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# Inquiry into Australia's Immigration Detention Network

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## **Joint Select Committee on Australia's Immigration Detention Network**

**17 August 2011**

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## Acknowledgement

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## Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Joint Select Committee on Australia's Immigration Detention Network (the Committee).
2. The Law Council welcomes the establishment of the Committee and its broad terms of reference as an important step forward in delivering much needed transparency and accountability in laws, practices and policies underpinning the immigration detention system in Australia.
3. The Law Council has a long standing interest in ensuring Australia's immigration detention laws and policies adhere to rule of law principles and comply with Australia's international human rights obligations. The Council regularly raises concerns with the Commonwealth Government regarding the existing immigration detention laws and policies, and supports legislative efforts to ensure that the *Migration Act 1958* (Cth) (the Migration Act) more fully complies with Australia's international human rights obligations, including those obligations that relate to the protection of asylum seekers and refugees.
4. The Law Council also has a long standing and continued interest in ensuring that the conditions of immigration detention comply with human rights standards, and that detainees have access to the critical services necessary to give effect to their basic individual rights, including access to appropriate legal assistance regardless of the person's mode of arrival and during every stage of the resolution of their immigration status.
5. In line with the Law Council's past and ongoing advocacy in this area, the following submission focuses on Committee's terms of reference relating to:
  - (a) any reforms needed to the current immigration detention network;
  - (b) the particular impact of detention on children and families, and viable alternatives;
  - (c) the impact, effectiveness and cost of mandatory detention and any alternatives, including community release;
  - (d) compliance with the Government's immigration detention values within the detention network;
  - (e) the processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network; and
  - (f) any other matters relevant to the above terms of reference.
6. In relation to other relevant matters, the Law Council wishes to draw the Committee's attention to a range of additional concerns and issues with Australia's current immigration detention network, such as the need for access to appropriate legal assistance at all stages of resolution of immigration status, including in relation to judicial review proceedings and the impact of the broad discretionary powers attributed to the Minister under the Migration Act that are subject to only limited forms of external review, such as those under section 501.

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## Responding to the Inquiry's Terms of Reference

### Reforms Needed to the Current Immigration Detention Network

7. Australia's immigration detention network, and the laws and policies underpinning this network, are in urgent need of reform.
8. The current laws and policies providing for mandatory immigration detention for all non-citizens without a valid visa have been criticised extensively by national and international human rights bodies as being in breach of Australia's international human rights obligations.<sup>1</sup>
9. As specifically noted by one of the Law Council's constituent bodies, the Law Society of South Australia (LSSA), there is a substantial body of jurisprudence from the United Nations Human Rights Committee (UN Human Rights Committee) that Australia's mandatory immigration detention policy is in breach of the protection against arbitrary deprivation of liberty under Article 9 of the International Covenant on Civil and Political Rights (the ICCPR).<sup>2</sup> Another of the Law Council's constituent bodies, the Queensland Law Society (QLS) has also noted the need for reform in relation to mandatory immigration detention to ensure compliance with Article 9.
10. The current laws and policies which designate asylum seekers who arrive by boat at places excised from Australia's migration zone as offshore entry persons have been subject to similar criticisms as these laws and policies result in their claims being processed differently from those of other asylum seekers.<sup>3</sup>
11. The claims of offshore entry persons are processed differently in that they are not entitled to apply for a protection visa unless the Minister for Immigration lifts a statutory bar to them doing so.<sup>4</sup> In order to determine whether to exercise that discretion, Departmental officers and independent assessors undertake a Protection Obligations Determination Process rather than the statutory process under the Migration Act which applies to other asylum seekers.<sup>5</sup>
12. As also noted by the LSSA and the Refugee Council of Australia, asylum seekers who apply for protection visas onshore are generally given bridging visas and are eligible to apply for Asylum Seeker Assistance Scheme Payments. They can also apply for work rights and study rights.<sup>6</sup> There appears to be little justification for this differential treatment of onshore asylum seekers and offshore entry persons.

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<sup>1</sup> See the "Australia's Immigration Detention System Continues to Breach International Human Rights Obligations", Australian Human Rights Commission, Media Release, 21 July 2011 at [http://www.hreoc.gov.au/about/media/media\\_releases/2011/60\\_11.html](http://www.hreoc.gov.au/about/media/media_releases/2011/60_11.html) and see Report of the Working Group on the Universal Periodic Review of Australia by the United Nations Human Rights Council, 24 March 2011 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

<sup>2</sup> See the International Covenant on Civil and Political Rights at <http://www2.ohchr.org/english/law/ccpr.htm>. See eg *A v Australia* Communication No 560/1993, Views adopted 3 April 1997; *Bakhtiyari v Australia*, Communication No 1069/2002, Views adopted 29 October 2003; *T v Australia*, Case No 706/1996, Views adopted on 4 November 1997; *Shams v Australia* Communications Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, Views adopted 11 September 2007; *C v Australia*, Communication No 900/1999, Views adopted 28 October 2002.

