Division, *Immigration Detention Statistics Summary*, 20 May 2011.

<sup>10</sup> *Detainee despair: 1500 in hospital*, Sydney Morning Herald, 17 August 2011, p. 1.

<sup>11</sup> See, for instance, UNHCR Media Release Changes to Australia's detention arrangements, 19 April 2010 (<http://unhcr.org.au/unhcr/>)

<sup>12</sup> See Summary Conclusions, Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, Geneva, 11-12 May 2011, para. 15.

compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities.<sup>13</sup>

28. UNHCR is also concerned with the significant delays in the determination of refugee status and completion of ASIO security assessments, including mandate refugees, and the protracted or indefinite detention of refugees who have received negative security assessments, and of those who cannot be returned, including stateless persons. UNHCR recently made a submission to the 2011 Independent Review of the Intelligence Community in which it outlined its position about the interaction between refugee status assessments and security considerations, and expressed concern about delays in security assessments and the lack of procedural safeguards in Australia.<sup>14</sup>
29. The detaining authorities, and those responsible for carrying out security and other checks, should, in UNHCR's view, make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the necessity of continued detention in conformity with general norms and principles of international human rights law, and to explore alternatives to detention.

**Recommendation 2:**

UNHCR considers all efforts should be made to avoid the situation of protracted detention and possibility of indefinite detention.

**V. IMPACT OF DETENTION ON VULNERABLE GROUPS, INCLUDING CHILDREN**

- (d) *The health, safety and wellbeing of asylum seekers, including specifically children, detained within the detention network;*
- (e) *Impact of detention on children and families, and viable alternatives.*
30. The impact of immigration detention on vulnerable persons, especially the elderly, women, children, and those with health problems or disabilities, is well-known.<sup>15</sup>
31. The President of the Australian Medical Association on 17 August 2011 expressed his view that "The AMA believes that the system of mandatory detention of asylum seekers is inherently harmful to the physical and mental health of detainees. The harm is especially acute in the case of children...Despite improvements in the provision of health care to immigration detainees, the policy of mandatory detention and the remote location of most detainees mean that the health status of detainees continues to decline."<sup>16</sup>

<sup>13</sup> Ibid, para. 16.

<sup>14</sup> Submission by UNHCR to 2011 Independent Review of the Intelligence Community, 1 April 2011 ([http://unhcr.org.au/unhcr/protecting\\_refugees/submissions](http://unhcr.org.au/unhcr/protecting_refugees/submissions)).

<sup>15</sup> See, for instance, Guy J. Coffey, Ida Kaplan, Robyn C. Sampson and Maria Montagna Tucci, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) *Social Science & Medicine* 70(12), 2070-2079.

<sup>16</sup> *AMA calls for end to mandatory detention*, Canberra Times, 18 August 2011, p.5.

32. According to DIAC's Answer to Q4 of the Joint Select Committee, 991 children were in some form of detention in Australia as at 30 June 2011.
33. UNHCR has appreciated the considerable efforts undertaken by the Department of Immigration and Citizenship to move children and vulnerable families into community detention, including following the Immigration Minister's announcement of 18 October 2010 on the expanded use of community detention, but notes that several hundred children remain in alternative places of detention, immigration residential housing and immigration transit accommodation. In this regard, the recent Global Roundtable on Alternatives to Detention hosted by UNHCR and the Office of the United Nations High Commissioner for Refugees cautioned:

Some alternatives to detention may themselves impact upon a person's human rights, be it on their liberty or on other rights. As a consequence, such measures also need to be in line with principles of necessity, proportionality, legitimacy and other key human rights principles...For this reason, alternatives should not be used as alternative *forms of* detention. Likewise, alternatives to detention must not become alternatives to release. Safeguards must be put in place to ensure that those eligible for release without conditions are not diverted into alternatives.<sup>17</sup>

34. While UNHCR notes Australia's immigration legislation provides "as a principle that a minor shall only be detained as a measure of last resort"<sup>18</sup> and one of the Government's Key Immigration Detention Values specifies that "Children....and, where possible, their families, will not be detained in an immigration detention centre,"<sup>19</sup> UNHCR is deeply concerned by the ongoing detention of children in Australia, especially unaccompanied minors. Australia's practice in this regard is inconsistent with the relevant provisions of the Convention on the Rights of the Child.<sup>20</sup>

Recommendation 3:

UNHCR considers that greater legal safeguards need to be built into the Australian detention regime to ensure that children are not detained and that all actions taken in respect of children are in the best interests of the child.

<sup>17</sup> *Summary Conclusions*, Global Roundtable on Alternatives to Detention, Geneva, 28 July 2011, paras. 18-19, (<http://www.unhcr.org/3e5f78bc4.html>).

<sup>18</sup> Section 4AA of the Migration Act 1958 (Cth).

<sup>19</sup> *New Directions in Detention*, op.cit., Value 3.

<sup>20</sup> Article 37 (b), 20 (1) and 18 (1).

