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20 June 2011

Committee Secretary
Joint Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra, ACT 2600

Dear Secretary,

**Re: *Migration Amendment (Mandatory Detention and Procedural Fairness) Bill 2010* submission to the Joint Standing Committee on Legal and Constitutional Affairs**

Thank you for the opportunity to make a submission to the Joint Standing Committee on Legal and Constitutional Affairs. We are students of law at the Australian National University, with experience and expertise in international, refugee and migration law.

## Our position on the *Migration Act 1958* as it stands

> "[The UNHCR Executive Committee] notes with deep concern that large numbers of refugees and asylum- seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation"[1]

The *Migration Act* seeks to regulate the lawful entry of people into Australia. Despite Australia having helped draft the *Refugee Convention*, the *Migration Act* has not caught up to international standards.

## Our Submission

Our submission looks at Australia's mandatory immigration detention policy over four chapters. Chapter One looks at Australia's obligations under International Law, and whether the *Bill* will ameliorate Australia's compliance with international standards. Chapter Two explores the mandatory and indefinite nature of immigration detention in relation to Australian law. Chapter Three examines the practical and legal implications of excised offshore places, and questions its existence in light of recent legal developments. Chapter Four analyses the privative clauses in the *Migration Act*, examining their status under Australian law. To frame this discussion, it is important to consider Australia's refugee policy history to better understand underlying policy priorities and objectives.

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[1] UNHCR Executive Committee Conclusion No. 44 (XXXVII), 37th Session 1986 [a].

## Australia's Refugee policy history

Australia has a long history of offering asylum and protection to those seeking it. Its first refugee and immigration policies stem from the 1940s, and were directed to those fleeing post WWII Europe, with Australia becoming a party to the International Refugee Organisation, the predecessor to the UNHCR, in 1947.[2] The Department of Immigration and Citizenship boasts that 'since the end of World War II, Australia has resettled more than 750 000 refugees and people in humanitarian need.'[3] This number demonstrates not only Australia's compassionate nature but also its attempts to comply with international obligations under the 1951 Convention on the Status of Refugees and the subsequent 1961 Protocol.

It is clear that Australia has not always regarded refugee flows with the humanitarian aspirations envisaged by the drafters of the UNHCR, instead focusing on the security issues surrounding refugee movements. Australia received international notoriety through Tampa Case and the subsequent creation of the Pacific Solution that involved processing asylum seekers extraterritorially.[4] Further, widespread criticism of Australia's mandatory detention scheme has been frequent with the UN Human Rights Committee and Human Rights Council consistently finding the mandatory detention regime to breach human rights standards under many of the International Treaties Australia is a party to [see **Chapter 1**].[5] As a result the current government, in 2008, proposed sweeping changes to restore integrity the immigration system promising 'a commitment to reform and a more human treatment of those seeking our protection.'[6]

Thus while we recognise the government's border security concerns, founded on fear of mass influx and the international battle to overcome people smuggling, we strongly propose that the government enact the *Migration Amendment (Detention Reform and Procedural Fairness) Bill* 2010. Australia is not detached from the rest of the world, and is influenced not only by international law but also by the domestic law of other countries. Adopting the *Bill* not only ensures that the government fulfil its election promises, but also guarantees that Australia conforms to and complies with International Treaties and Conventions it has itself signed on to.

High Court of Australia Justice McHugh noted in the notorious case of *Al-Kateb v Godwin* that due to an absence of a bill of rights in Australia, the courts were unable to question the propriety of Parliamentary decisions on human rights grounds.[7] In lieu of such human rights protections, Australia must look to and rely upon its international obligations to prevent arbitrary detention and other

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[2] http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/d30d79e4ab5621f9ca256c8600163c0d/34de11e5815c539dca256b7e00810cb6?OpenDocument

[3] http://www.immi.gov.au/media/fact-sheets/01backgd_01.htm

[4] The Australian Story: Asylum Seekers outside of the law. Susan Kneebone

[5] http://www.amnesty.org.au/refugees/comments/20597/

[6] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008, 2.

[7] *Al-Kateb v Godwin* [2004] HCA 37.

breaches of rights on the ground. The Australian government is under a duty[8] to uphold Treaties that it has signed on to, and we submit that the adoption of the proposed *Bill* will enhance Australia's compliance with its international obligations.

## The Government's concerns

"Social insecurity exists when communities of whatever kind define a development or potentiality as a threat to their survival as a community"[9]

The Government has two main concerns that it seeks to redress with its immigration policy: people smuggling; and mass influx.

### *(a) People smuggling*

Australia is currently a member of the Bali Process, a scheme with over 50 State participants, that aims 'to work on practical measures to help combat people smuggling, trafficking in persons and related transnational crimes in the Asia-Pacific region and beyond.'[10] Further, with the resolve "to break the people smugglers' business model and the trade in human misery"[11] being a primary goal of the proposed Malaysian Transfer Agreement, we recognise that people smuggling is a key concern in Australia's migration policy.

Concerns surrounding people smuggling and related transnational crimes have often resulted in the government adopting stricter controls in terms of border security, and legislative measures to ensure national security. Mandatory detention, excision and offshore processing have often been predicated as a ground of deterrence for people smugglers.[12] However, such actions are clear violations of Australia's international obligations. Mandatory detention has been criticised as arbitrary detention, breaching Article 9 of the *International Covenant on Civil and Political Rights* [see **1.2.2**].[13] Senator Chris Evans, when he was Minister for Immigration and Citizenship, recognised that 'the best deterrence is to ensure that people who have no right to remain in Australia are removed expeditiously.'[14] Such 'expeditious' removal is undermined by the current mandatory detention with detainees spending unqualified amounts of time in detention whilst security searches are undertaken to determine their identity and security risk status. However, an increase in the number of people claiming asylum in Australia[15] not only suggests that mandatory detention does not work as a deterrence for those desperate to flee persecution, but with an overall international increase in refugee flux, suggests that other factors drive

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[8] *Pacta sunt servanda*, Art 26 *Vienna Convention on the Law of Treaties*, 1155 U.N. Treaty Series 331, Concluded 23 May 1969, Entry into force 27 January 1980.
[9] Buzan et al, 1998: 119
[10] http://www.baliprocess.net/
[11] http://www.minister.immi.gov.au/media/cb/2011/cb165079.htm
[12] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008, 4.
[13] ICCPR Art 9.
[14] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008, 3.
[15] See Asylum Levels and Trends in Industrialized Countries 2010

asylum seekers to leave their countries. These underlying factors are the root cause of the increase in asylum seekers; people smuggling may be a concerning trend, but it should be seen primarily as a means for those seeking protection to reach a 'safe' place. Mandatory detention has not deterred individuals engaging in this transnational crime, rather it punishes those people that are so desperate and see no other choice but to engage people smugglers to assist them in finding a place of refuge.[16]

### *(b) Mass influx*

A further concern to the government is a mass influx of asylum seeker claims on Australian shores. Criticism of the government's migration policy by Shadow Minister for Immigration and Citizenship Scott Morrison, have suggested, "Labor's immigration and border protection policies have failed."[17] Such comments however, perpetuate negative attitudes and fail to recognise the international context that is driving people to flee their countries at any given time and Australia's international obligations. According to the UNHCR the number of asylum applications lodged internationally between 2006 and 2010 increased.[18].

Original notions of push-pull factors in the context of claims of asylum misrepresent the driving factors behind individuals leaving their countries of origin and seeking asylum elsewhere.[19] Push factors are those linked to individuals leaving their countries of origin, whilst pull factors are those that induce that induce asylum seekers to come to Australia to seek asylum. Australia's immigration policies are distinctive of political leaders who have allowed misunderstandings of pull factors to cloud their policy making.[20] Deterring individuals by mandatory detention, limited access to judicial review and a two-tiered *Migration Act* has not decreased the number of people seeking Australia's protection. Rather, the global increase suggests that on an international scale the push factors resulting in individuals fleeing their home country have amplified. In the words of Chris Evans, 'desperate people are not deterred by the threat of harsh detention – they are often fleeing much worse circumstances.'[21]

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[16] Future Seekers Refugees and the Law in Australia.
[17] http://www.liberal.org.au/Latest-News/2010/07/14/147-illegal-boats.aspx
[18] UNHCR Report 15.
[19] 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*, UNHCR, Legal and Protection Policy Series, iii, UN Doc PPLA/2011/01.Rev.1 (April 2011).
[20] Australia's Refugee History (Kapmark)
[21] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008, 5.

## *2010 Ranking of the top 10 Countries of Origin of Asylum Seekers*[22]

| | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|---|---|---|---|---|
| Serbia* | 4 | 4 | 6 | 6 | 1 |
| Afghanistan | 6 | 8 | 4 | 1 | 2 |
| China | 2 | 3 | 5 | 5 | 3 |
| Iraq | 1 | 1 | 1 | 2 | 4 |
| Russian Federation | 3 | 2 | 3 | 4 | 5 |
| Somalia | 8 | 6 | 2 | 3 | 6 |
| Islamic Rep. of Iran | 5 | 9 | 11 | 8 | 7 |
| Pakistan | 9 | 5 | 8 | 9 | 8 |
| Nigeria | 13 | 13 | 7 | 7 | 9 |
| Sri Lanka | 16 | 10 | 12 | 13 | 10 |

*Statistics prior to 2007 refer to Serbia and Montenegro.

[22] Extracted from Asylum Levels and Trends in Industrialized Countries 2010

## The proposed amendments

While the Labor government must be commended on its successful attempts to 'bring humanity, fairness, integrity and public confidence'[23] into Australia's refugee policies some provisions of the *Migration Act* breach Australia's international obligations.

1. The proposed *Bill* seeks to ameliorate the international criticism Australia has received regarding its practice of mandatory detention.
2. The *Bill* will align Australia with it international obligations but also adhere to rule of law principles embodied in the Australian *Constitution* through the separation of powers, by removing notions of arbitrariness from the *Migration Act*.
3. The *Bill* removes offshore excised places from the venacular of the *Act*, effectively destroying the two-tier processing system that currently exists.
4. The *Bill* allows greater access to the judiciary by removing the definition of privative clauses under s 5(1) of the *Migration Act* and specific provisions such as the proposed s 195C for the continued detention of individuals.
    a. This will prevent Immigration Ministers from acting *ultra vires,* or " playing God"[24] by providing better transparency and accountability through the judicial review process.
5. The *Bill* will remove the mandatory and potentially indefinite nature of immigration detention in Australia.

[23] http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm
[24] Address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm

## Recommendations

### *Mandatory nature of detention*

**Recommendation 1**: s 189 of the *Migration Act* should be repealed and the following section inserted into the *Migration Act*:
Presumption against detention of unlawful non-citizens
(1)The Parliament affirms that there is a presumption against the detainment of unlawful non-citizens.
(2)An officer may detain an unlawful non-citizen on one of the following exhaustive and exceptional grounds:

(a) the unlawful non-citizen requires health, identity or security checks;
(b) the unlawful non-citizen presents an unacceptable risk to the community; or
(c) the unlawful non-citizen has repeatedly refused to comply with their visa conditions.