<sup>3</sup> See note 1

<sup>4</sup> *Migration Act 1958 (Cth)* s 46A

<sup>5</sup> For details of the Protection Obligations Determination Process, see <http://www.immi.gov.au/visas/humanitarian/pdf/faq-changes-to-refugee-status.pdf>

<sup>6</sup> See Transcript of Hearing by Legal and Constitutional Affairs Legislation Committee into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*, 4 August 2011 at

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13. Australia also appears to be unique in detaining asylum seekers who arrive without visas for the duration of the processing of their claims.<sup>7</sup> As specifically noted by one of the Law Council's constituent bodies, the Law Society of Western Australia (LSWA) and by the Refugee Council of Australia, Australia is alone among industrialised nations and those nations which have signed the Refugee Convention in maintaining mandatory prolonged and indefinite detention of asylum seekers who arrive without visas.<sup>8</sup>
  14. In most other countries, asylum seekers are released into the community after a period in detention and the processing of their claims is completed while they reside in the community.<sup>9</sup> As the LSWA has noted, detention beyond a reasonable period for health, identity and security checks is not only contrary to article 31 of the Refugee Convention, which prohibits the imposition of penalties on account of mode of entry but it also gives rise to serious problems of a social nature in confined detention facilities.<sup>10</sup>
  15. The Law Council notes that the La Trobe Refugee Research Centre and the International Detention Coalition recently released a handbook which details a Community Assessment and Placement Model (CAP) for dealing with refugees, asylum seekers and irregular migrants.<sup>11</sup> The CAP model proposes a presumption that immigration detention is not necessary; an individual screening and assessment process; an assessment of possible residence in the community and of necessary conditions to maintain contact with immigration authorities and the possibility of detention as a last resort in exceptional cases. The Law Council submits that the Committee should consider the CAP model.
  16. The Law Council also notes that the CAP model handbook includes examples of current practices in other countries, including the United Kingdom, which has invested in early legal advice for asylum seekers, refugees and irregular migrants because it results in quicker and more durable decisions.<sup>12</sup>
  17. Conditions in immigration detention facilities have also been subject to sustained national and international criticism, with the strong and disturbing causal link between time spent in immigration detention and mental illness now well documented by many professionals and organisations, including numerous reports from the Australian Human Rights Commission.<sup>13</sup>

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<http://www.aph.gov.au/hansard/senate/commtee/s190.pdf>; See also details of the Asylum Seeker and Assistance Payments Scheme, at <http://www.asrc.org.au/media/documents/welfare->

<sup>7</sup> See Christine Phillips, "Immigration Detention and Health", *MJA Rapid Online Publication*, 14 December 2009

<sup>8</sup> *ibid*

<sup>9</sup> See note 6

<sup>10</sup> See the Convention and Protocol relating to the Status of Refugees at

<http://www.unhcr.org/3b66c2aa10.html>

<sup>11</sup> See *There Are Alternatives; A handbook for preventing unnecessary immigration detention*, 2011 at <http://idcoalition.org/cap/handbook/>

<sup>12</sup> *ibid*

<sup>13</sup> See Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html); *2011 Immigration Detention in Leonora* available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2011\\_leonora.html](http://www.hreoc.gov.au/human_rights/immigration/idc2011_leonora.html); *2010 Immigration Detention in Darwin* available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_darwin.html](http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.html)

*2010 Immigration Detention on Christmas Island* available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.html](http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.html). See also Christine Phillips, "Immigration Detention and Health", note 7; Louise K Newman and Zachary Steel, "The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention", *Child Adolesc Psychiatric Clin N Am* (2008)665-683; G Caffey, I Kaplan, R Sampson and M Tucci, "The meaning and mental health