## VI. REFORMS NEEDED TO THE CURRENT IMMIGRATION DETENTION NETWORK IN AUSTRALIA

### (a) *Any reforms needed to the current Immigration Detention Network in Australia.*

#### (i) *Purpose of detention*

35. UNHCR's view is that the detention of asylum-seekers is inherently undesirable. UNHCR's Executive Committee has outlined the limited number of circumstances in which detention may be considered necessary in an individual case while stating that it should normally be avoided:

If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.<sup>21</sup>

36. UNHCR, therefore, has ongoing concerns with Australia's legislative and policy framework of mandatory detention, which is inconsistent with the general principle that asylum-seekers should only be detained on exceptional grounds and that there should be a presumption against detention, unless shown to be necessary according to prescribed criteria relating to the risks posed by an individual.
37. UNHCR is of the view that, in the case of "unauthorised arrivals", once identity, health and security risks have been resolved, the purpose of detention has been achieved and the person should be released from detention. Efforts to resolve the substantive elements of the person's immigration status, namely their need for international refugee protection, may be pursued while the person is in the community and ought to be de-linked from the assessment of risk associated with detention.
38. In circumstances where the purpose of detention is no longer achievable within a reasonable period, notably in the case of stateless persons, UNHCR is of the view that the detainee must be released (by granting some form of visa concomitant with their legal status), or else the continued detention may become arbitrary and indefinite. This would be consistent with the specific incorporation of the principle that detention is a measure of last resort and should be for the shortest practicable time.
39. With regard to detention for the purpose of ascertaining health risks to the Australian community, UNHCR is of the view that any isolation or segregation on the basis of health risks posed by individual asylum-seekers beyond initial screening should be in an appropriate medical facility and that all actions to isolate them are proportional to the health risks posed. A clear distinction should be maintained between individuals detained on the basis of security risk and those who need to be isolated or segregated on the basis of health risks posed.<sup>22</sup>

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<sup>21</sup> ExCom Conclusion No. 44 (XXXVII) (1986), para. (b) and reiterated in UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999), Guideline 3.

<sup>22</sup> UNHCR, Submission No 133 to Joint Standing Committee on Migration, Inquiry into Immigration Detention in Australia, 12 September 2008, [46]-[48] <<http://www.unhcr.org.au/pdfs/ImmigrationDetention2008.pdf>>.



40. It is UNHCR's position that the decision to detain should be subject to effective administrative or judicial oversight and review.
41. Judicial review, independent of the determining authority, provides greater oversight and accountability. Article 9 of the *1966 International Covenant on Civil and Political Rights* ('1966 ICCPR') provides that:
1. 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.
  - ...
  4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
42. The Report of the Working Group on Arbitrary Detention ("the Working Group") on its visit to Australia in 2002 noted its concern with 'the lack of sufficient judicial review of the detention. Under international law anyone deprived of his/her liberty shall be entitled to take proceedings before an independent court in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is unlawful'.<sup>23</sup> The Human Rights Committee observed 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. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.<sup>24</sup>
43. In accordance with UNHCR's Guidelines, asylum-seekers, if detained, should be entitled to the following minimum procedural guarantees:
- (i) To receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and in terms they understand.
  - (ii) To be informed of the right to legal counsel. Where possible, they should receive free legal assistance.
  - (iii) To have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention at which the asylum-seeker or his representative would have the right to attend.

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<sup>23</sup> Commission on Human Rights, '*Civil and Political Rights including the Question of Torture and Detention*', 59<sup>th</sup> sess, Annex: Report of the Working Group on Arbitrary Detention on its visit to Australia (24 May-6 June 2002), [19], UN Doc E/CN.4/2003/8/Add.2 (2002).

<sup>24</sup> *A v Australia*, CCPR Communication No 560/1993, [9.4.], UN Doc CCPR/C/59/D/560/1993 (1997).

- (iv) Either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain.
- (v) To contact and be contacted by the local UNHCR office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.<sup>25</sup>

Recommendation 4:

Any decision to detain a refugee, asylum-seeker or stateless person should be limited solely to the purposes authorized by international law and standards, and should be subject to review in accordance with international law and standards.

**VII. ALTERNATIVES TO DETENTION**

**(g) *The impact, effectiveness and cost of mandatory detention and any alternatives, including community release.***

- 44. Australia's current legal and policy settings contain a broad range of alternatives within and to detention which allows the Government of Australia to accommodate refugees, asylum-seekers, stateless persons and other irregular migrants in the community.
- 45. UNHCR's Guidelines on Detention recommend that monitoring mechanisms which can be employed as viable alternatives to detention (such as reporting obligations or guarantor requirements) should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should, therefore, only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.<sup>26</sup>
- 46. UNHCR and the International Detention Coalition (IDC) co-chaired an Expert Roundtable on Alternatives to Detention held in Canberra, Australia on 9-10 June 2011 to explore the expansion of the alternatives presently available, and to identify potential alternatives to immigration detention in light of international best practices, which would limit the use of detention to the least extent possible whilst, at the same time, protecting the legitimate security concerns of the State.
- 47. UNHCR and the IDC have each recently published research on alternatives to detention. The IDC research identifies and describes alternatives to detention that protect the rights and dignity of refugees, asylum-seekers and irregular migrants while meeting government and community

<sup>25</sup> UNHCR, Detention Guidelines, Guideline 5.

<sup>26</sup> UNHCR, Detention Guidelines, Guidelines 3 and 4.

expectations.<sup>27</sup> UNHCR's research focuses on the latest international legal standards in this area and comparative findings of five country examples and their practical application.<sup>28</sup>

48. UNHCR draws the attention of the Committee to the Co-Chair Summary Statement and Summary Report of the UNHCR-IDC Expert Roundtable on Alternatives to Detention for further information on the outcomes, which are attached (Attachment C) and identifies the following conclusions of particular note:

- (i) Immigration detention is not a deterrent to migration and has a negative impact on the health and wellbeing of individuals concerned.
- (ii) Australia has many good alternatives within and to detention which have had a positive impact on detention practices globally. The existing alternatives could be utilized more effectively and linked to an early release mechanism.
- (iii) It is important, in Australia, to develop an early assessment process of risks to public safety, linked to provisional and conditional release mechanisms, and an expansion of the existing triaging to enable initial screening within the detention framework.
- (iv) It is important to distinguish between risks to public safety (relevant to release from detention) and risks to national security (relevant to visa grant and permanent stay), and the Government of Australia must develop clear and transparent definitions and tests for each.
- (v) Issues relating to national security, including adverse national security assessments, require particular attention and review. Whilst UNHCR fully accepts the right of all sovereign States to undertake appropriate security checks on those entering its borders, UNHCR is particularly concerned with the opacity and lack of accountability that currently exists both in the legislation and way in which security assessments are carried out. Comparative studies with other sovereign States indicate that the scale of detention for security purposes in Australia is not in line with those of other States and that in those very limited cases where detention is used in other jurisdictions, there are safeguards in place that balance the interests of the individual with those of the detaining State. For example, special advocate mechanism, similar to models in Canada, New Zealand and the United Kingdom, could provide an appropriate bridge between the confidentiality of intelligence gathering and the procedural fairness necessary to detention and/or refugee status decisions.
- (vi) The costs of detention includes the maintenance of facilities (whether they are full or not) and associated difficulties of access to services. In the Australian context of remote detention and isolated immigration detention facilities the cost of detention is remarkably expensive. Detention-related costs also need to be considered, including the human costs, ongoing impact to vulnerable asylum-seekers and medical treatment relating to

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<sup>27</sup> R. Sampson, G. Mitchell and L. Bowring, *There are alternatives: Handbook on Preventing Unnecessary Immigration Detention*, 2011.

<sup>28</sup> Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1.

post-traumatic and psychosocial harm relating to the actual detention. The actual cost of Australia's detention regime, however, requires further research based on an appropriate and accepted methodology.<sup>29</sup>

Recommendation 5:

Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned against the existence of any demonstrable and real risk to the community if released (on terms, if required).

Recommendation 6:

There is a need to review the practices relating to national security, including adverse national security assessments, in light of international examples in comparable jurisdictions with a view to enhancing the efficiency and fairness of such procedures.

**VI. REFUGEE STATUS DETERMINATION IN A DETENTION CONTEXT**

*(r) Processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network.*

49. UNHCR is of the view that the offshore procedures for assessing refugee status should be as closely aligned as possible with onshore procedures and subject to appropriate legal frameworks and accountability, and due process. The current policy creates a bifurcated system whereby those arriving by air receive greater procedural safeguards than those arriving by sea. It is arguable that this is a discriminatory policy that is also at variance with Australia's obligations under Article 31(1) of the 1951 Convention relating to the Status of Refugees, which provides that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

50. This takes into account the fact that refugees may be forced to enter a country illegally in order to escape persecution. Article 31 also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any

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<sup>29</sup> UNHCR-IDC, *Expert Roundtable on Alternatives to Detention: Co-Chair Summary Statement and Summary Report*, 19 July 2011  
<[http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=221&catid=37&Itemid=61](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=221&catid=37&Itemid=61)>

restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.

51. The article applies to asylum-seekers as well as recognized refugees. Although not all asylum-seekers meet the refugee definition, a person is a refugee as soon as he or she does meet the refugee definition, even though formal determination and recognition of that status takes place later. An individual does not become a refugee because of recognition, but is recognized because he or she is a refugee.<sup>30</sup>
52. Detention imposes barriers to communication, access, and creates psycho-social effects which limit an asylum-seeker's ability to engage in the refugee status determination process. Early legal advice, whether in detention or the community, is critical to ensuring procedural fairness to asylum-seekers. With timely and sufficient access, a lawyer can engender trust and confidence, break down practical and cultural barriers, as well as elicit coherent and accurate claims. Access to early legal representation impacts significantly on the quality, fairness and efficiency of the refugee status determination process, and enables the asylum-seeker to participate in a meaningful way in the process.
53. Following the High Court of Australia decision of M61/2010 and M69/2010 (11 November 2010), more information is needed about the right of offshore arrivals to gain access to judicial review. There are constitutional questions about how claimants will access it, as well as whether they will have legal aid and competent legal representation to make it a real remedy. Attention will also need to be given to the fact that the remedy of judicial review may also prolong, significantly, the period in detention under current policy settings of mandatory detention.

Recommendation 7:

The procedures for assessing refugee status for 'offshore entry persons' should be as closely aligned as possible with onshore procedures and subject to appropriate legal frameworks and accountability, and due process.

Recommendation 8:

Asylum-seekers should not be detained beyond the purpose of assessing identity, health and security checks. Detention should not extend to a determination of the merits because this is not a legitimate ground for detention. In addition, detention imposes a barrier to communication, access, and creates psycho-social effects which limit an asylum-seeker's ability to engage in the refugee status determination process. Detention for the purpose of assessing refugee status, in the absence of any risk to the community, is an unlawful and impermissible basis for detention.

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<sup>30</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/Rev.2 (1 January 1992), [28].

## **VII. CONCLUSION**

54. UNHCR welcomes the opportunity to provide a submission and address issues in the Committee's Terms of Reference insofar as they affect refugees, asylum-seekers and stateless persons, stands ready to provide more information and to discuss these matters further

*UNHCR Regional Representation for Australia,  
New Zealand, Papua New Guinea and the Pacific*