### *Long term and potentially Indefinite Nature of Detention*

**Recommendation 2**: The establishment of an independent judicial review mechanism of the decision to detain as well as the length and reasons for continued detention. This should include the power to order the removal of an applicant from detention. This will necessitate the repeal of s196 (3) of the *Migration Act*.

**Recommendation 3:** The development of guidelines, including content and timeframe, as to what constitutes a health check, an identity check, and a security check.

**Recommendation 4:** The definition of what constitutes an unacceptable risk to the community.

**Recommendation 5:** The expansion of the use of community detention and bridging visa alternatives to immigration detention. This will require:

1. Legislation to the effect that beyond the categories deemed necessary for immigration detention, a person must be released into the community on a bridging visa or to be placed in community detention. This includes when the purpose of the detention has come to an end i.e. the completion of identity, health and security checks.
2. Reform the bridging visa framework to ensure that those released into the community have access to regular and sustaining income, health care, legal and case work support, counselling and mental health services if required and appropriate housing.

### *Excised offshore zones*

**Recommendation 6:** We recommend the Government implement Part 3 of the *Bill* that seeks to repeal the excised offshore provisions contained within the *Migration Act*. Doing so will remove the current distinction between asylum seekers arriving onshore and those arriving offshore, bringing legislation into

line with enunciated policy and international law, and eliminating artificial barriers to access to justice.

Further, we fully support repealing the excised offshore places that currently create a tow-tiered system of processing asylum claims breaching Article 31 of the 1951 Convention, penalizing those that arrive irregularly. Subsequently we advocate for the fair system of processing proposed by the *Bill,* which would move Australia towards compliance with UNHCR guidelines on detention.[25]

### *Privative clauses in the Migration Act*

**Recommendation 7:** We strongly agree with the *Migration Amendment (Detention Reform and Procedural Fairness) Bill* and encourage the government to repeal the definition of privative clauses and the definition of purported privative clauses under s5(1) of the *Migration Act*. This will allow the *Act* to reflect the current state of the law in relation to judicial review of decisions made under the *Act* that have been affected by jurisdictional error.

**Recommendation 8:** The power to make residence determinations under s 197AB of the *Migration Act* should not be limited to ministerial discretion and it is recommended that this power is extended to officers of the Department of Immigration and Citizenship.

### *Arbitrary detention*

**Recommendation 9:** Detention that is inappropriate, unjust and unpredictable, is arbitrary and is in breach of international law. We recommend that the Government adopt the asylum seeker principles in the *Bill* to eliminate arbitrariness and inhumane practice in the detention system.

### *Mental health*

**Recommendation 10:** We submit that mandatory detention is actively contributing to mental health degradation of detainees, particularly children. We further submit that the only way to effectively deal with mental health issues is to remove inappropriate, unjust and unpredictable practices from the detention regime, bringing it in line with international standards.

Sincerely,

Alice McBurney
Benjamin Pynt
Susan Wnukowska-Mtonga

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[25] In particular, those in UNHCR Executive Committee Conclusion No. 44(XXXVII), 37th Session 1986 and subsequent Conclusions on detention.

# Chapter 1:
# Conformity with International law

International treaties are not self-executing and must be incorporated into domestic law. Australia's decision to accede to and ratify international treaties should be seen as an exercise, rather than a ceding, of Australian sovereign power to make policy decisions. Accession to an international treaty is an exercise of executive power, and incorporation through legislation is an exercise of legislative power. The former is indicative, and the latter declaratory, of Australia's intention to be bound by the terms of the Treaty.[2] Once ratified, Article 26 of the *Vienna Convention on the Law of Treaties* requires States to implement and perform treaty obligations in good faith.[3] Therefore, ratification should be seen as an act of national will, and is a positive expression of Australia's independence and an affirmative exercise of sovereignty.[4]

Despite Australia having incorporated the bulk of the text of the *Refugee Convention* into the *Migration Act*, it is continually called upon in international forums to enhance compliance with its international obligations, both with the *Refugee Convention* and Treaties of fundamental human rights.[5] Thus the *Migration Act (Mandatory Detention) Amendment Bill* seeks to bring immigration legislation in line with Government policy as announced in 2008.[6]

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[2] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 [286-7]; Jennings, M. "The Relationship between Treaties and Domestic Law," Treaties in the Global Environment: A Department of Foreign Affairs and Trade Workshop held 6 November 2003, available online at: http://www.dfat.gov.au/treaties/workshops/treaties_global/jennings.html

[3] *pacta sunt servanda*, Art 26 *Vienna Convention on the Law of Treaties*, 1155 U.N. Treaty Series 331, Concluded 23 May 1969, Entry into force 27 January 1980.

[4] Human Rights and Equal Opportunities Commission, *National Inquiry into Children in Immigration Detention*, April 2004 [90]

[5] For example, see: UN Human Rights Council, Working Group on the Universal Periodic Review, Tenth Session, UN Doc. A/HRC/WG.6/10/L. 8, 3 February 2011.

[6] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008.

### 1.1 The Refugee Convention

The *Refugee Convention*, to which Australia is an original signatory, prohibits punishment of asylum seekers for any laws they may have breached by entering a country illegally.[7] The UNHCR has consistently noted its concern that asylum seekers and refugees are subject to mandatory detention,[8] and deplored its arbitrary and indefinite nature,[9] as well as the fact that asylum seekers are routinely deprived of the right to *habeas corpus*.[10] This is discussed below at [**1.2.2**, **2.1**].

Article 31(2) of the *Refugee Convention* stipulates that necessary restrictions on movement may only be applied until refugee status is finalised. The UNHCR Executive Committee (ExCom) has interpreted this provision as disallowing detention that is 'unduly prolonged'.[11] The ExCom expressed its opinion that detention is only justifiable when it is 'absolutely necessary' to:

1. Verify identity, including cases where asylum seekers have destroyed their identity documents or used fraudulent documents;
2. Determine the elements on which the protection claim is based; or
3. Protect national security or public order.[12]

The Australian Government has consistently held that its right to secure borders allows Australia to detain people based on their illegal entry.[13] The UN Human Rights Committee (HRC), however, has found a proportionality requirement to exist in such a situation, stipulating that grounds for detention must be sufficient to justify indefinite and prolonged detention.[14] The HRC has held that the *Refugee Convention* is inextricably linked to other human rights treaties, and has found recourse to rights for detainees to be 'grossly inadequate'.[15]

**Who is a refugee?**

For the purposes of the *Refugee Convention*, a refugee is someone who is outside their country of origin, and has a well-founded fear of persecution upon return based on their race, religion, nationality, membership of a particular social group or political opinion, and is unable or unwilling to avail themselves of the protection of their country of nationality.[16]

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[7] Article 31(1) *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations (General Assembly), Treaty Series, Vol. 189, p. 137, (Refugee Convention).
[8] UNHCR ExCom Conclusions No. 44 (XXXVII) 1986; Nos. 46 & 47 (XXXVIII) 1987; No. 50 (XXXIX) 1988; No. 55 (XL) 1989; 65 (XLII) 1991; No. 68 (XLIII) 1992; No. 85 (XLIX) 1998.
[9] UNHCR ExCom Conclusion No. 85 (XLIX) 1998 [§dd].
[10] UNHCR ExCom Conclusion No. 71 (XLIV) 1993 [§f].
[11] ExCom Conclusion No. 44 (XXXVII) 1986 [§c].
[12] ExCom Conclusion No. 44 (XXXVII) 1986 [§b].
[13] A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997). Adopted 3 April 1997 [§4.12].
[14] CCPR Communication No. 560/1993, [§9.2].
[15] Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia, E/CN.4/2003/8/Add.2 24 October 2002, [Section E].
[16] Article 1A(2), *Convention Relating to the Status of Refugees,* 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, (*Refugee Convention*).

## 1.2 International treaties of fundamental human rights

### 1.2.1 The International Covenant of Civil and Political Rights

**Article 2**

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

**Article 9**

(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 that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The *International Covenant of Civil and Political Rights* (*ICCPR*) is a Treaty of fundamental Human Rights to which Australia is a signatory. The UN Human Rights Commission (HRC), as the body in charge of monitoring compliance with and issuing guidelines for the *ICCPR*, released *General Comments 8* and *21* on the right to liberty.[17] The HRC interpreted the *ICCPR* as requiring 'prompt' judicial or administrative review in all cases of detainment, which in its view must not exceed 'a few days'.[18] In the same comment, the Committee noted that preventative detention (such as the Australian mandatory detention system) must not be arbitrary, and that people detained in such a manner must still have recourse to their rights under Article 9 of the *ICCPR*. This includes a requirement that migrant detainees enjoy the right to challenge the legality of their decision before a court.[19]

The Article 7 prohibition on torture is complemented by Article 10, which provides that the dignity of persons deprived of liberty must be guaranteed under the same conditions as that of free persons. In other words, Article 10 requires the State to

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[17] UNHRC (CCPR), *General Comment 8: Right to liberty and security of persons (Article 9)* 16th Session, 30 June 1982; *General Comment 21: Concerning humane treatment of persons deprived of liberty (Article 10)*, 44th Session, 10 April 1992.

[18] *General Comment 8*, para 2.

[19] Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia, E/CN.4/2003/8/Add.2 24 October 2002 §61

provide a minimum standard of humane conditions of detention, including a guarantee against arbitrary detention. [20]

### 1.2.2 What is arbitrary detention?

Arbitrary detention is broadly defined as including elements of inappropriateness, injustice and lack of predictability,[21] and is a breach of *ICCPR* Article 9. The Human Rights Committee noted in *A v Australia* that arbitrariness was not to be equated with 'against the law', but rather as an 'incompatibility with the principles of justice or with the dignity of the human person'.[22] Although it is not arbitrary to detain asylum seekers per se,[23] unnecessarily prolonged detention will be arbitrary and result in a breach of Article 9(1) of the *ICCPR*.[24] Access to judicial review must be real and not just formal; if a judge's power is merely to declare the domestic legality of a decision to detain, rather than to consider the decision in the broader legal (including international) context, that will be a breach of Article 9(4) of the *ICCPR*.[25] The Australian Human Rights and Equal Opportunity Commission (HREOC), in its report to Government on the *el Masri* case, concluded that systematic deprivation of the right to judicial review was in breach of Article 9 of the *ICCPR*.[26]

The UN Arbitrary Detention Working Group delegation found that Australia is the only country in the world with such a system combining mandatory, automatic, indiscriminate and indefinite detention without recourse to substantive judicial review.[27] The UN High Commissioner for Human Rights, in a speech at the Australian National University this year, announced that automatic, discriminatory and indefinite detention is a breach of Australia's human rights under Treaty law.[28]

### 1.2.3 Is arbitrary detention a prohibited penalty under the Refugee Convention?

The *Refugee Convention* itself does not define the word 'penalty', however, the HRC's interpretation of 'penalty' under Article 15 of the ICCPR reasoned that the *Refugee Convention* should be read broadly to achieve its primary aim of conferring protection to those in need.[29] It should also be noted that the Working Group on Arbitrary Detention found Australian detention conditions to be similar 'in many ways' to prison conditions.[30] Administrative detention, particularly when prolonged, is a penalty applied to people travelling irregularly, in breach of *Refugee Convention* Article 31 and *ICCPR* Article 9.