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18. The effectiveness of the immigration detention network at achieving legitimate policy aims – such as ensuring the orderly and fair processing of visa applications and protecting Australia’s territorial borders – remains unclear. Given the evidence of the detrimental impact of these policies on the rights and lives of individuals, it is highly questionable whether the current approach is a proportionate means of achieving these outcomes.
  19. Review of Australia's immigration detention laws, policies and facilities by international bodies such as the UN Human Rights Council provide an overview of the types of areas in need of reform – which range from ending the policy of mandatory detention to ensuring access to appropriate health care in immigration detention.<sup>14</sup>
  20. As the representative body for the Australian legal profession, the Law Council's advocacy has focused on ensuring that the provisions of the Migration Act and the policies developed to give effect to these provisions comply with rule of law and human rights standards. This has led the Law Council and several of its constituent bodies individually to advocate for the introduction of reforms that would address the following key concerns:<sup>15</sup>
    - (a) the mandatory and arbitrary features of Australia’s immigration policy as provided for in the Migration Act and the punitive character of immigration detention in Australia;
    - (b) the provisions of the Migration Act that permit indefinite detention of unlawful non-citizens in circumstances where there is no real prospect of removing them from Australia;
    - (c) the lack of judicial oversight and access to regular review of all forms of detention, particularly for offshore entry persons;
    - (d) the absence of maximum periods of immigration detention for all categories of detainees;
    - (e) the absence of clear, objective criteria to determine the length of detention and time of release for those detained following health, identity and security checks;
    - (f) the need to ensure that all detainees are fully informed of their legal rights and have access to appropriate publicly funded legal assistance at all stages of the resolution of their immigration status;

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consequences of long-term immigration detention for people seeking asylum”, *Social Science and Medicine* (2010) 2070 -2079

<sup>14</sup> Report of the Working Group on the Universal Periodic Review of Australia by the United Nations Human Rights Council, 24 March 2011, note 1.

<sup>15</sup> See Law Council submission to the Joint Committee on Migration’s Inquiry into Immigration Detention in Australia, 25 August 2008 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=6A25929A-1C23-CACD-226C-D408E6295E48&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A25929A-1C23-CACD-226C-D408E6295E48&siteName=lca); see Law Institute of Victoria submission, 25 August 2008 to the same inquiry at <http://www.apf.gov.au/house/committee/mig/detention/subs/sub127.pdf>; see Queensland Law Society and Law Society of WA submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* at [http://www.apf.gov.au/senate/committee/legcon\\_ctte/migration\\_detentionreform\\_proceduralfairness/submissions.htm](http://www.apf.gov.au/senate/committee/legcon_ctte/migration_detentionreform_proceduralfairness/submissions.htm)

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- (g) the need to expand transparency and visibility of immigration detention facilities and processes by ensuring clear standards of treatment and operation are implemented in legislation and enforced; and
- (h) the need to improve the conditions of immigration detention in line with the recommendations made by the Australian Human Rights Commission.<sup>16</sup>
21. In line with the advocacy outlined above, the Law Council generally supports the recommendations for reform made by the Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) in its submission to the Joint Committee on Migration's 2008 Inquiry into Immigration Detention<sup>17</sup> and the recommendations made by the Joint Committee following its inquiry.<sup>18</sup>
22. The Law Council also generally supports the reforms proposed in the Government's *Migration Amendment (Immigration Detention Reform) Bill 2009* (the Bill), designed to give legislative effect to the Commonwealth Government's *New Directions in Detention Policy*, announced on 29 July 2008.<sup>19</sup> The Council regrets that this Bill was not re-introduced following the proroguing of Parliament prior to the 2010 Federal Election.
23. More recently, the Law Council has also expressed general support for the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* introduced by Australian Greens Senator Sarah Hanson-Young, which aims to significantly amend the way in which the Migration Act currently operates in respect of asylum seekers, by ending different processing for offshore entry persons; ensuring that detention is only used as a last resort; ending indefinite and long-term detention; and introducing a system of judicial review of detention beyond 30 days.<sup>20</sup>
24. The Law Council has also called for reform in other specific areas that have an impact on Australia's immigration detention network, such as the Minister's broad discretionary powers to cancel or refuse visas on character grounds under section 501 of the Migration Act.<sup>21</sup>
25. The Law Council also supports the call by the LSSA for the following specific reforms to the current immigration detention network, namely a discontinuation of the practice of placing certain immigration detention facilities in remote and harsh conditions, where access to health, education and legal services is severely

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<sup>16</sup> See Australian Human Rights Commission, *Immigration Detention at Villawood 2011; 2011 Immigration Detention in Leonora; 2010 Immigration Detention in Darwin; 2010 Immigration Detention on Christmas Island*, note 6

<sup>17</sup> See Human Rights and Equal Opportunity Commission submission dated 4 August 2008 at <http://www.aph.gov.au/house/committee/mig/detention/subs/sub099.pdf>

<sup>18</sup> In particular those recommendations in *Report 1 Immigration detention in Australia: A new beginning - Criteria for release from detention* – see <http://www.aph.gov.au/house/committee/mig/detention/index.htm>, 1 December 2008

<sup>19</sup> See New Directions Policy at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> and Law Council submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Immigration Detention Reform Bill) 2009*, 31 July 2009 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=DDE606DD-1E4F-17FA-D2E0-B3F24326983E&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=DDE606DD-1E4F-17FA-D2E0-B3F24326983E&siteName=lca).