*19 August 2011  
Canberra*

UNHCR'S STANDING TO COMMENT

1. Australia has assumed responsibility to extend protection to refugees and asylum-seekers through accession to the *1951 Convention relating to the Status of Refugees* (1951 Convention) and the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).<sup>31</sup>
2. UNHCR has the duty of supervising the application of the 1951 Refugee Convention pursuant to the preamble and article 35 of the 1951 Convention, article II of the 1967 Protocol, and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* ("the UNHCR Statute").<sup>32</sup> These instruments call for cooperation between Governments and UNHCR in dealing with refugee problems.
3. The Office's supervisory role is complemented by the conclusions reached by consensus by UNHCR's Executive Committee ("ExCom Conclusions").<sup>33</sup> Although not formally binding, ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. Australia takes an active role in the work of ExCom.
4. UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("the UNHCR Handbook")<sup>34</sup> provides guidance to government officials concerned with the determination of refugee status in the various Contracting States. In addition, UNHCR's Guidelines on International Protection complement and update the understanding in the UNHCR Handbook. These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.
5. More generally, UNHCR's Thematic Guidelines are developed by drawing on the 1951 Refugee Convention, ExCom Conclusions, and general human rights treaties, including the *1966 International Covenant on Civil and Political Rights* (1966 ICCPR), *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984 CAT) and the *1989 Convention on the Rights of the Child* (1989 CRC).
6. UNHCR's *1999 Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* ("UNHCR's Detention Guidelines"),<sup>35</sup> (currently under review), establish the applicable minimum standards which apply to all refugees, asylum-seekers and stateless persons who are being considered for, or who are in, detention or detention-like situations.

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<sup>31</sup> The term '1951 Refugee Convention' is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

<sup>32</sup> UN General Assembly, Resolution 428 (V) of 14 December 1950.

<sup>33</sup> ExCom Members are elected by ECOSOC on the basis of their (a) demonstrated interest in and devotion to the solution of refugee problems; (b) widest possible geographical representation; and, (c) membership of the United Nations or its specialized agencies.

<sup>34</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/Rev.2 (1 January 1992).

<sup>35</sup> UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999).

INTERNATIONAL STANDARDS

1. The *1948 Universal Declaration of Human Rights*, the 1966 ICCPR, and regional human rights instruments,<sup>36</sup> all specify – in more or less similar terms – that no one should be arbitrarily deprived of his or her liberty.
2. Article 31 of the 1951 Convention prescribes that:
 

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
3. This takes into account the fact that refugees may be forced to enter a country illegally in order to escape persecution. Article 31 also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.
4. The Article applies to asylum-seekers as well as recognized refugees. Although not all asylum-seekers meet the refugee definition, a person is a refugee as soon as he or she does meet the refugee definition, even though formal determination and recognition of that status takes place later. An individual does not become a refugee because of recognition, but is recognized because he or she is a refugee.<sup>37</sup>
5. UNHCR’s Detention Guidelines bring together important international law principles relating to detention and set out minimum standards for what might be considered acceptable state practice. They also offer greater clarity regarding the circumstances in which restrictions may be warranted and the alternatives which could be considered. They are not binding, but represent UNHCR’s authoritative views which draw upon the 1951 Refugee Convention, relevant ExCom Conclusions,<sup>38</sup> and binding human rights law and standards. The Guidelines are attached in extenso (Annex A).
6. UNHCR defines detention or detention-like situations<sup>39</sup> as:
 

confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.
7. This definition is sufficiently broad to encompass most forms of detention recognized as such by international human rights law; and is applicable to situations where natural geography may be used to restrict freedom of movement.<sup>40</sup> It applies equally to the detention of asylum-seekers, refugees and

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<sup>36</sup> See, eg, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights “Pact of San Jose”, and the Cairo Declaration on Human Rights in Islam.

<sup>37</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/Rev.2 (1 January 1992), [28].

<sup>38</sup> See, for example, UNHCR, ExCom Conclusions Nos. 44 (XXXVII) – 1986; 46 (XXXVIII) – 1987, [f]; 47 (XXXVIII) – 1987 [e]; 50 (XXXIX) – 1988 [i]; 65 (XLII) – 1991 [c] and [j]; 71 (XLIV) – 1993 [f]; 85 (XLIX) – 1998 [cc] and [ee]; and 89 (LI) – 2000.

<sup>39</sup> UNHCR, *Guidelines on Detention*, Guideline 1.

<sup>40</sup> UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, POLAS/2006/03 (April 2006), 2.



stateless persons within Australia's migration zone and excised offshore places, including Christmas Island.

8. While this definition does not per se include other forms of 'administrative' detention in Australia, UNHCR notes that Article 9(1) of the 1966 ICCPR, which inter alia requires that no one shall be subjected to arbitrary arrest or detention, applies to '*all deprivations of liberty*, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc'.<sup>41</sup>
9. In UNHCR's view, any form of detention or deprivation of liberty should be humane with respect shown for the inherent dignity of the person and should be prescribed by law.<sup>42</sup>
10. UNHCR's Detention Guidelines state the principle that detention of asylum-seekers should be an exception, not the rule and should be for the shortest possible period.
11. The Guidelines reiterate the limited basis on which the detention of asylum-seekers may be permissible, if necessary and if prescribed by a national law which is in conformity with general norms and principles of international human rights law. The exceptional situations in which detention of asylum-seekers may be permitted are those agreed to by States in ExCom Conclusion No. 44 (XXXVII) of 1986 (attached in Annex B):<sup>43</sup>
  - (i) to verify identity;
  - (ii) to determine the elements on which the claim for refugee status or asylum is based;<sup>44</sup>
  - (iii) to deal with cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
  - (iv) to protect national security or public order.
12. The Guidelines also propose a number of alternatives to the use of detention for asylum seekers, including the use of reporting and residency requirements, release on bail, sureties and allowing asylum-seekers to live in open centres where their presence can be monitored.
13. The Guidelines state that any form of detention or deprivation of liberty should be humane with respect shown for the inherent dignity of the person and should be prescribed by law.<sup>45</sup>

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<sup>41</sup> 1966 ICCPR, Article 9(1); UN Human Rights Committee, 'General Comment No. 8: Right to liberty and security of persons (Article 9)', 16<sup>th</sup> sess, (30 June 1982), [1] (emphasis added).