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[20] Nowak, M., *UN Covenant on Civil and Political Rights ICCPR Commentary* 1993 [86].
[21] CCPR Communication No. 560/1993, [§3.1; 4.2].
[22] CCPR Communication No. 560/1993, [§7.6].
[23] CCPR Communication No. 560/1993, [§9.3].
[24] CCPR Communication No. 560/1993, [§9.4].
[25] CCPR Communication No. 560/1993, [§9.5].
[26] *El Masri v Commonwealth (DIAC): Report into unlawful and arbitrary detention and the right of people in detention to humane treatment*, 2009 AusHRC 41.
[27] Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia, E/CN.4/2003/8/Add.2 24 October 2002 [§62(b)].
[28] Navanthem (Navi) Pillay, *Roundtable Discussion: Human Rights Protections – What does Australia need?* 24 May 2011, Centre for International and Public Law, Australian National University.
[29] *Van Duzen v Canada*, CCPR Communication No 50/1979, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) [10.2]; UNHCR ExCom Conclusion No. 22 (XXXII) 1981, [§B2(a)].
[30] Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia, E/CN.4/2003/8/Add.2 24 October 2002 §60.

### 1.2.4 The Convention Against Torture and humane detention

The *Convention Against Torture* (*CAT*) is a treaty of fundamental human rights to which Australia is a signatory. Article 1 of the *CAT* prohibits infliction of physical or mental pain or suffering as punishment for an act a person may have committed.[31] Article 7 of the *ICCPR* also prohibits torture as defined by the *CAT*.

Overcrowding of detention facilities is specifically prohibited by Article 9 of the *UN Standard Minimum Rules for the Treatment of Prisoners* (*SMRTP*), however it continues to be an issue in Australian detention facilities, particularly at Christmas Island. The Government has reported 'pressures' on the detention system as necessitating the opening of new facilities across the country.[32] The major 'pressure' is widely accepted as overcrowding by the Australian media.[33]

### 1.2.5 The Asylum Seeker Principles

Article 4AAA(3) of the *Bill* sets out asylum seeker principles that would apply as guidelines in the making of every decision to do with asylum seekers, to safeguard human dignity and ensure fairness in procedure.

If applied in the spirit of the *Refugee Convention*, the asylum seeker principles would bring Australia into line with its international obligations.

Part of Australia's 'Pacific Solution'[34] was the processing of asylum seekers on Nauru and Manus Island [see **3.1**]. Section 198A(3) allows the Minister to declare a country for offshore processing so that under s198A(1) 'offshore entry persons' may be taken to that country where their asylum claim will be processed. It is possible that the Gillard Government may seek to rely on this power to help establish a regional protection framework. At the time of writing, it is still uncertain how the 'Malaysia Plan' will fold out, however, it is likely that the Government will seek to rely on s 198A to send offshore entry persons to Malaysia for processing. As such, we strongly support the *Bill* to repeal section 198A. One does not need to look far to know that Malaysia has a poor reputation for maintaining human rights and in particular to refugees. Simply put, Malaysia is not a signatory to the *Refugee Convention* and as such, Australia would face a real risk of compromising its international obligations by sending refugees to Malaysia. We believe that repealing s 198A will finish what the Labor Government started in 2008 and bring an end to the 'Pacific Solution.' Without delving into a separate topic on a regional protection

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[31] *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 Adopted by General Assembly resolution 39/46 of 10 December 1984, Entry into force 26 June 1987.

[32] Minister Chris Bowen, *New Short Term Detention Centre in Tasmania*, posted 5 April 2011, available online at: http://www.chrisbowen.net/media-centre/media-releases.do?newsId=4298

[33] See for example: Brennan, B., "Darwin detention centre lease to cost $74m," *ABC News Online*, 8 March 2011, available online at: http://www.abc.net.au/news/stories/2011/03/08/3158576.htm?section=justin

[34] See Refugee Council of Australia, online at: http://www.refugeecouncil.org.au/news/current.php#may_manus

framework and the 'Malaysia plan', we will however, submit that s 198A is not the key to establishing a regional protection framework and believe that the Government should focus on other initiatives, such as the Bali Process to work towards a regional protection framework.

We strongly agree with Part 3 of the *Bill* which repeals s 198A.

### 1.3 Right to judicial review

The right to judicial appeal is a fundamental right that serves as a guarantor for democratic institutions,[35] and is enshrined in the *ICCPR*[36] and *UDHR,*[37] two treaties of fundamental human rights; it is a right from which no derogation is permitted.[38] The UNHCR has also mandated that all asylum seekers must have access to judicial review.[39] Although the *M61* decision [**see below at 3.1**] has meant appeal rights for some decisions, it is worrying that security determinations and ministerial decisions to grant or deny asylum seekers the right to lodge a protection application,[40] are neither transparent nor reviewable.

These binding international treaties require States to facilitate appeals for every trial that involves criminal or administrative penalties. The proposed changes to the *Migration Act* through the *Amendments facilitating judicial review of detention decisions*[41] would bring Australia into line with international standards on this issue.

#### 1.3.1 Amendments facilitating judicial review of detention decisions

Replacing 'must detain' with 'may detain' in ss42 and 189 of the *Migration Act*, the *Bill* seeks to change the "climate of xenophobia and hostility against [asylum seekers]." [42] The new ss195B and 195C ensure all asylum seekers have the same right to judicial review as all Australians have, and guard against arbitrary detention by requiring a magistrate to order continued detention after only 30 days.

As at May 2011, 39.2% of 6730 immigration detainees had been in detention for between six and twelve months, and 23.5% had been detained for between twelve and eighteen months.[43] 30 days represents a great leap forward for Australia, however still falls short of above-mentioned international standards [**see 1.2.2**].

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[35] See Chapter III, *Australian Constitution 1901*.
[36] Article 2(b), Art 9 *ICCPR*.
[37] Article 11, *Universal Declaration of Human Rights*.
[38] Article 5, *ICCPR*.
[39] UNHCR ExCom Conclusion No. 44 (XXXVII), 37th Session, 1986 [at (e)].
[40] Under s46A(2) *Migration Act 1958* (Cth).
[41] Ss 195B, 195C, *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*.
[42] UN Human Rights Council Panel Discussion: *Human Rights of Migrants in Detention Centres*, Informal Summary of Discussions of 17 September 2009.
[43] Infrastructures and Services Management Division, Department of Immigration and Citizenship, *Immigration Statistics Summary*, 13 May 2011 [figure 8].

## 1.4 Non-discrimination

Article 3 of the *Refugee Convention* prohibits discrimination on the basis of race, religion or country of origin in the application of its provisions. Given the wide interpretation to be accorded to all rights provisions in the *Convention*, and with a view to achieving protection standards,[45] the non-discrimination clause should be applied to require an examination of each case on an individual basis.

International law has strong anti-discrimination injunctions embodied in the *Convention on the Elimination on all forms of Racial Discrimination* (*CERD*),[46] the *ICCPR*[47] and *UDHR*.[48] Against this backdrop, the right to live a life free from discrimination brings a correlative duty incumbent upon States to ensure their laws are non-discriminatory, both formally and in practice.[49]

Discrimination on the basis of national origin is strictly prohibited by the fundamental human rights treaties.[50] Australia's treatment of groups of asylum seekers as like without analysing their claims on an individual basis, as is a necessary consequence of policies such as temporary freezes on processing,[51] is a violation of this rule.

### *1.4.1 The asylum seeker principles and discrimination*

The focus on individual merits on every aspect of decision-making in relation to asylum seekers could create formal compliance with international law. However, if the Government continues to conclude agreements with other States to repatriate or transfer asylum seekers without individual assessment, structurally enshrined anti-discrimination measures will count for nothing as they are circumvented by executive action.

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[45] See Note 29.
[46] *International Convention on the Elimination on All Forms of Racial Discrimination*, Opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, Entry into force 4 January 1969.
[47] Articles 2(1), 26, *ICCPR*.
[48] Article 7 *UDHR*.
[49] Human Rights Committee (CCPR) *General Comment18: Non-Discrimination*, 37th Session, 11 October 1989 [§9].
[50] Human Rights Committee (CCPR) *General Comment18: Non-Discrimination*, 37th Session, 11 October 1989 [§1].
[51] http://www.theaustralian.com.au/news/julia-gillard-to-send-back-boatpeople/story-e6frg6n6-1225887782751

## 1.5 The right to health

The *International Covenant on Economic, Social and Cultural Rights (ICESCR),* as a human rights treaty to which Australia is a party, guarantees the right to health for all.[52] Australia ratified the *ICESCR* in 1975, attracting good faith implementation obligations to come in line with standards enunciated therein.

Economic, social and cultural rights are generally regarded as 'third tier' rights lacking the same normative weight as civil and political rights, however the right to health is an important exception, having been declared a fundamental human right on a number of occasions by the World Health Organisation (WHO).[53] Notwithstanding its peremptory character under WHO instruments, a deliberate deprivation of the right to health may result in a finding of inhuman or degrading treatment or punishment, reviewable and rectifiable by a court of law.[54]

### 1.5.1 The right to health in immigration detention

The *Refugee Convention* mandates provision for refugee access to health services on the same basis as citizens.[55] In the United Kingdom, the House of Lords found healthcare duties were applicable to all asylum seekers (not just recognised refugees), requiring the State to provide for, or at least to not intentionally deny, the 'most basic necessities of life'.[56] Australia's obligations in relation to the right to health for refugees include assuring availability of, and access to, health services, facilities and products of good quality.[57] Additionally, the *SMRTP* provides for the presence of a qualified medical officer with some knowledge of psychiatry at every detention facility.[58] Articles 25 and 26 also demand that the medical officer report when a detainee's mental health has been, or is likely to be, injuriously affected by detention, and that the Director of any facility is to act upon those reports immediately.[59]

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[52] Article 12, *International Covenant on Civil and Political Rights*, UNTS Vol. 993, p. 3, adopted at New York, December 1966, Entry into force 3 January 1976.
[53] Preamble to the Constitution of the World Health Organisation, adopted by the International Health Conference, New York, 19 June to 22 July 1946, entry into force 7 April 1948; *Health-For-All Policy for the Twenty-First Century*, Annex I: *World Health Declaration*, WHO Resolution WHA51.7.
[54] Cholewinski, R., "Enforced Destitution of Asylum Seekers in the United Kingdom: the Denial of Fundamental Human Rights," (1998) 10 IJRL 462; *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ. 540.
[55] Article 24(1)(b), *Refugee Convention 1951*.
[56] *R v Secretary of State for the Home Department, Ex Parte Adam,* [2005] UKHL 66 [7] per Lord Bingham.
[57] Committee on Economic, Social and Cultural Rights, *General Comment 3* (1990) [10]; Hunt & Backman, "Health Systems and the Right to the Highest Attainable Standard of Health," in Clapham, A. & Robinson, M., *Realising the Right to Health*, (Rüffer and Rub: Geneva) 2009 [41]; Royal Australian College of General Practitioners, *Standards for health services in Australian Immigration Detention Centres*, (RACGP: Melbourne) 3rd Edition, June 2007 [75].
[58] Article 22(1), *Standard Minimum Rules for the Treatment of Prisoners (SMRTP)*, Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, approved by the Economic and Social Council by Resolutions 63C (XXIV) 31 July 1957, and 2076 (LXII) 13 May 1977.
[59] Articles 25(2), 26(2), *SMRTP*.