<sup>20</sup> See Law Council submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Detention Reform and Procedural Fairness Bill) 2010*, 24 June 2011 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=CE52B126-EB0F-F30A-D66F-F87F93EA9E7A&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=CE52B126-EB0F-F30A-D66F-F87F93EA9E7A&siteName=lca).

<sup>21</sup> See Law Council submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=62248187-C85C-E71B-95CD-61C4B3AE9323&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=62248187-C85C-E71B-95CD-61C4B3AE9323&siteName=lca)

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reduced; greater access for independent inspectors to immigration detention facilities; and compliance with all recommendations made by the Commonwealth Ombudsman and the Australian Human Rights Commission in relation to immigration detention facilities.

26. The LSSA has also noted that the UN Human Rights Committee has commented that conditions in detention facilities, particularly in cases causing demonstrated mental and physical harm, constitute a breach of the prohibition against cruel, inhuman and degrading treatment under Article 7 of the ICCPR, where Australia is aware of a detainee's mental condition and fails to take steps to ameliorate the person's suffering.<sup>22</sup>
27. The Law Council also supports the specific call by one of its constituent bodies, the Law Institute of Victoria (LIV) for greater transparency in the operation and management of the immigration detention network by including detention standards in legislative instruments. Such inclusion would ensure recognition of the broader public impact of detention standards rather than just their impact on the interest of the contracting parties, the service provider and the Government.

## **Impact of Detention on Children and Families**

28. The Law Council has raised concerns with the Minister for Immigration and his Department on numerous occasions relating to the treatment of children in immigration detention facilities. As the QLS has specifically noted, Australia has a number of international human rights obligations, including those under the Convention on the Rights of the Child to protect children from arbitrary detention and to provide appropriate protection and assistance to children seeking refugee status.<sup>23</sup>
29. Even detention in community detention arrangements or alternative detention arrangements such as immigration residential housing, immigration transit accommodations and alternative temporary detention may raise concerns about compliance with Australia's international human rights obligations depending on the nature of these facilities, and the ability of children to access appropriate services and exercise their rights, including the right to family reunification, the right to education and the right to leisure, culture and play.<sup>24</sup>
30. To this end, the Law Council has welcomed the commitments made by the Australian Government to remove children and families from immigration detention centres and to detain children only as a last resort. The Law Council notes that as at July 2011 62% of children had been released from immigration detention centres and moved into community detention or are being held in alternative detention facilities in line with the Government's policy commitment.<sup>25</sup> However, without being enshrined in legislation, these commitments fail to fully appease the very serious concerns of national and international human rights bodies regarding the welfare of children and families in Australia's immigration detention network.

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<sup>22</sup> *C v Australia* Communication No 900/1999, Views adopted 28 October 2002

<sup>23</sup> See Articles 22 and 37 of the *Convention on the Rights of the Child* at <http://www2.ohchr.org/english/law/crc.htm>

<sup>24</sup> See details of alternative detention arrangements at <http://www.immi.gov.au/managing-australias-borders/detention/services/alternative-arrangements.htm>

<sup>25</sup> See Doorstop Interview with Minister for Immigration, 29 June 2011 at <http://www.minister.immi.gov.au/media/cb/2011/cb167721.htm>



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31. The Law Council supports the specific views of a number of its constituent bodies in relation to issues concerning children in detention.
  32. The QLS is of the view that removing children from high security facilities and accommodating them in some alternative detention facilities is inadequate to comply with Australia's obligations under international law as some of these alternative facilities are overcrowded suburban motels, or inappropriate facilities such as the Construction Camp on Christmas Island, where children are detained under guard.
  33. The LSSA is of the view that community detention is the only appropriate form of detention for children and families provided it includes access to proper services such as those which meet the requirements identified above, as well as services to properly treat physical and mental health problems. The LSSA and the Law Institute of Victoria (LIV) have also cited extensive and widely published studies by professionals and the Australian Human Rights Commission, which detail the adverse mental health effects of immigration detention on children.<sup>26</sup>
  34. The Law Council acknowledges that there are also many other organisations with particular experience and expertise in the area of children's rights that are well placed to comment in detail on the general impact of immigration detention on children and families.<sup>27</sup>