<sup>42</sup> UNHCR, Detention Guidelines, Guideline 10.

<sup>43</sup> UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986 on Detention of Refugees and Asylum-Seekers.

<sup>44</sup> UNHCR elaborates that 'the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim ... and would not extend to a determination of the merits or otherwise of the claim'; UNHCR, Detention Guidelines, 4; UNHCR, ExCom Conclusion No. 44 (XXXVII).

<sup>45</sup> UNHCR, Detention Guidelines, Guideline 10.

**UNHCR-IDC EXPERT ROUNDTABLE ON ALTERNATIVES TO DETENTION**  
**CANBERRA, 9-10 JUNE 2011**

**Co-Chair Summary Statement**

The Co-Chairs of the Expert Roundtable on Alternatives to Detention held in Canberra on 9-10 June 2011 issue the following summary statement to reflect the views expressed and conclusions reached:

1. The Expert Roundtable agreed that immigration detention is not a deterrent to migration and has a negative impact on the health and wellbeing of individuals concerned.
2. There was broad agreement on the need for strong political and public leadership and the use of responsible language to facilitate informed public discussions and develop public confidence.
3. There was general concern that Australia's legal and policy settings relating to mandatory detention might not be fully consistent with international refugee and human rights law, including protection against arbitrary detention. Detention should be used as a last resort and only take place when necessary, reasonable and proportionate, and utilizing the least restrictive means, based on an individualized and case-by-case decision.
4. The Expert Roundtable discussed that any detention should to be time-limited and for the purposes of screening rather than full processing of refugee status.
5. The Expert Roundtable noted that the detention of large numbers of refugees and asylum-seekers at remote and isolated facilities continues to have a significant psychological and physical impact on the short and long-term health and well-being of the individuals concerned. Geographical isolation further restricts access to essential legal and social assistance, particularly for survivors of torture or trauma and other vulnerable individuals, including children.
6. Significant delays in the refugee status determination and delays and uncertainty in the security assessment of asylum-seekers arriving in excised territories have led to protracted detention, compounding the deterioration of psycho-social welfare, and have contributed to an escalating incidence of self-harm, violence, destruction of property, and rioting in detention facilities.
7. The Expert Roundtable discussed the various mechanisms implemented by comparable States to manage identity, health and security risks to society, and noted the availability of various management tools, including screening and assessment, documentation, and monitoring mechanisms.
8. There was broad agreement on the need to distinguish between risks to public safety (relevant to release from detention) and risks to national security (relevant to permanent stay), and to develop clear and transparent definitions and tests for each.
9. The Expert Roundtable recommended that issues relating to national security, including adverse national security assessments (as a separate assessment of risk to society arising from identity, health and public safety issues), required reconsideration. A special advocate mechanism, similar to models in Canada, New Zealand and the United Kingdom, could provide an appropriate bridge between the confidentiality of intelligence gathering and the procedural fairness necessary to detention and/or refugee status decisions.

10. International experts noted that, despite large numbers of arrivals, national security issues did not present significant difficulties in their respective countries. International experts reported that refugees and asylum-seekers were generally not detained for the purpose of determining national security risk and those with vulnerabilities were removed from detention expeditiously.
11. The Expert Roundtable agreed on the need, in Australia, to develop an early assessment process of risks to public safety, linked to provisional and conditional release mechanisms, and an expansion of the existing triaging to enable initial screening within the detention framework.
12. The Expert Roundtable acknowledged the value of establishing an expert working group to formulate a clear and coherent definition of national security and to progress consideration of a special advocate mechanism with the Australian Government.
13. The majority of Australia's detainee population is eventually recognized as refugees. This requires a shift from an emphasis on status as unlawful non-citizens (requiring control and welfare) to refugee status (requiring settlement and self-reliance). The impact of detention on people who are highly likely to settle permanently in Australia works against future integration and successful settlement outcomes. The approach to detention for arrivals should be distinguished from the approach to removals.
14. The Expert Roundtable recognized that Australia has many good practices which have had a positive impact on detention practices globally. There was agreement that existing alternatives could be utilized more effectively and linked to an early release mechanism.
15. There was broad agreement that provisional release for low-risk cases could build on existing bridging visas, or be based on a new model with transitional work and stay rights. Conditional release could draw on international models and apply to medium-risk arrivals, whereas an expanded version of the existing community detention system could apply for higher-risk individuals. However, the type of alternative (within or to detention) which is appropriate in any particular case depends on an assessment of the individual circumstances and requires effective monitoring.
16. Participants considered that early legal representation for asylum-seekers in the community enhances the quality of the refugee status determination process as well as the capacity of failed asylum-seekers to make considered and informed decisions about their future (including return).
17. Important differences of opinion emerged regarding the cost-effectiveness of community-based alternatives to detention as compared to detention facilities. The Australian context of remote detention facilities and associated difficulties of access to services was a remarkably different operating environment to other States. It was agreed that the actual cost of Australia's detention regime required further research based on an appropriate and accepted methodology.
18. The Expert Roundtable considered that positive developments in Australia's reception of asylum-seekers and refugees could have positive dividends expanding the protection space throughout the South-east Asia region, particularly within the broader Regional Cooperation Framework agreed at the Bali Process Ministerial meeting in March 2011. Conversely, Australia's current mandatory detention policies settings make it more difficult to encourage other states in the region to adopt alternatives to detention.
19. The Co-Chairs are keen to work with the Australian Government, statutory bodies and non-governmental organizations to promote the best possible alternatives to detention for asylum-seekers and refugees.