### 1.5.2 Mental health in immigration detention

Between March and October 2001, the Department of Immigration reported 264 cases of self-harm in immigration detention facilities. [60] 6.2% of Christmas Island detainee injuries were due to self-harm between 2005 and 2006.[61] Such high instances of self-harm are indicative of Australia being in breach of *SMRTP* provisions requiring medical oversight of detention facilities, as well as treaty provisions relating to the right to health. A culture of hunger strikes, self-harm and rioting in immigration detention facilities demonstrates that conditions there are not conducive to a life of dignity as required by the *ICCPR, CAT* and *SMRTP*.

Asylum seeker health problems, particularly mental health conditions, increase correlatively with time spent in detention.[62] The Commonwealth and Immigration Ombudsman has received several complaints concerning long waiting times and access to health services amounting to a breach of human rights obligations.[63]

2011 Australian of the Year Professor Patrick McGorry, renowned mental health expert, expressed his dismay at the 'reprehensible' conditions of detention centres, noting that they are 'factories' for mental health problems.[64] Moreover, the Australian Human Rights Commissioner recognised that indefinite and prolonged detention 'has a significant impact on the mental health of detainees, regardless of the delivery of mental health services', noting that it is not possible to address these problems whilst a person is still in detention.[65]

### 1.5.3 Recommendation

**We submit** that for the government to effectively deal with breaches of the right to health, immigration detention must be removed in line with the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*.

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[60] Submission by the International Coalition on Detention of Refugees, Asylum Seekers and Migrants to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia, Submission No. 22 to Senate Inquiry into *Migration Amendment (Immigration Detention Reform) Bill 2009* [10].

[61] Green, J. P. & Eagar, K., "The health of people in Australian immigration detention centres," *Medical Journal of Australia,* Vol. 192, No. 2, 2010, Box 7.

[62] Green, J. P. & Eagar, K., Ibid, Box 6.

[63] Commonwealth Immigration Ombudsman, *Christmas Island immigration detention facilities: Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island, October 2008 to September 2010*, (Report No. 02/2011) February 2011 [§2.18].

[64] Vasek, L., "McGorry attacks 'reprehensible' detention, *The Australian*, January 10, 2011, available online at: http://www.theaustralian.com.au/news/mcgorry-attacks-reprehensible-detention/story-e6frg6n6-1225984685389

[65] *Submission of the Human Rights and Equal Opportunity Commission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, 4 August 2008 [§190].

## 1.6 Detention of minors

***Convention on the Rights of the Child***

**Article 22(1):** States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

**Article 37(b)**: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Australia was an original signatory to the *Convention on the Rights of the Child* (*CRC*)[66] in 1990, and ratified the Treaty in the same year. Having recognised the special vulnerability of asylum-seeking children, the Government announced that children and, if possible, their families, would not be detained in immigration detention centres.[67]

Detention of minors must be proportionate to the gravity of the offence committed. Institutionalisation is to be for the minimum necessary period, and all possible measures must be taken to avoid unnecessary delays.[68]

The juvenile justice system should promote physical and mental wellbeing of detainees.[69] Numerous instances of riots, hunger strikes and self-harm has meant children in immigration detention have been exposed to a higher level of violence and distress than they would have been in the general community.[70] Combined with a high rate of pre-existing trauma upon entry to an immigration detention facility,[71] this has led to increased participation of children in acts of self-harm and violence over time, in turn exposing those children to heightened risks of psychological as well as physical harm.[72] Neglecting to protect children from all forms of physical and

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[66] *Convention on the Rights of the Child*, UNTS Vol. 1577, p. 3, Adopted at New York, 20 November 1989, entry into force 2 September 1990.
[67] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law, 29 July 2008, [7].
[68] Articles 5, 19, 20: *UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, Adopted by UN General Assembly Resolution 40/33 of 29 November 1985.
[69] Annex I, Article 1, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules)*, A/RES/45/113, 68th Plenary Meeting, 14 December 1990.
[70] Human Rights and Equal Opportunities Commission (HREOC), *National Inquiry into Children in Immigration Detention*, April 2004, [297].
[71] HREOC *National Inquiry into Children in Immigration Detention*, [429].
[72] HREOC *National Inquiry into Children in Immigration Detention*, [298, 317].

mental violence contravenes Article 19(1) of the *CRC*.[73] Australia's failure to implement repeated recommendations by mental health professionals regarding children in immigration detention amounts to cruel, inhumane and degrading treatment of those children.[74]

92.8% of children in immigration detention between 1999 and 2002 were found to be refugees, and 96.7% of unaccompanied minor detainees were granted refugee status in the same period.[75] In the context of such high acceptance rates, it would be difficult for Australia to maintain the systematic and automatic detention of minors in immigration detention facilities without continuing to breach international laws relating to arbitrary and inhumane detention of minors.

## 1.7 Conclusions on conformity with international law

Australia is currently in breach of the Refugee Convention and the ICCPR in mandatorily detaining asylum seekers for the reason of their method of travel, for an unspecified time and without recourse to prompt judicial or administrative review. Indeed, the Government itself came to this conclusion in 2008.[76] Australia is also in breach of the *ICESCR, Refugee Convention, SMRTP* and *World Health Organisation* norms by failing to provide adequate access to health facilities.

**We submit** that the *Migration Amendment (Mandatory Detention and Procedural Fairness) Bill's* proposed changes would go a long way to fulfilling Australia's obligations under the *Refugee Convention*, *ICCPR*, *ICESCR, CRC* and *SMRTP*.

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[73] HREOC *National Inquiry into Children in Immigration Detention*, [340].
[74] HREOC *National Inquiry into Children in Immigration Detention,* Major finding 2 [850].
[75] HREOC *National Inquiry into Children in Immigration Detention*, [66, 71].
[76] Senator Chris Evans, 'New Directions in Detention', [8].

# Chapter 2:
# Amendments Relating to the Mandatory and Indefinite Nature of Immigration Detention in Australia

Australia's immigration regime mandates the detention of 'unlawful non-citizens'. This power is exercised in relation to individuals that are often in vulnerable situations and is not subject to substantive regulation. The legislative framework does not prescribe grounds for which a person may be detained, the permissible timeframe for detention or that individuals may apply to have their detainment reviewed. Consequently, immigration detention in Australia is mandatory, potentially indefinite and not subject to judicial review.

We support the spirit and intent of the legal reforms put forward by the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* regarding the mandatory and potentially indefinite and long-term nature of detention in Australia, as it seeks to bring Australia in line with its international obligations. This shift is consistent with Australia's obligations under international law, including the relevant provisions under the *Refugee Convention*, *International Covenant on Civil and Political Rights* and the *Convention Against Torture*,[1] as outlined Chapter 1, as well as the UNHCR's non-binding but authoritative statements on immigration detention.[2] It is also breaches Australian common law, democratic and constitutional principles.

## 2.1 Why does Australia persist with mandatory and potentially indefinite immigration detention?

The Australian government has traditionally sought to justify its particular manifestation of immigration detention by referring to three factors. The first is that detention in Australia, as submitted by Australia to the Human Rights Council, is "administrative in nature and is not used for punitive or correctional purposes."[3] However, the very nature of immigration detention, irrespective of its intended purpose, becomes punitive when asylum-seekers are mandatorily detained for a lengthy or indefinite period without any reason other than administrative purposes. Furthermore, the UN Special Rapporteur for the Human Rights of Migrants has stressed that "detention is a tool that characterises criminal law as opposed to administrative law, which, by nature, should resort to alternative interim measures to detention."[4]

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[1] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into 26 June 1987); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

[2] UNHCR Executive Committee Conclusion 44 (XXXVII) 1986; UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999).

[3] UN Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1 Australia*, 10th sess, 137, UN Doc A/HRC/WG.6/10/AUS/1 (5 November 2010).

[4] J Bustamante, *Human Rights of Migrants: Report of the Special Rapporteur on the Human Rights of Migants*, UN GA, 65th sess, 9, UN Doc A/65/222 (3 August 2010).

Secondly, the government asserts that immigration detention is in the interests of national security and public order. The Department of Immigration and Citizenship has recently stated that, "the government considers mandatory immigration detention an essential component of strong border control."[5] The Australian government alludes to the necessity of strong and even harsh measures to act as a deterrent for irregular migration and to discourage the criminal activity of people smuggling. Edwards points to the fact that there is no empirical evidence available to support the false, long-standing belief that the threat of detainment deters asylum-seekers because despite increasingly harsh government policies, global migration statistics are increasing.[6] The dominant idea of push-pull factors represent a misunderstanding of asylum-seeker motivation, particularly in the case of refugees. As Edwards explains, "threats to life or freedom in an individual's country of origin are likely to be a greater push factor than any disincentive created by detention policies."[7]

The third factor in government rhetoric is the risk of non-compliance of asylum-seekers that are let out into the community pending decisions. However, a recent study has indicated that less than 10% of asylum seekers breach their conditions of release.[8] This is supported by the findings of Field and Edwards that "asylum seekers very rarely need to be detained, or indeed restricted in their movements, prior to a final rejection of their claim or prior to the point at which their removal becomes a practical reality."[9]Furthermore, if asylum seekers are treated with respect and human dignity, they are far more likely to have a positive attitude towards Australian society and authorities once released into the community.

It is therefore clear that there is a growing body of literature and evidence that challenges the purported purposes and effectiveness of detention, as espoused by the Australian government. There are, in addition to the inaccuracy of current motivations and rhetoric in favour of mandatory detention, other reasons that challenge the current manifestation of detention as mandatory and potentially indefinite in Australia. Firstly, it breaches Australia's obligations under international law. Secondly, the development and maintenance of immigration detention facilities is a very costly affair. Thirdly, it has a detrimental impact on the mental health and well-being of individuals subject to immigration detention, particularly those, who have already suffered traumatic ordeals. In light of these criticisms, it is pertinent that Australia seeks alternatives to Australia's system of immigration detention.