## **Impact of Mandatory Detention and Any Alternatives, Including Community Release**

35. For many years, the Law Council has strongly opposed the policy of mandatory detention of unlawful non-citizens prescribed in the Migration Act and called for a system that relies upon detention only as a matter of last resort, and only for specified purposes such as health, identity and security checks. The Law Council has also advocated for any detention of asylum seekers and other non-citizens to be subject to effective judicial oversight and regular review.<sup>28</sup>
36. Such reforms would go some way to ending the human suffering that has occurred in Australia immigration detention centres, particularly by those persons who have been detained for prolonged periods. The health impacts of mandatory detention, and its costs to individuals and the community have been well documented<sup>29</sup> and

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<sup>26</sup> See note 6 and Human Rights and Equal Opportunity Commission, *A Last Resort? The National Enquiry into Children in immigration Detention*, May 2004 at

[http://www.hreoc.gov.au/human\\_rights/children\\_detention/index.html](http://www.hreoc.gov.au/human_rights/children_detention/index.html)

<sup>27</sup> For example, those organisations which contributed to the 2011 Child Rights Taskforce Report, *Listen to the Children*, May 2011 available at [http://www.childrights.org.au/\\_data/assets/pdf\\_file/0014/14405/Listening-to-children-Report-2011-colour.pdf](http://www.childrights.org.au/_data/assets/pdf_file/0014/14405/Listening-to-children-Report-2011-colour.pdf)

<sup>28</sup> For example see Law Council of Australia submission to the Joint Parliamentary Committee on Migration Review into Immigration Detention (August 2008) available at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=1B2BF9EA-F430-AE50-DD02-2DBDEC1C83A4&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=1B2BF9EA-F430-AE50-DD02-2DBDEC1C83A4&siteName=lca).

<sup>29</sup> See Australian Human Rights Commission, *Immigration Detention at Villawood 2011*, available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html); 2011 *Immigration Detention in Leonora* available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2011\\_leonora.html](http://www.hreoc.gov.au/human_rights/immigration/idc2011_leonora.html); 2010 *Immigration Detention in Darwin* available at

[http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_darwin.html](http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.html)

2010 *Immigration Detention on Christmas Island* available at

[http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.html](http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.html). See also Christine Phillips, "Immigration Detention and Health", note 7; Louise K Newman and Zachary Steel, "The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention", *Child Adolesc Psychiatric Clin N Am* (2008)665-683; G Caffey, I Kaplan, R Sampson and M Tucci, "The meaning and mental health consequences of long-term immigration detention for people seeking asylum", *Social Science and Medicine* (2010) 2070 -2079

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provide a strong case for repealing the current laws and policies and pursuing alternatives.

37. Ending the policy of mandatory, non-reviewable detention would also ensure that Australia adheres to its international human rights obligations. Pursuant to the Migration Act, unlawful non-citizens must be detained until they are either granted a visa or removed from Australia.<sup>30</sup> For many people this means they will be held in immigration detention for prolonged periods, while their immigration status is being determined. This is the case even if the person has a right to seek refuge in Australia under the Refugee Convention.
38. In the past, where complaints have been submitted by individuals who have been held in detention for prolonged or indefinite periods, the Australian Human Rights Commission has found that prolonged and indefinite detention constituted arbitrary detention, in breach of article 9(1) of the ICCPR.<sup>31</sup> This policy of mandatory detention has also attracted criticism from international human rights bodies including most recently the UN Human Rights Council following the Universal Periodic Review (UPR) of Australia in January 2011.<sup>32</sup> The QLS has noted that Australia rejected a number of the UPR recommendations in relation to repealing or amending the laws and policies in relation to mandatory immigration detention in its response to the UPR.<sup>33</sup>
39. The mandatory detention of unlawful non-citizens is also contrary to the UN High Commissioner on Refugees' *Revised Guidelines on Applicable Criteria and Standards Relating To The Detention Of Asylum Seekers*, which provide that the detention of asylum-seekers is 'inherently undesirable' and prescribe that:

*There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements ...), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose. [emphasis in original]*<sup>34</sup>

40. As noted above, a Community Assessment and Placement Model has been developed, which proposes a presumption against detention and the Law Council submits that the Committee should consider this model as an alternative to mandatory detention.
41. In light of the above concerns, the Law Council supports the following measures to reform Australia's mandatory detention policy:

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<sup>30</sup> *Migration Act 1958* (Cth), ss 189(1), 196(1).

<sup>31</sup> See, for example Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights* (Report No. 13) (2001). available at [http://humanrights.gov.au/legal/humanrightsreports/hrc\\_report\\_13.html](http://humanrights.gov.au/legal/humanrightsreports/hrc_report_13.html). This view has also been held by the United Nations Human Rights Committee in a number of cases. See, for example UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997). See also note 2.