**UNHCR-IDC EXPERT ROUNDTABLE ON ALTERNATIVES TO DETENTION**  
**CANBERRA, 9-10 JUNE 2011**

**Summary Report**

*These notes are a summary of issues discussed and do not necessarily reflect the views of UNHCR, IDC or any individual participant. With agreement from participants, all discussions were conducted pursuant to the Chatham House Rule. The Roundtable was conducted with the financial support of the Australian Human Rights Commission.*

**I. SETTING THE SCENE**

Detention is one of the most challenging issues to face Australia's asylum environment due to the complex interaction and sometimes tensions between humanitarian protection and national security. One of the purposes of the Expert Roundtable was to explore areas of convergence between a State's security concerns, including the effective management of its borders, and its responsibilities to provide protection and humanitarian support for people coming to its borders in an irregular way.

The detention of refugees, asylum-seekers and stateless persons is one of the main gaps in the international protection framework, and there have been significant efforts to promote alternatives to detention at various international fora, most recently at the UNHCR-OHCHR Global Roundtable on Alternatives to Detention in Geneva in May 2011.

The Expert Roundtable outlined the Australian legal and policy settings, monitoring and oversight mechanisms, and NGO perspectives on detention reform. The main objectives of the Expert Roundtable were to explore the expansion of the alternatives presently available in Australia, and to identify potential alternatives to immigration detention in light of international best practices.

The Expert Roundtable was informed by the recent publications of the Co-Chairs: UNHCR's *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1; and IDC's *There are alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 2011, which were officially launched in Australia at the conclusion of the Expert Roundtable.

**Challenge**

To situate the current situation of mandatory immigration detention in Australia against applicable international standards and alternatives to detention, including good practices employed by other similarly-placed States.

**Conclusions: International Context and the Introduction of Priority Concerns**

- A solid international legal framework exists for detention standards.
- There is no empirical evidence that detention deters irregular immigration, and deterrence is not a permissible consideration.

- Alternatives are a key starting point to ensure that every decision to detain is a ‘risk-based’ and individualized process that is used as a last resort, and which is strictly governed by principles of necessity and proportionality of detention.
- It is possible to establish policy and practices that include alternatives to detention that are compatible with the concern of States to manage their sovereign borders and national security responsibilities.
- Treating persons with respect and dignity throughout the asylum or immigration processes contributed to constructive engagement in that process, and improved voluntary return outcomes. Those awaiting an outcome on their asylum process have a very low risk of absconding, as do those who gain support throughout the process.
- There are many useful examples of other States, from which Australia can take best practices. Australia already has some of the better alternatives; however, these alternatives have not been fully implemented.

#### Conclusions: Domestic Context

- Government policy on detention should not be based on deterrence.
- Australian policy needs to be grounded in risk management rather than deterrence, and should ensure the availability of the person to have their status assessed and reviewed according to law.
- Detention should be assessed on a case-by-case basis and to only result if there is a demonstrable risk to the community which cannot be managed in another less intrusive way other than a deprivation of liberty.
- There are concerns around significant delays in refugee status determination and security assessments; with indefinite detention of those with adverse security assessments, and of those who cannot be returned.
- The necessity of a decision relating to detention should be capable of challenge and effective review.
- The signing of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) may provide the opportunity for additional and important opportunities for monitoring.
- Within the present context of mandatory detention in Australia, if the Government of Australia is unwilling to shift from these legal and policy settings, there is great scope to introduce change in terms of limiting the length of detention and increasing the use of community-based options.

#### Conclusions: Public Perceptions

- Among the most pervasive and damaging public misperceptions are: that there is an orderly queue; that detention deters migration; that seeking asylum is an unlawful act; and that asylum-seekers will take employment opportunities and welfare resources from Australians.
- Public confidence needs to be built through clear messages and strong political and community leadership; to promote the alternative programmes in existence; to encourage the Department of Immigration and Citizenship and other public offices to provide facts to the public about numbers, populations and the asylum narrative.
- More focus on detention relating to removals, as opposed to on-arrival processing, may contribute to the public confidence.
- There needs to be a change in the use of language around security and detention policy and movement away from a simplified debate. The debate requires greater public leadership which does not adopt mutually exclusive positions on asylum issues (either mandatory detention or open borders).
- Positive public messaging from a broader range of sources, especially through broad-based community engagement, has been successful in improving the quality of the asylum debate and has been effective in exposing the community to asylum issues.

## II. THEME 1: NATIONAL SECURITY AND HEALTH

The session discussed the comparative perspectives of practice from the United States of America and New Zealand in risk management, as well as broader discussions on responses by other jurisdictions to national security and detention policy.

### Challenges

To determine the way States should manage the screening of identity, health and security; to consider the best tools for determining who should be detained and who should not; and to identify methods of managing populations in the community.