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[5] Department of Immigration and Citizenship, *Response to the 2011 Australian Human Rights Commission Statement on Immigration Detention at Villawood* (2011) Australian Human Rights Commission < http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood_response.html> at 27 May 2011.

[6] 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*, UNHCR, Legal and Protection Policy Series, iii, UN Doc PPLA/2011/01.Rev.1 (April 2011).

[7] Ibid.

[8] Ibid.

[9] O. Fields and A. Edwards, *Study on Alternatives to Detention*, UNHCR, Legal and Protection Policy Series, 50, UN Doc POLAS/2006/03 (2006).

## 2.2 Mandatory Nature of Detention

### 2.2.1 Current framework

Australia's current detention model is mandatory.[10] Detention is the default presumptive means of dealing with 'unlawful non-citizens' as outlined in s 189 of the Migration Act. In the Australian context, detention is clearly the rule, rather than the exception.

The practical implications of Australia's system of mandatory detention is that irrespective of individual circumstances, all people deemed to be 'unlawful non-citizens', that is, those who are not a citizen and do not hold a valid visa, must be detained. [11] This means that different groups of people, who do not deserve to be subject to mandatory detention, such as legitimate and genuine refugees, whose traumatic circumstances of flight prevent them from obtaining proper legal documentation, will immediately be detained. Such persons are subject to re-traumatisation and punishment prior to the determination of their asylum status. It must be noted that according to UNHCR, a refugee "does not become a refugee because of recognition, but is recognised because he is a refugee."[12] A concerning outcome of mandatory detention in Australia is the immediate detention of individuals for no real reason. This is exemplified by the highly publicised immigration detention of Cornelia Rau, whereby she was detained for 6 months, which is an excessive amount of time for someone who "was not a prisoner, had done no wrong, and was put there simply for administrative convenience."[13] This particular case, alongside others, has received widespread international condemnation. Mandatory detention in conjunction with no independent judicial review of decisions to detain, which will be discussed further below, creates a concerning situation whereby asylum- seekers may be held in detention for indefinite and lengthy periods for no real reason outside of administrative processing. Administrative processing that bypasses a certain period of time is unjustifiable and arbitrary.

### 2.2.2 Proposed amendment

The Bill seeks to remedy the mandatory situation of detention in Australia by removing 'must' detain in subsections 42(4) and 189 (1) (2) and replacing it with 'may' detain. The reason for these minor changes is to ensure that "detention is the exception, not the rule." [14]

Whilst we applaud the spirit of the proposed reform, in practice, it is clear that the replacement of 'must' for 'may' will not provide the necessary presumption against detention and exhaustive criteria of necessary exceptions for the detainment of asylum-seekers in order to avoid detention that is arbitrary. Decisions to detain asylum-seekers will be in violation of Article 9(1) of the *ICCPR*[15] if they are found to be arbitrary. Arbitrariness in the context of Article 9(1) has been understood expansively by the Human Rights

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[10] *Migration Act 1958* (Cth), s 189

[11] *Migration Act 1958* (Cth), s14, s 189

[12] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para 28, UN Doc HCR/IP/4/Eng/REV.1 (January 1992).

[13] M. Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (July 2005) 12.

[14] Explanatory Memorandum, Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 (Cth) 1.

[15] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Committee as not being merely against the law, but as including elements of "inappropriateness, injustice and lack of predictability."[16] To the extent that States may be able to exercise their sovereign right to employ administrative detention, they are also constrained by the principle of proportionality, which has been established in UN treaty body communications as well as in the jurisprudence of the European Court of Human Rights.[17] The principle of proportionality holds that "detention should only be used to the limited extent necessary to facilitate the administrative goals provided for in immigration law."[18] Without clear criteria for mandatory detention, despite the allowance of mandatory detention under s189, it is highly likely that the mandatory detainment of asylum-seekers will be arbitrary and violate the principle of proportionality.

Additionally, the UNHCR in Executive Committee Conclusion 44 and Guidelines on Detention Criteria and Standards affirms the widely held international standard that detention should be the exception and not the rule. A presumption against detention and a list of exhaustive and necessary exceptions is required in legislation to avoid this. The UNHCR outlines the necessary exceptions as including identity verification, determination of the elements on which the claim to refugee status is based, in cases where travel documents have been destroyed or are fraudulent and to protect national security or public order.[19] Even within the skeletal and arguably outdated framework of refugee protection offered by the 1951 Refugee Convention,[20] it is argued by eminent legal scholars Goodwin Gill and McAdam that the drafters intended that after an investigatory period of detention, further detention would "need to be justified as necessary under Article 31(2) or exceptional under Article 9."[21]

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[16] UN Human Rights Committee, *Van Alphen v The Netherlands: Communication No. 305/1988*, 5.8, (23 July 1990).

[17] UN Human Rights Committee, *A v Australia: Communication No. 560/1993*, 59th sess, 9.2, UN Doc CCPR/C/59/D/560/1993 (30 April 1997); Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (2010) 301-305.

[18] Michael Flynn, 'Immigration Detention and Proportionality' (Global Detention Project Working Paper No. 4, February 2011) 10.

[19] UNHCR Executive Committee Conclusion 44 (XXXVII) 1986; UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 44.

[20] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

[21] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) 462.

### 2.2.3 Recommendation

For the reasons outlined above, we submit that although the replacement of 'must' for 'may' is consistent with the spirit of international standards, in practice, it will not prevent the arbitrary detainment of asylum seekers. Instead, for the purpose of ensuring immigration detention in Australia is the exception and not the rule, we recommend that s 189 of the *Migration Act* is repealed and the following section or similar section is inserted into the *Migration Act*:

**Presumption against detention of unlawful non-citizens**

(1) The Parliament affirms that there is a presumption against the detainment of unlawful non-citizens.
(2) An officer may detain an unlawful non-citizen on one of the following exhaustive and exceptional grounds:
(a) the unlawful non-citizen requires health, identity or security checks; or
(b) the unlawful non-citizen presents an unacceptable risk to the community; or
(c) the unlawful non-citizen has repeatedly refused to comply with their visa conditions.

The drafting of this recommendation is based not just upon UNHCR statements and guidelines that are consistent with international human rights standards, but also upon Australian government policy. In 2008, the Labor government introduced seven new values that would underpin Australia's immigration detention policy.[22] We commend the Australian government for taking this positive step, however, due to the non-binding nature of these new values, we call for the incorporation of these principles into the *Migration Act*. The formulation of the section above incorporates the second 'key immigration value' of the government's New Directions policy that seeks to restrict detention to three main groups; all unauthorised arrivals for the purpose of health, identity and security checks, people who present an unacceptable risk to the community and people who have repeatedly breached their visas.[23] In his speech, Chris Evans stated that if the checks in the first group are successfully completed then "continued detention while immigration status is resolved is unwarranted", pointing to the need for an alternative set-up for asylum-seekers waiting for status determination and visa application outcomes or appeals, that have cleared health, identity and security checks.[24] Furthermore, he revealed that "a departmental decision-maker will have to justify why a person should be detained against these values that presume that that person should be in the community," which is in line with the design of the proposed section above. Our recommendation would ensure the delivery of what the government has already promised.

We acknowledge that immigration detention may be legitimate for a limited period of time, for a necessary purpose. However, we submit that 'unlawful non-citizens' should be considered on a case by case basis on their individual merits and thereby only held in immigration detention centre if necessary, under the prescribed criteria outlined above.

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[22] Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (Speech delivered at the Australian National University, 29th July 2008).
[23] Ibid.
[24] Ibid.

## 2.3 Indefinite Nature of Detention

### 2.3.1 Current framework

Australia's mandatory detention system permits long-term and indefinite detention. The *Migration Act* states that 'unlawful non-citizens' must be detained until a visa is granted or the person is removed or deported.[25] The decision to detain a person or the period of detention after mandatory detainment, pending the limited grounds for release in s 196(1), are not subject to judicial review.[26] The Minister has the power to grant a visa to a person in detention, if it is in the public interest,[27] however the Minister is subject to no duty to consider whether to exercise the power, even if requested to do so.[28] This power is an inadequate compensation for the lack of review mechanisms due to its highly discretionary and subjective nature. Currently 65.5% of detainees have been held in immigration detention for over 6 months, with a significant 20.6% held for over 1 year.[29] The Australian Human Rights Commission (AHRC) has stated that delays, lack of transparency and inefficiency with Australian Security Intelligence Organisation (ASIO) security assessments and refugee status assessment processes have unnecessarily increased detention duration.[30]

The practical implications of this legislative framework is that asylum-seekers can be subject to long-term or indefinite detention without judicial review. Australia's longest serving immigration detainee, Peter Qasim, spent over 6 years in immigration detention due to failure to prove his nationality.[31]The Commonwealth Ombudsman's immigration reports reveal than an Indonesian man has been detained in immigration detention for over three years because the establishment of his identity remains outstanding and the inability to determine whether he would present a risk to the community if released into community detention.[32] In his report, the Ombudsman recommended that DIAC "reassesses the appropriateness of Mr.X's ongoing detention in an IDC taking into account the adverse impact on his mental health and well-being."[33] The indefinite duration of detention is also demonstrated by the Australian High Court case of *Al-Kateb v Godwin*.[34] Al-Kateb was a stateless Palestinian, who arrived in Australia as an 'unlawful non-citizen' and was detained. His visa application was denied with no prospect of being removal from Australia. The majority held that indefinite detention of unsuccessful asylum seekers, who could not be removed to another country, was constitutional, the sentiment of which is now reflected in the *Migration Act*.[35]

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[25] *Migration Act 1958* (Cth), s 196(1).
[26] *Migration Act 1958* (Cth), s 196 (3).
[27] *Migration Act 1958* (Cth), s 195A (2).
[28] *Migration Act 1958* (Cth), s 195A (4).
[29] Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (6 May 2011).
[30] Australian Human Rights Commission, *2011 Immigration detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood* (2011) 9-11.
[31] 'Quasim's grim record-beating spell to end in days', *The Sydney Morning Herald* (Sydney), 22 June 2005.
[32] Commonwealth Ombudsman Alan Asher, *Immigration Report 629/11* (11th May 2011) 16.
[33] Ibid 18.
[34] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[35] *Migration Act 1958* (Cth), s 196.