<sup>32</sup> See Report of the Working Group on the Universal Periodic Review of Australia by the United Nations Human Rights Council, 24 March 2011 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

<sup>33</sup> See <http://www.hrc.org.au/files/Australias-Formal-UPR-Response.pdf>

<sup>34</sup> UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum Seekers, (February 1999) Guideline 2 Available at <http://www.unhcr.org/Au/Pdfs/Detentionguidelines.Pdf>

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- (a) repeal the provisions of the Migration Act 1958 relating to mandatory detention;
  - (b) enact provisions to ensure that asylum seekers are detained only where strictly necessary (such as for health, identity and security checks) and as a last resort;
  - (c) enact provisions to ensure that other non-citizens, who present unacceptable risks to the community and who have repeatedly refused to comply with visa conditions are only detained as a last resort;
  - (d) enact provisions to ensure that no children are held in immigration detention facilities;
  - (e) provide for regular, periodic, judicial review of a person's detention;
  - (f) provide time limits on immigration detention; and
  - (g) ensure that all detainees have adequate access to legal assistance, interpreters, communication facilities, education, physical and mental health services and other appropriate support networks.

## **Compliance with the Government's Immigration Detention Values**

42. On July 2008 the Minister delivered a speech entitled '*New Directions in Detention – Restoring Integrity to Australia's Immigration System*'. In this speech, the Minister outlined seven values that will guide and drive new detention policy and practice into the future.<sup>35</sup> The seven key immigration detention values are:
- *Mandatory detention is an essential component of strong border control.*
  - *To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:*
    - *all unauthorised arrivals, for management of health, identity and security risks to the community*
    - *unlawful non-citizens who present unacceptable risks to the community and*
    - *unlawful non-citizens who have repeatedly refused to comply with their visa conditions.*
  - *Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).*
  - *Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.*
  - *Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.*
  - *People in detention will be treated fairly and reasonably within the law.*

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<sup>35</sup> See New Directions Policy at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

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- *Conditions of detention will ensure the inherent dignity of the human person.*

43. The Law Council welcomed the announcement of these values when they were introduced and also generally supported the *Migration Amendment (Immigration Detention Reform) Bill 2009*<sup>36</sup> introduced to implement some of these values into legislation.
44. The Law Council was subsequently disappointed when the Bill lapsed with the proroguing of Parliament in 2010 and to date has not been introduced. The Law Council is also disappointed that the Government's subsequent policies and legislative reforms do not appear to fully comply with the seven values described above. The Law Council notes the views of the Refugee Council of Australia that the values have been reasonably effectively applied to visa overstayers but not to asylum seekers.<sup>37</sup>
45. In light of these developments, without implementing these values in legislation, it is difficult to have confidence that these values will continue to guide Government policy making in this area.
46. Implementing the principles in legislation will help solidify Australia's commitment to ensuring its laws and policies comply with international human rights standards. Implementing principles of this nature in legislation would also begin to address a number of long standing concerns and recommendations for change previously made by the Law Council<sup>38</sup> and by domestic and international human rights bodies, including the Australian Human Rights Commission,<sup>39</sup> the United Nations Human Rights Committee<sup>40</sup> and the United Nations High Commissioner for Refugees.<sup>41</sup>

## **Assessment of Protection Claims made by Irregular Maritime Arrivals and Other Persons**

47. As noted above, the Law Council considers that the current laws and policies which designate asylum seekers who arrive by boat at places excised from Australia's migration zone as irregular maritime arrivals or offshore entry persons require reform.
48. As noted above, the claims of offshore entry persons are processed differently in that they are not entitled to apply for a protection visa unless the Minister for Immigration lifts a statutory bar to them doing so. In order to determine whether to

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<sup>36</sup> The text of this Bill can be found at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs720%22>

<sup>37</sup> See Transcript of Hearing by Legal and Constitutional Affairs Legislation Committee into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*, 4 August 2011, note 6

<sup>38</sup> For a summary of the Law Council's past advocacy in this area, and to access relevant submissions and media releases, see <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/detention.cfm>.

<sup>39</sup> See for example, Human Rights and Equal Opportunity Commission's Submission to the Joint Committee on Migration's Inquiry into Immigration Detention in Australia (4 August 2008) available at [http://www.hreoc.gov.au/legal/submissions/2008/20080829\\_immigration\\_detention.html](http://www.hreoc.gov.au/legal/submissions/2008/20080829_immigration_detention.html); for more recent reports and recommendations see for example, Australian Human Rights Commission, *Immigration Detention at Villawood*, (May 2011) available at [http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html)

<sup>40</sup> See, for example UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

<sup>41</sup> See for example UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum Seekers, (February 1999) available at <http://www.unhcr.org/Au/Pdfs/Detentionguidelines.Pdf>.