### Conclusions

- Unlike Australia, New Zealand does not have a system of mandatory detention for asylum-seekers who arrive in an irregular manner, and the United States and the United Kingdom release asylum-seekers whose claims are being processed.
- The international models include the presumption that asylum-seekers will not be detained (for example, the US Asylum and “Credible Fear” policy of January 2010).
- The length and type of detention differs depending on its focus. There are three areas of focus: public safety (initial, short-term detention) related to character or obfuscated identity; national security, often related to the possibility of participating in a terrorist act; and deportation or removal of individuals who refuse to comply with a negative visa decision.
- Asylum-seekers are rarely detained for national security reasons. Previous association with terrorist organizations in a country of origin will not automatically pose a threat to the national security of a host country. Despite the much higher number of asylum-seekers in other comparable jurisdictions, those countries do not employ mandatory detention policy settings and indeed, seldom use detention for national security related issues despite their greater proximity to, and risk of, sources of insecurity. Other comparable jurisdictions primarily use detention for the removal of failed asylum-seekers.
- There was a general disquiet that the criteria on which security assessments are made in Australia are extremely unclear, opaque and lacking in any form of meaningful accountability. In view of the serious consequences for those affected by a negative security assessment – including indefinite detention – it is essential that greater transparency be introduced.
- If detention is required for genuine reasons of national security, appropriate measures for procedural fairness can be introduced without compromising the State’s security apparatus. Experience from other State jurisdictions shows that one option could be the establishment of a special advocate model to ensure the detainee has access to redacted versions of any adverse intelligence whilst preserving the sources and integrity of intelligence.
- Whichever purpose underpins the detention, in Australia there should be periodic review by an independent judicial body that is able to assess the legality, necessity and validity of the detention.
- In Australia, there is a conflation of the tests for risk to national security, the decision to detain, and the eligibility to protection visas for those granted refuge status. There needs to be an early and internal risk assessment process, as opposed to the security assessment process for permanent visas.
- Initial internal screening and more effective ‘triaging’ needs to be linked to release mechanisms.
- There needs to be a rule-of-law based approach to the character test. Current law allows for processing in the community in the absence of evidence of risk, but policy does not reflect this.
- Even if security or character concerns are present at the lower scale, alternatives to immigration detention can still be explored, such as conditional release and community-based supervision arrangements. Examples were provided of jurisdictions such as Canada, Germany and Finland that allow the release of undocumented individuals who are complying with identity and security check processes.

### **III. THEME 2: HUMANITARIAN (INCLUDING PSYCHO-SOCIAL RESEARCH AND PRACTICES)**

This session looked at the unique features of community-based alternatives to detention or within detention, and explored whether these features lessen the problems faced by vulnerable groups currently in mandatory detention environments. In particular, the impact of alternative models on the families involved in the UK family removal programme was discussed.

#### Challenge

To identify the particular humanitarian impact, including psycho-social and other forms of harm, upon those in detention and to determine whether and how this can be ameliorated by community-based arrangements.

#### Conclusions

- Immigration detention has a negative impact on the health and wellbeing of individuals concerned, both during and after the detention period. The detention of large numbers of refugees and asylum-seekers at remote and isolated facilities throughout Australia, in particular, has had a significant psychological impact on the short and long-term health and well-being of the detainees.
- Geographical isolation further restricts their access to essential legal and social assistance, particularly those suffering from torture or trauma and other vulnerable cases.
- Significant delays in the determination of refugee status and completion of security assessments has led to protracted detention which further compounds the deterioration of the psycho-social health and welfare of refugees and asylum-seekers, and has caused an alarming incidence of suicide, self-harm, violence and abuse, destruction of property, and rioting in the immigration detention facilities.
- The psycho-social effects of prolonged detention are significant, and give rise to long-term social and community costs after release, which is inevitable for many given that most asylum-seekers in detention will be determined to be refugees.
- Community detention ameliorates these effects by allowing for a smoother transition to the community upon grant of refugee status and making voluntary departure more likely in the event of denial of refugee recognition.
- The UK does not detain unaccompanied children, families with children, women who are 24-plus weeks pregnant, those requiring 24 hour medical care, victims of trafficking, and those with evidence they are victims of torture.
- The UK has developed assisted return, required return and ensured return programmes as alternatives to detention for families with children.
- Australia has many good community-based practices which have had a positive impact on refugees, asylum-seekers and stateless persons. The existing alternatives, established both in Australian law and policy, could be utilized more fully and effectively at every level and linked to an early and effective release mechanism.

### **IV. THEME 3: INTERNATIONAL AND NATIONAL REFUGEE AND HUMAN RIGHTS LAW**

International legal standards of detention were reviewed, along with an analysis of the extent to which current Australian policy and legislation meets these standards. The session also included an explanation of the obstacles to effective legal practice caused by detention.

#### Challenges

To consider how Australia can better meet its international obligations; and to appreciate the positive flow-on effect this would have on the RSD process.

#### Conclusions

- Refugee displacement is never orderly and seldom takes place through ‘regular’ immigration channels, using travel documents and visas. International refugee law specifies that the act of seeking asylum is not unlawful or criminal (even if an asylum-seeker relies on services of criminalized international entities, including people smugglers).
- Australia is not meeting its obligations under Article 9(4) of the ICCPR to allow proceedings in court to challenge the lawfulness of detention and to request release if unlawful. It should be possible to challenge the proportionality and necessity of detention.
- The current policy is overly risk-averse given the low rate of absconding, which renders the blanket mandatory detention policy disproportionate.
- Detention imposes barriers to communication, access, and creates psycho-social effects which limit the claimant’s engagement in the refugee status determination process.
- Early legal advice, whether in detention or the community, is critical to ensuring procedural fairness to asylum-seekers. With timely and sufficient access, a lawyer can engender trust and confidence, break down practical and cultural barriers, as well as elicit coherent and accurate claims. Access to early legal representation impacts significantly on the quality, fairness and efficiency of the refugee status determination process.
- Following the High Court of Australia decision of M61/2010 and M69/2010 (11 November 2010), more information is needed about the right of offshore arrivals to gain access to judicial review. There are constitutional questions about how claimants will access it, as well as whether they will have legal aid and competent legal representation to make it a real remedy. Perversely, the remedy of judicial review may also prolong significantly the period in detention.

## V. RECENT RESEARCH INTO ALTERNATIVES TO DETENTION

Summaries of the UNCHR and IDC research publications were provided in this session. The principal findings were presented from UNHCR’s *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1 and IDC’s *There are alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 2011.