Alongside, long-term and potentially indefinite detention, there are associated mental health and self-harm concerns. The Australian Human Rights Commission has attributed the recent violence, unrest and protests in immigration detention centres around Australia to the large numbers of people that are being held in detention for long periods of time.[36] Commission President Catherine Branson QC has stated that "What we saw at Villawood was the result of the system of mandatory and indefinite detention, where people can see no end in sight because there is no set time limit on the period a person can be held in detention."[37]

### 2.3.2 Proposed amendment

The Bill aims to bring an end to long-term and indefinite detention in Australia. It does this through the insertion of the proposed s 195B, s 195C and the repeal and substitution of s 196(3). These provisions would ensure that "where detention is required, specific time limits on the duration are in place, of no longer than 30 days, unless a court order outlining the reasons for continued detention is agreed to."[38]

This legislative reform is consistent with Australia's international obligations. Liberty of the person is fundamental to international human rights as well as Australian common law and democratic and constitutional principles. The liberty and security of the person are protected by Article 9 of the *ICCPR,*[39] which is applicable to "immigration control."[40] In *A v Australia* it was held by the UN Human Rights Committee that Australia's prolonged detention of A pending the determination of his refugee status was arbitrary within the meaning of Art 9(1). This was because:

> … 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.[41]

This finding is in line with the recommendation outlined above that there must be a presumption against immigration detention and any exceptions must be "necessary" according to a set of specifically legislated grounds. The Committee also found that the impossibility to challenge the lawfulness of the detention was in violation of Art 9(4).This

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[36] Australian Human Rights Commission, above n 26, 3. This unrest has included suicide, suicide attempts, serious self-harm including lip-sewing and fasting, riots, protests, fires, break-outs and the use of force by the AFP against people in detention on Christmas Island.

[37] *Potential for suicide and self-harm is a real concern* (26 May 2011) Australian Human Rights Commission <http://www.hreoc.gov.au/about/media/news/2011/44_11.html> at 27 May 2011.

[38] Explanatory Memorandum, Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 (Cth) 1.

[39] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

[40] UN Human Rights Committee, *General Comment 8: Article 9: Right to Liberty and Security of Persons*, 16th sess, 95, UN Doc A/37/40 (1982).

[41] UN Human Rights Committee, *A v Australia: Communication No. 560/1993*, 59th sess, 9.4, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

was because in the Australian regime, the Court could only look at the lawfulness of detention under domestic law and if this was satisfied, the Court had no power to review the continued detention of an individual and to order his/her release. The Committee stated that "lawfulness of detention under Art 9(4)...is not limited to mere compliance of the detention with domestic law."[42] This means that the court should also be empowered to order release, when detention is incompatible with Art 9(1). It is clear that Australia is in breach of its international obligations, as there is no access to such review, as demonstrated by s 196(3) of the *Migration Act* and the High Court finding in *Al-Kateb*. Many commentators, including Curtin, have argued in relation to *Al-Kateb* findings that in the international law context "it is clear that detention for the 'purpose' of removal where there is no prospect of removal in the reasonably foreseeable future is arbitrary in the sense intended by art 9(1) of the ICCPR."[43]

Furthermore, under New Directions, the Australian government has acknowledged that "detention that is indefinite or otherwise arbitrary is not acceptable."[44] The government committed in this instance, to ensuring that detention was subject to regular review. They have instituted review mechanisms, including the review by a DIAC officer every 3 months and review by the Commonwealth Ombudsman every 6 months. Whilst these are positive steps, they are not sufficient to prevent arbitrary and indefinite detention. As the AHRC has pointed out, "the DIAC reviews are not conducted by an independent body and the Ombudsman is not able to enforce his recommendations."[45]

### 2.3.3 Recommendations

Whilst the legislative reforms to end long-term and indefinite detention are in line with international standards, we submit that these reforms do not address the root causes of the problem and that there are more practical and efficient ways of achieving the same outcome. Rather than impose a 30 day time limits, regulated by a magistrate, it is submitted that the focus should be on increasing the transparency and efficiency of DIAC processing, allowing for the judicial review of immigration detention and pushing for greater use of alternatives to immigration detention such as community detention or the granting of bridging visas. The following recommendations are in line with the New Directions policy, which asserts that immigration detention is to be used "as a last resort" so that people are detained in the least restrictive environment appropriate to their circumstances.[46]To address the issue of long-term and potentially indefinite detention in Australia, we submit the following recommendations:

[42] Ibid 9.5.
[43] Juliet Curtin, 'Never Say Never: Al-Kateb v Godwin' (2005) 27 *Sydney Law Review* 355, 366 (p355 – 370).
[44] Evans, above n 19.
[45] Australian Human Rights Commission, above n31, 8.
[46] Evans, above n 19.

**Recommendation 1:** The establishment of an independent judicial review mechanism of the decision to detain as well as the length and reasons for continued detention. This should include the power to order the removal of an applicant from detention. This will necessitate the repeal of s196 (3) of the *Migration Act*.

**Recommendation 2**: The development of guidelines, including content and timeframe, as to what constitutes, a health check, an identity check and a security check.

**Recommendation 3:** The definition of what constitutes an unacceptable risk to the community.

In order to achieve this, it is recommended that the Joint Standing Committee on Migration's 2008 report on the Criteria for release from immigration detention, in particular its recommendations, are consulted.[47] It is also important to acknowledge the Australian Human Rights Commission's useful recommendation that "the security check should not be interpreted as requiring a full ASIO security assessment...rather, the security check should consist of a summary assessment of whether an individual would pose an unacceptable risk."[48]

**Recommendation 4:** The expansion of the use of community detention and bridging visa alternatives to immigration detention.

1. Legislate to the effect that beyond the categories deemed necessary for immigration detention, a person must be released into the community on a bridging visa or to be placed in community detention. This includes when the purpose of the detention has come to an end i.e. the completion of identity, health and security checks.
2. Reform the bridging visa framework to ensure that those released into the community have access to regular and sustaining income, health care, legal and case work support, counselling and mental health services if required and appropriate housing.

The government must be congratulated on the introduction of community detention in 2005, which allows detainees to live unsupervised in the community with certain reporting requirements.[49] Out of the 6715 people in immigration detention, there are currently 562 are being held in community detention.[50]The Minister under s197AB of the Migration Act may make a 'residence determination' to the effect that specified people are able to reside in a place instead of being detained in an immigration detention centre, in other words, community detention. As captured in the recommendation above, the place of community detention in our immigration system needs to be expanded, so that people who no longer fall into a category of people who may be detained in immigration detention must be moved into community detention.

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[47] Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning – Criteria for release from immigration detention* (2008).
[48] Australian Human Rights Commission, above n31, 29.
[49] Joint Standing Committee on Migration, *Immigration detention in Australia: Community-based alternatives to detention* (2009) 22.
[50] Department of Immigration and Citizenship, above n 25.

The applicability of bridging visa scheme should be increased to those being held in immigration detention, as "most people on bridging visas will have entered Australia on a valid visa."[51] There are only 3 classes of visa available to people in immigration detention; bridging visa E, R and F.[52] An important observation on the difference between community detention and bridging visas was made by the Joint Standing Committee on Migration:

> those in alternative forms of detention, such as community detention or IRH, have either an allowance to meet expenses or have all food and utilities provided for in the facility...however income assessment, health care and case worker support for those on bridging visas (as an alternative to detention) occurs in a more ad hoc fashion.[53]

In order that bridging visas can be a viable option for asylum-seekers, the government must ensure that they are accompanied by strong support systems to address asylum-seeker needs.

**Recommendation 5:** The power to make residence determinations under s 197AB of the *Migration Act* should not be limited to ministerial discretion and it is recommended that this power is extended to officers of the Department of Immigration and Citizenship.

It is important for the Australian government to be aware the current system of immigration detention is not the only way of maintaining strong border control. This is illustrated by more humane immigration systems utilised in other countries. We would point to the Swedish model as evidence of this. Sweden's current detention model is of particular relevance to Australia because it was born as a result of changes made to counteract growing problems in detention centres, such as riots and self-harm, much like the problems Australia is currently experiencing. [54] Furthermore the Swedish model encapsulates many facets of our proposed recommendations in relation to mandatory and indefinite immigration detention in Australia, such as, criteria for administrative detention, an independent body to review decisions to detain as well as the continuation of detention and legal limits on the length of detention.[55] Perhaps, one of the most interesting elements of the Swedish model, is that the Swedish Migration Board, responsible for immigration detention orders, is part of the Ministry of Justice. Under the system, Swedish police can detain suspected irregular non-citizens, but must report the detention to the Migration Board, who determines, whether such measures should be continued. Furthermore, government ministries may overturn detention orders, but cannot issue them. We also would like to refer you to the recently released International Detention Coalition CAP model, as a reference to a system that prevents unnecessary immigration detention, in line with our recommendations.[56]

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[51] Joint Standing Committee on Migration, above n 46, 25.
[52] Ibid 26.
[53] Ibid 35-36.
[54] Michael Flynn and Cecilia Cannon, 'The Privatisation of Immigration Detention: Towards a Global View' (A Global Detention Project Working Paper, September 2009) 12.
[55] Global Detention Project, *Sweden Detention Profile* (2009) <http://www.globaldetentionproject.org/countries/europe/sweden/introduction.html> at 28 May 2011.
[56] International Detention Coalition, *There are Alternatives: A handbook for preventing unnecessary immigration detention* (2011).

# Chapter 3:
# Amendments repealing excised offshore places provisions

## 3.1 Background

The Australian Government in September 2001 introduced the *Migration Amendment (Excision from Migration Zone) Act 2001* and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* as part of the broader 'Pacific Solution' that was established in response to the '*Tampa* crisis.' The amendment deemed certain areas of Australia (such as Christmas Island) to be excluded from Australia's migration zone. Therefore, any person entering the excised zone without a valid visa is deemed to be an 'offshore entry person,'[1] and may not make a valid visa application by virtue of section 46A of the *Migration Act* unless the minister personally considers it to be in the public interest to allow the application. Section 46A of the *Migration Act* is set out below:

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:
  (a) is in Australia; and
  (b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

(3) The power under subsection (2) may only be exercised by the Minister personally.

In 2008 one of the first agenda items for the newly elected Labor Government led by Kevin Rudd, was to declare an end to the 'Pacific solution' by ceasing the offshore processing that was occurring on Nauru and Manus Island.[2] However, the Labor Government's attempt to call an end to the 'Pacific solution' is largely superficial demonstrated through the government's failure to revoke the offshore excision legislation. Michael White notes that the new approach "…did not fundamentally alter Australia's previous immigration policy and many features of the Pacific Solution remained."[3] The Australian Government has retained the provisions so as to take all irregular maritime arrivals to Christmas Island for offshore processing.

On the 11 November 2010, the High Court in *Plaintiff M61/2010E v Commonwealth of Australia & Ors and Palintiff M69 of 2010 v Commonwealth of Australia & Ors*[4] (hereon *M61*) raised doubt over the validity of the offshore excision. Because of the decision, since 1 March 2011 the Australian Government has now replaced the previous non-statutory Refugee Status Assessment (RSA) process with a different non-statutory process known as the Protection Obligations Determination (POD) process.[5] The decision in *M61* and the offshore processes will be considered in more detail below.