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exercise that discretion, Departmental officers and independent assessors undertake a Protection Obligations Determination (POD) Process rather than the statutory process under the Migration Act which applies to other asylum seekers.

49. The Law Council submits that offshore entry persons should be processed in the same way, and given the same access to Australian courts, as other asylum seekers and that Australia should end the different processing regimes.
50. If the POD process is to continue, further consideration must be given to ensuring the rights of offshore entry persons, particularly their rights to procedural fairness and judicial review, and their access to appropriate legal assistance at all stages of their immigration status determination.

## **Additional Concerns with Australia's Immigration Detention Network**

### Access to Legal Assistance

51. As is readily apparent to any one interacting with the Migration Act and its regulations, migration law in Australia is highly complex and it is inherently difficult for persons to easily understand their legal rights without professional legal and migration assistance. This is particularly the case for vulnerable persons, or those who face language barriers or other difficulties obtaining information.
52. Given the life changing impact a migration decision can have for an individual and his or her family, it is critical that all persons seeking to have their immigration status resolved are provided with appropriate legal and migration assistance.
53. The Law Council is strongly concerned that many persons within Australia's immigration detention network are currently unable to obtain timely, accurate legal and migration assistance or to fully understand their legal rights and the processes to which they will be subject. This is not only having an impact on the basic individual rights of detainees, but it is also exacerbating delays in visa processing, increasing pressure on the courts and resulting in greater costs to the general community – particularly in the context of processing of offshore entry persons.
54. For this reason, the Law Council has advocated for the provision of appropriate legal assistance at all stages of the resolution of immigration status, including in relation to judicial review proceedings.
55. On 8 April 2011 the Law Council wrote to the Minister for Immigration and the Attorney-General outlining its ongoing concerns at the lack of any formal scheme or framework for the provision of legal advice for offshore entry persons seeking judicial review of a decision to refuse to consider an application for a protection visa.
56. While the Law Council acknowledged the availability of free legal and migration advice under the Immigration Advice and Application Assistance Scheme for both offshore entry persons and other asylum seekers at the initial application and merits review stages, the limited availability of assistance for judicial review, particularly for offshore entry persons was highlighted.
57. The letter noted that since the High Court's decision in November 2010 in the M61 case, there has been an increase in applications for judicial review from offshore

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entry persons seeking asylum in Australia.<sup>42</sup> The Law Council had received a number of reports that this is placing considerable pressure on the Federal Magistrates Court and individual legal aid commissions, community legal centres and members of the legal profession practising in this field, many of whom provide these services on a pro bono basis.

58. The Law Council asked for information about any proposals for a scheme to provide legal assistance to offshore entry persons seeking judicial review, including the provision of increased resources to legal aid commissions and community legal centres to cope with the increasing demand for their services.
59. The Minister for Immigration and the Attorney-General replied by simply referring to an increase in legal aid funding in 2009-10 and the fact that migration matters are service priorities under the National Partnership Agreement on Legal Assistance Services, which commenced on 1 July 2010.
60. The Law Council submits that the Committee should recommend that the Government consider increasing resources for legal assistance for persons subject to immigration detention, particularly offshore entry persons.
61. As noted above, the CAP model handbook includes examples of current practices in other countries, including the United Kingdom, which has invested in early legal advice for asylum seekers, refugees and irregular migrants because it results in quicker and more durable decisions.
62. The LSWA has noted that legal assistance is not uncommon at the review stage for protection applications in other Refugee Convention member countries and that under Article 16 of the Refugee Convention, refugees are entitled to free access to courts and the same treatment as nationals in matters pertaining to access to the courts, including legal assistance.
63. The LIV has noted that in the experience of its members the POD process currently produces very poor outcomes and places unnecessary pressure on the judicial system. A well funded fair and rigorous assessment process with access to legal and migration assistance for applicants would reduce the high number of decisions taken on appeal.
64. The LSSA has also called for increased funding for legal aid commissions for assistance with judicial review applications and has also expressed concern that asylum seekers are experiencing limited access to lawyers due to the remoteness of the locations in which they are accommodated.