### Challenges

To understand the empirical research from a range of countries and their different political, legal, logistical and geographical settings; and to consider the how these good practices may be incorporated into law, policy and practice in Australia.

### Conclusions

- The IDC’s Community Assessment and Placement model, or ‘CAP’ model, integrates international best practice by identifying five steps governments take to prevent and reduce unnecessary detention. These steps are to presume detention is not necessary; screen and assess the individual case; assess the community setting; apply conditions in the community if necessary; and detain only as a last resort in exceptional cases.
- The most successful programmes incorporate initial screening but have good case management and provision for early legal advice.
- Alternatives that involved NGOs often had better outcomes.
- Alternatives can mean lower costs, increased compliance and better health/well-being for individuals.



## **VI. THEME 4: RESOURCES AND ADMINISTRATION**

In this session, the human and financial costs of detention and community arrangements were considered.

### Challenges

To identify an appropriate methodology to measure the human and financial costs of placements in immigration detention facilities as compared with community detention and other community-based arrangements; and to ensure consistent and accurate calculation of detention, and detention-related costs.

### Conclusions

- There is a need for research on correct and accurate cost and a clearer methodology.
- Any community detention model implemented will need to consider the effectiveness of adopting a “welfare approach”, in which financial and accommodation assistance is provided, or a “work rights approach”, in which limited assistance is provided in favour of self-sufficiency. The availability of housing or ability to attain gainful employment will be relevant considerations.
- A welfare approach may be more expensive than a work rights approach (especially where start-up costs are involved or the programme is risk-adverse with 24 hour care); however, in the medium-longer term cost savings may be achieved.
- Detention costs include the maintenance of facilities whether they are full or not and the remoteness of locations increases costs very significantly; community housing models can be tailored to the fluctuations of actual numbers and more cost effective. Detention-related costs also need to be considered, including the human costs, ongoing impact to vulnerable asylum-seekers and medical treatment relating to post-traumatic and psychosocial harm relating to the actual detention.
- Housing may be limited, and asylum-seekers will be in competition with low-income families. There may be an advantage in working with Australian State and Territory Governments to see how transitional housing for the homeless sector is treated differently.
- Support in the community after refusal of a claim may make removal and informed decisions about judicial review options more likely.
- It may be possible to introduce a greater range of visa options which provide more options for community release than are presently available, as an alternative to detention. These temporary visa options may also impose limits on lodging subsequent substantive claims to prolong their stay in Australia. Community detention may be a preferred option for unaccompanied minors who require additional welfare and support (as compared to the grant of work rights).
- It is important to recognize that asylum-seekers arriving by boat, the majority of who are recognized as refugees, comprise the significant proportion of Australia’s detainee population, and detention is largely unrelated to responding to irregular, non-refugee migrants. There is a need to shift away from an unlawful non-citizen approach to a refugee-focussed approach to irregular arrivals in Australia as an issue of reception and humanitarian response, which encourages future settlement and self-reliance outcomes.

## **VII. ALTERNATIVES TO DETENTION**

This session explored in more detail the alternatives to detention in various countries around the world. Discussion looked at requirements on an individual, monitoring mechanisms, supervision, bail and surety arrangements and ‘case resolution’ models.

### Challenges

To identify alternatives to and within detention which emphasize a risk-based approach to detention, based on clear and transparent criteria to complete identity, health and security checks relating to release into the community, and the implementation of graduated restrictions on freedom of movement, where necessary, which

prevent, rather than react to, long-term detention; and to ensure that assessments of vulnerability are made in a timely and robust fashion.

### Conclusions

- Refugees and asylum-seekers in comparative jurisdictions were, in general, not detained for the purpose of determining their risk to national security and asylum-seekers with vulnerable and complex cases removed from detention expeditiously. The Australian Government should consider implementing an early internal risk assessment process, linked to provisional and conditional release mechanisms for vulnerable groups and those who meet identity, health and public safety checks, and an expansion of the existing triaging process to enable early security screening within the detention framework.
- Australia already has in place most of the models found in the international survey but the key? is to find the political ‘space’ for Government to implement many of the good practices already identified and to ensure these are injected early as part of a preventive and effective release mechanism – before damage is done to those affected by detention.
- Provisional release for low-risk cases could build on existing bridging visas, or be based on a new temporary visa model with transitional work and stay rights. Conditional release could draw on international models and apply to medium-risk arrivals, whereas an expanded version of the existing community detention system could apply for higher-risk individuals. However, the type of alternative (within or to detention) which is most appropriate in any particular case depends on the individual circumstances and requires effective monitoring and oversight.

## **VIII. DISCUSSION ON KEY ISSUES**

### Challenges

To bring together the discussions of previous sessions to identify strategies for improved conditions and for promotion of alternatives; for an Australian-tailored answer to screening tools and risk assessment; current challenges in relation to particular caseloads; and managing public perception.

### Conclusions

- There needs to be an internal, front-end, quick assessment of public safety and security concerns.
- There needs to be a clearer definition of national security, with a higher threshold of threat than currently exists.
- There needs to be a transparent process around cases involving classified information.
- The codification of the current policy values into law is important to ensure the future development of alternatives.
- There needs to be a strong message to the public that asylum-seekers and detention are not inextricably linked, that detention does not deter, and that detention should be a last resort. This can be balanced with the message that detention occurs where it is necessary, and thus meet public safety and political concerns.
- Australia’s approach to immigration detention should be shifted from an approach that emphasizes their status as unlawful non-citizens (requiring control and welfare) to one that emphasizes their refugee status (requiring settlement and self-reliance). The approach to detention for arrivals should be distinguished from the approach to detention for removals.