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[1] *Migration Act 1958* (Cth) s 5(1).
[2] The Howard Government was processing asylum seekers offshore in Nauru by virtue of s 198A of the *Migration Act 1958* (Cth).
[3] Michael White, *Australian Offshore Laws,* (2009) 154; see also s198A *Migration Act 1958* (Cth).
[4] [2010] HCA 41.
[5] DIAC, *Fact Sheet 75- Processing Irregular Maritime Arrivals* <http://www.immi.gov.au/media/fact-sheets/75processing-irregular-maritime-arrivals.htm> at 3 May 2011.

## 3.2 Compliance with International Law

**We submit** that Australia's excised offshore places do not adhere to the basic principles of *non-refoulement* and the non-penalisation clause in the *Refugee Convention* and furthermore it breaches principles contained within the ICCPR.

### 3.2.1 Article 33(1) Refugee Convention - Principle of non-refoulement

As previously discussed at [**1.1**], the principle of *non-refoulement* is a well-founded principle of customary International Law and has the status of *jus cogens*.[6] *Non-refoulement* applies irrespective of whether the asylum seeker arrived at the frontier unlawfully.[7] As Goodwin-Gill and McAdam note, "…although *non-refoulement* is not synonymous with a right to admission, the principle of non-rejection at the frontier implies at least temporary admission to determine an individual's status."[8] Although one may argue that an offshore process is still determining the asylum seekers' claims, adherence to *non-refoulement* requires "access to fair and effective procedures for determining status and protection needs."[9]

The offshore processing arrangements are different to the onshore ones and are arguably discriminatory since offshore asylum seekers' access to rights, such as lodging an application for a protection visa, are limited and take place under opaque and non-reviewable decisions. In addition, the effectiveness of the offshore determination procedures is questionable since the High Court decision in November 2010.[10] Australia is at risk of directly or indirectly *refouling* people whose claims have not been processed adequately under the separate offshore processing arrangement. Indeed "…experience unfortunately confirms that errors of *refoulement* are more likely when procedural shortcuts are taken in zones of restricted guarantees and limited access."[11] Although, Goodwin-Gill and McAdam note that it is not so much the different status that is the problem, but one needs to scrutinise the treatment that is given which is important[12]. As the *M61* discussion will show later, the treatment that is accorded is in fact problematic.

Therefore, **we submit** that the current offshore processing regime does not comply with Article 33(1) of the *Refugee Convention*.

### 3.2.2 Article 31 of the *Refugee Convention* – the *non-penalization* clause

Article 31 stipulates that contracting states shall not penalise asylum seekers who enter illegally where they are coming directly from a territory where their life or freedom was threatened. The Australian Human Rights Commission (AHRC) has repeatedly submitted

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[6] Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, 2007) 212

[7] *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 (16 November 2000) [136] (Gummow J).

[8] Goodwin-Gill, above n 6, 215.

[9] UNHCR Executive Committee (ExCom) Conclusion No. 99 (LV) "Conclusions adopted by the Executive Committee on the International Protection of Refugees," 55th Session, 2004.

[10] *Plaintiff M61/2010E v Commonwealth of Australia & Ors and Palintiff M69 of 2010 v Commonwealth of Australia & Ors* [2010] HCA 41.

[11] Goodwin-Gill, above n 6, 255.

[12] Ibid 254.

that the two-tiered system undermines Australia's obligations under the *Refugee Convention* and is in breach of Article 31.[13] The non-statutory processes currently taking place on Christmas Island are arguably punishing refugees since they are processed through non-statutory processes that are guided by non-transparent policy guidelines and they are not able to have their denied claims reviewed by the RRT or AAT. Moreover, unlike onshore applicants they are barred from lodging a valid protection visa unless the Minister uses his/her personal discretion to lift the bar.

In addition to 'offshore entry persons' being penalised by being afforded less rights compared to their onshore counterparts, they are often aligned with criminals because they have usually used people smugglers to enter Australia; so they suffer an 'imputation of double criminality.'[14] Therefore, their offshore entry status is tainted by viewing them as criminals. The effect of this penalisation is particularly unfair when judged against the fact that most of the irregular maritime arrivals have been assessed to be refugees. About 70-97% in the last decade have been processed as refugees.[15]

**We therefore submit** that the two-tier system does not adhere to Article 31 of the *Refugee Convention* as it penalises irregular maritime arrivals.

### 3.2.3 Provisions in the ICCPR

As previously mentioned at [**1.2.1]** arbitrariness in the context of Article 9(1) has been understood expansively by the Human Rights Committee as not being merely against the law, but as including elements of "inappropriateness, injustice and lack of predictability."[16] Applying this meaning, the ministerial power afforded in s46A is an arbitrary power. It is unjust and unpredictable as the power is non-compellable and involves a personal discretion with no possibility of appeal. Michael White finds that "a disturbing aspect of the Act is the amount of power it gives personally to the 'minister.'"[17] In addition, Article 26 of the ICCPR provides that 'all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law', is a non-discrimination provision that applies broadly to all treaties, so that it would impact on how one reads the *Refugee Convention*.[18] As such, the excision provision that treats offshore asylum seekers differently from onshore asylum seekers is discriminatory and is not within the spirit of Article 26 of the ICCPR.

We therefore submit that the arbitrary power given to the minister and the discriminatory nature of the two tier system offends Articles 9 and Article 26 of the ICCPR.

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[13] Australian Human Rights Commission, Immigration Detention and offshore processing on Christmas Island (2009) <http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html> at 15 May 2011; Australian Human Rights Commission, Immigration detention on Christmas Island (2010) <http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.html> at 15 May 2011.

[14] Goodwin-Gill, above n 6, 385.

[15] Janet Phillips, *Background Note: Asylum seekers and refugees: what are the facts?* Parliament of Australia, Department of Parliamentary Services, 10 May 2010.

[16] UN Human Rights Committee, *Van Alphen v The Netherlands: Communication No. 305/1988*, 5.8, (23 July 1990).

[17] White, above, n 3, 150.

[18] James Hathaway, *The Rights of Refugees Under International Law* (2005) 260.

### 3.3 The High Court Decision in *M61*

We believe that the decision of the High Court in *M61* makes the excised migration and the offshore processing scheme largely redundant. Below is a brief overview of *M61.*

Plaintiffs M61 and M69 were two Sri Lankan Tamil asylum seekers under the offshore processing arrangements who were deemed to be people that protection obligations were not owed to. This determination was made using the RSA process and the Independent Merits Review (IMR) available at the time. The RSA process is carried out by an officer from DIAC while the IMR process is conducted by an independent private company. The claimants instituted proceedings in the original jurisdiction of the High Court arguing that they were not accorded procedural fairness, that the review process contained errors of law and s46A was unconstitutional.

The unanimous High Court decision made a declaration that the RSA and IMR procedures must be conducted according to law and with procedural fairness. It did however, reject the claim that s46A was unconstitutional.

The Australian Government argued that since s46A was a discretionary power to confer a right, procedural fairness was irrelevant because s46A was not prejudicing a right. But in fact, the court held that deciding whether or not to lift the bar under s46A directly impacted the claimants' rights because whether or not to exercise the power afforded under s46A impacted upon their detention and whether they could apply for a visa.[19] Therefore, the court held that the RSA and IMR procedures must adhere to common law procedural fairness. In doing so the court found that failing to give the claimants an opportunity to respond to adverse country information was a breach of procedural fairness. [20] The court also held that there was an error of law for not treating judicial decisions and provisions of the Migration Act as binding.[21]

Although, the High Court did not rule the offshore processing as unconstitutional, its decision does mean that the offshore processes must be conducted according to law and afford procedural fairness. Therefore, asylum seekers may now legally challenge procedural aspects of their case. Offshore processing is now subject to judicial review "as long as the status determination process is tied to the visa grant in some way, the judgement suggests that the process may be reviewable."[22] This defeats one of the main purposes for the excision zone which was to limit the offshore applicants' access to judicial review.[23] We now ask the question why impose a different processing system on a person when they can still access judicial review? We submit that streamlining the two onshore and offshore processes would make the decision-making easier for DIAC case officers and more cost effective, and would remove discriminatory consequences of the government's offshore processing policy.

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[19] *Plaintiff M61/2010E v Commonwealth of Australia & Ors and Palintiff M69 of 2010 v Commonwealth of Australia & Ors* [2010] HCA 41, [76].
[20] Ibid [69].
[21] Ibid [88]- [89].
[22] Mary Crock and Daniel Ghezelbash 'Due process and rule of law as human rights: The High Court and the "offshore" processing of asylum seekers' (2011) 18 *Australian Journal of Administrative Law* 101, 113.
[23] *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) s 494AA.

Mary Crock and Daniel Ghezelbash also raise the argument that *M61* may in fact place offshore applicants in a better position than onshore applicants.[24] This is because the procedural fairness provisions in the Migration Act require that *relevant information* be presented to the applicant when it is "specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member."[25] This would appear to be a lesser threshold than the common law procedural fairness of providing adverse information. As Crock and Ghezelbash say, "this outcome once again illustrates the counterproductive nature of legislative attempts by successive governments to undermine various elements of the rule of law."[26] Streamlining the processes would ensure equality for both applicant groups.

It is important to note that the Minister for Immigration and Citizenship, the Hon Chris Bowen MP, announced on 7 January 2011 that the POD process will be the new offshore processing scheme to take place for all asylum seekers who arrive in the excision zone from 1 March 2011.[27] According to the information form provided by DIAC,[28] the POD process consists of two processes much like the previous RSA model. First there is a Protection Obligations Evaluation (POE) conducted by a departmental officer and an Independent Protection Assessment (IPA), which is conducted by an independent assessor. The difference under the new POD scheme is that asylum seekers who are found not to be owed protection obligations at the first POE stage will automatically be referred to the IPA stage; whereas previously denied asylum seekers had to independently lodge for an internal review with the IMA. Although, this may mean more efficient processing of asylum claims, it is hard to see how this new process ensures that the problems of *M61* are not revisited. It is concerning that 100 independent assessors will be pulled from the previous IMA setting into the new IPA review.[29]

Moreover, DIAC claims to have responded to *M61* by adjusting the new POD process "…to ensure that assessments are meeting procedural fairness requirements and are free from judicially reviewable error,"[30] however, the new guidelines like the previous guidelines are still not publicly available. In addition, the claimed procedurally fair guidelines are not being applied to asylum seekers who arrived before 1 March 2011. On 15 April 2011, there were 6216 people undergoing the old RSA processing.[31] In short, it is difficult to measure the success of the POD process given it is so recent, and at the time of writing this paper there is a current hold on the processing of recent asylum claims while the government secures the exchange deal with Malaysia. We do however, assert that the POD process does not seem too dissimilar from the previous process which was held to be an error of law and

[24] Crock, above n 22, 112.
[25] *Migration Act 1958* (Cth) s57(1)(b).
[26] Crock, above n 22, 112.
[27] Chris Bowen MP Minister for Immigration and Citizenship 'Government announces faster, fairer refugee assessment process' (Press Release, 7 January 2011)
[28] Department of Immigration and Australian Citizenship, Changes to refugee status determination Questions and Answers (2011) <http://www.immi.gov.au/visas/humanitarian/onshore/protection-obligations-determination.htm> at 13 May 2011.
[29] Ibid.
[30] Ibid.
[31] Department of Immigration and Australian Citizenship, *Immigration Detention Statistics Summary* (As at 15 April 2011) <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/ > at 18 April 2011.

procedurally unfair. We further submit that failure to remove the arbitrary power of the Minister to make a s46A decision undermines any positive steps made to bring judicial oversight to some aspects of the determination process.