#### Broad Discretionary Powers of Minister under the *Migration Act 1958* (Cth)

65. When inquiring into Australia's Immigration Detention Network it is important to consider the many powers exercisable by the Minister that can result in a person's visa application being refused or their current visa being cancelled and which can lead to the person being detained in immigration detention.
66. One such power that raises particular concern is the broad discretionary power to cancel a person's visa or refuse a visa application on character grounds, provided under section 501 of the Migration Act.

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<sup>42</sup> *Plaintiff M61/2010E v Commonwealth of Australia, Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41

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67. The Law Council has long standing concerns regarding the broad nature of the Minister's discretionary power under section 501 which can have serious impacts on a person's human rights, particularly given that the use of such power is subject to only limited forms of review.
  68. The Minister has a range of powers to cancel or refuse to grant a visa,<sup>43</sup> which include the power under section 501A to refuse or cancel a person's visa if a Departmental officer or the Administrative Appeals Tribunal (AAT) decides not to exercise their respective powers to refuse or cancel the person's visa. The Minister can do so even if the person satisfied the original decision-maker that they pass the section 501 character test.<sup>44</sup> Further, under section 501B, in certain circumstances the Minister can set aside a decision by a Departmental officer to refuse or cancel a person's visa, and substitute it with his or her own decision to refuse or cancel the person's visa.<sup>45</sup> The Minister can do so even if the person has applied to the AAT for merits review of the original DIAC decision.<sup>46</sup>
  69. In making these decisions, the Minister is not required to comply with the rules of natural justice<sup>47</sup> and does not have to comply with the considerations set out in Ministerial Direction No. 41.
  70. The broad nature of the Minister's powers is particularly concerning because the Minister's decisions are subject to limited external review. A decision by the Minister to refuse or cancel a person's visa under section 501, or a decision by the Minister to substitute a decision of a Departmental officer or the AAT under section 501A or 501B, is not subject to merits review by the AAT and is only subject to judicial review by the courts if the decision may be affected by 'jurisdictional error'.
  71. The Law Council submits that the Committee should recommend limiting the Minister's discretionary powers to cancel or refuse visas on character grounds.

## Conclusion

72. The Law Council considers that Australia's immigration detention network is in urgent need of substantial reform, particularly in relation to:
  - (a) repealing the provisions of the Migration Act relating to mandatory detention;
  - (b) enacting provisions to ensure that asylum seekers are detained only where strictly necessary (such as for health, identity and security checks) and as a last resort;
  - (c) enacting provisions to ensure that other non-citizens, who present unacceptable risks to the community and have failed to comply with visa conditions are only detained as a last resort;
  - (d) repealing provisions relating to offshore entry persons being unable to make applications for protection visas without the Minister exercising a discretion allowing them to do so and discontinuing the separate POD process;

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<sup>43</sup> *Migration Act 1958 (Cth)*, ss 501(2), 501(3).

<sup>44</sup> *Migration Act 1958 (Cth)*, s 501A(1).

<sup>45</sup> *Migration Act 1958 (Cth)*, ss 501B(1), 501B(2)..

<sup>46</sup> *Migration Act 1958 (Cth)*, s 501B(5).

<sup>47</sup> *Migration Act 1958 (Cth)*, ss 501(3), 501(5), 501A(3), 501A(4).

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- (e) enacting provisions to ensure that no children are held in immigration detention facilities;
  - (f) providing for regular, periodic, judicial review of a person's detention;
  - (g) providing time limits on immigration detention;
  - (h) ensuring that all detainees have adequate access to legal assistance, interpreters, communication facilities, education, physical and mental health services and other appropriate support networks;
  - (i) ensuring that all detainees are fully informed of their legal rights and have access to appropriate publicly funded legal assistances at all stages of the resolution of their immigration status;
  - (j) increasing resources for legal assistance for persons subject to immigration detention, particularly offshore persons;
  - (k) increasing transparency and visibility of immigration detention facilities and processes by ensuring clear standards of treatment and operation are implemented in legislation and enforced;
  - (l) adopting all recommendations by the Commonwealth Ombudsman and the Australian Human Rights Commission to improve conditions in detention facilities;
  - (m) legislating to implement the 2008 *New Directions in Detention Policy*;
  - (n) limiting the exercise of Ministerial discretion in relation to character grounds for refusing or cancelling visas;
  - (o) discontinuing the practice of placing certain immigration detention facilities in remote and harsh locations;
  - (p) providing greater access for independent inspections of detention facilities
  - (q) considering allowing all asylum seekers, including offshore entry persons to reside in the community on bridging visas after detention for health, identity and security checks;
  - (r) considering legislating for clear, objective criteria to determine the length of any period of detention following health, identity and security checks; and
  - (s) considering the Community Assessment and Placement model as an alternative to mandatory detention.



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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.