We therefore submit that the need for different processing arrangements for offshore and onshore processing is obsolete since *M61,* and to ensure a fairer transparent system the processes should be streamlined.

### 3.4 The desired practical effect of the excision policy is not met

As previously mentioned in section 2.1, the harsh legislative policies that are largely justified as being deterrent measures, are in fact questionable. The increases in unlawful arrivals are a clear indication that the policies are not working. On the 15 April 2011, DIAC recorded 6588 irregular maritime arrivals in detention,[32] and in the 2009-2010 financial year there were 110 boat arrivals carrying 5609 people.[33] The DIAC annual report recorded that in the 2009-2010 period there was a 510.7 per cent increase in the total numbers of irregular maritime arrivals held in immigration detention compared to the previous year.[34] Khalid Koser sees the harsh deterrent measures as 'quick-fixes' which do not address the push factors.[35] Koser points to a number of factors to demonstrate that these sorts of deterrent measures do not work because there are other variables "...that are just as significant as government policy in determining the choice of destination for asylum seekers." [36] For example, he points to surveys which show that asylum seekers rarely know about the policies in the countries that they are fleeing to and there are other factors which drive asylum seekers to Australia, such as its geographical location and social networks that already exist. We agree with Koser's conclusion:

> *The Government and the Opposition should avoid a race to the bottom to see whose asylum policies can be the most restrictive. The High Court has found that they may be illegal. They are also expensive, they jeopardise Australia's reputation, as they probably won't stop the boats.*[37]

[32] Ibid.
[33] Janet Phillips and Harriet Spinks, *Social Policy Section Boat arrivals in Australia since 1976,* Parliamentary Library, 11 February 2011.
[34] Department of Immigration and Citizenship, *Annual Report 2009-2010*, Outcome 4, 194.
[35] Khalid Koser, 'Responding to Boat Arrivals in Australia: Time for a Reality Check' (2010) *Lowy Institute for International Policy* 1, 12.
[36] Ibid 8.
[37] Ibid 13.

## 3.5 Conclusion

Australia's excision policy is not novel, for example, Guantanamo Bay used to be an offshore processing centre for Haitian and Cuban refugees,[38] and France seeks to limit refugee claims by designating its airport as an International zone and not French soil. However, at Guantanamo Bay the US could not exclude the rule of law,[39] and France could not shirk its International obligations that have extraterritorial effect.[40] Although the policy is not novel, previous models have been fraught with difficulties and Australia's model is also problematic. As outlined above, the excision policy does not accord with basic principles of International law, such as the *non-refoulement* and *non-penalisation* clauses contained within the *Refugee Convention,* and breaches certain principles within the ICCPR for being discriminatory and the arbitrary nature of the minister's power. The excision policy is further complicated since the *M61* decision, which has raised significant doubt over the lawfulness of the offshore processing procedures and questions the necessity to maintain an excision zone since the offshore mechanisms are now exposed to judicial review. Lastly, as the figures demonstrate there is reason to question the deterrent element of the excision policy since the arrival of asylum seekers has significantly increased.

### 3.5.1 Recommendation

We recommend the Government implements Part 3 of the *Bill* that seeks to repeal the excised offshore provisions contained within the *Migration Act*. Doing so will remove the current distinction between asylum seekers arriving onshore and those arriving offshore, bringing legislation into line with enunciated policy and international law, and eliminating artificial barriers to access to justice.

[38] Crock, above n 22, 104.
[39] *Hamdi v Rumsfeld* 124 S Ct 2633 (2004); *Rasul v Bush* 123 S Ct 2686 (2004).
[40] *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

# Chapter 4:
# Amendments restoring fair process and procedural fairness

## 4.1 Privative clause decisions

*The Migration Amendment (Detention Reform and Procedural Fairness) Bill* proposes to repeal privative clause decisions within the *Migration Act* to ensure fair process and procedural fairness by allowing judicial review of decisions made under the Act.

> Section 474 of the *Migration Act*
>
> A decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Despite the government's efforts to reduce judicial review by enacting such limitation provisions, the High Court has nevertheless been able to find jurisdiction if the decisions are those made by an 'Officer of the Commonwealth'[1] and vitiated by jurisdictional error. Little over eight years ago the High Court in the case of *Plaintiff S157*, decided on the actual validity of privative clause decisions made under s 474 of the *Migration Act*. While the court may have upheld the validity of this section, stressing that the words 'under this Act' did not refer to decisions affected by jurisdictional error[2], ultimately the legislative efforts of the government to limit jurisdictional review of privative clause decisions were undermined. Despite this, the government has failed to remove the privative clause definition under s 5 and s 474.[3] Australian Information Commissioner Professor John McMillan, recently assigned to advise the government on possible options for improving the efficiency and minimizing the duration of the judicial review process for irregular maritime arrivals, suggests there are two schools of thought regarding the removal of privative clauses.[4] The first argues that while they may not prevent the High Court from being able to judicially review decisions affected by jurisdictional error, privative clauses have thus far worked in preventing an influx of applications for review of decisions made under the *Migration Act*. On the other hand there are those, who advocate for the removal of privative clauses from the *Migration Act* as they are effectively meaningless

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[1] *Australian Constitution* s 75(v).
[2] *Plaintiff S157* [2003] HCA 2 [76]; (2003) 211 CLR 476.
[3] *Migration Act* 1958 (Cth).
[4] Interview with Professor McMillan, Australian Information Commissioner, The Office of the Australian Information Commissioner (26th May 2011).

following the decision in *Plaintiff S157*.[5] In effect, however, both schools of thought recognise the same outcome that the privative clauses are in practice meaningless as a way of limiting judicial review.

The main concern is that these privative clauses may in fact hinder those who have legitimate grounds for seeking judicial review to refrain from seeking such review. Effectively allowing these individuals to be returned to their countries of origin where they could face the possibility of further persecution. As framed in the Written Submission on Behalf of the Human Rights and Equal Opportunity Commission: 'The removal of a person from Australia, who is in fact a person to whom Art 1A of the Refugees' Convention applies and who is not otherwise excluded from the protection afforded by the Convention, will place Australia in breach of its obligations under that Convention: in particular, the non-refoulement obligation in article 33 of the Convention.'[6]

This is especially the case when the privative clause decisions relate to decisions made by the Refugee Review Tribunal and the Migration Review Tribunal. The Gillard government recently stated that 'Australians are hospitable people and we believe in honouring our international protection obligations.'[7] Needless to say the non-refoulement principle is potentially undermined through the preservation of the privative clauses as they currently stand in the *Migration Act*. Repealing the definition of privative clauses under s 5 of the *Migration Act* would at best provide fair process for those seeking jurisdictional review of decisions that could ultimately result in re-persecution as defined in Art 1 of the 1951 Convention.[8] This would realign Australia with its obligations under the 1951 Convention and the 1967 Protocol. In effect, at worst, repealing privative clause decisions would not change the *Migration Act* but for its form and structure.

## 4.2 Purported Privative Clause decisions

The Amendment Bill further purports to remove the definition of purported privative clause decisions under s 5(1) of the Act. In light of the decision in *Plaintiff S157*[9] and in the more recent case of *M61*[10], this amendment is unsurprising and in fact begs the question as to why this definition has not been repealed earlier; removing purported privative clause decisions from the *Migration Act*. Section 75(v) of the *Constitution* not only ensures that 'the court is empowered in the

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[5] *Plaintiff S157* [2003] HCA 2 [76]; (2003) 211 CLR 476.

[6] Submission by the Human Rights and Equal Opportunity Commission, filed by the Commission pursuant to orders made by Gummow J at the directions hearing held on 30 July 2002 in the case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1.

[7] Joint Press Release Julia Gillard - Prime Minister of Australia and Chris Bowen Minister for Immigration and Citizenship, 'The regional cooperation framework' (Press Release, 7 May 2011).

[8] *1951 Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137, art 1(2), entered into force 22 April 1954.

[9] *Plaintiff S157* [2003] HCA 2; (2003) 211 CLR 476.

[10] *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; (2010) 85 ALJR 133; [2010] HCA 41.

exercise of its responsibility to maintain the rule of law'[11], but also secures that there is jurisdiction to restrain officers of the Commonwealth from exceeding Federal power. In *M61* the plaintiff raised the argument of the unconstitutionality of s46A.[12] Making reference to 'the uncontroversial proposition that "a non judicial body cannot determine the limits of its own power,"'[13] while the constitutionality of the section may have been upheld because if the Minister decided to make a decision, it would be subject to jurisdictional review, the same cannot be said for purported privative clauses. These clauses essentially attempt to block out the judicial review process creating 'islands of power'.[14] Moreover in obiter the majority in *Plaintiff S157* stated that construing a provision such as s 474 to read 'decisions purportedly made under the Act'[15] would be in direct conflict with s 75(v) and thus constitutionally invalid. Hence, removing the definition of purported privative clause decision from the *Migration Act* essentially removes a constitutionally invalid clause, which cannot operate within the *Migration Act* as it currently stands.

### Recommendations 4.3

Article 16(1) of the 1951 Convention allows a refugee 'free access to the courts of law on the territory of all Contracting States.'[16] Privative clauses and purported privative clauses put Australia in a position where it may breach this obligation by attempting to curtail judicial review where an individual's status, refugee or otherwise, has not been determined within the decisions maker's jurisdictional powers. The amendments suggested by the Bill restore fair process into the *Migration Act* in form only, because as the High Court has made clear judicial review is available when a decision has been affected by jurisdictional error despite the use of privative clauses. What the Bill is essentially doing is re-aligning the legislation with the operation of the law as it currently stands.

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[11] *Re Minister for Immigration & Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341 at [6]
[12] *Migration Act* 1958 (Cth).
[13] *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; (2010) 85 ALJR 133; [2010] HCA 41, [54].
[14] *Kirk v Industrial Court* (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1, [99].
[15] *Plaintiff S157* [2003] HCA 2 [76]; (2003) 211 CLR 476.
[16] *1951 Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137, art 16(1), entered into force 22 April 1954.