



# International Detention Coalition

Human rights for detained refugees,  
asylum seekers and migrants

## **Submission by the International Detention Coalition to the Joint Select Committee on Australia's Immigration Detention Network**

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### **1. Introduction**

The International Detention Coalition (IDC) welcomes the Joint Select Committee Inquiry into Australia's Immigration Detention Network as an opportunity to ensure Australia's detention laws and policy are in line with international standards and Australia's international obligations. It is also an opportunity to place on the public record, the serious human rights concerns that have been raised by individuals and organizations, over the almost 20 years of Australia's indefinite, non-reviewable mandatory detention policy.

The IDC is an international NGO, based in Australia and is a network of non-governmental organizations, faith based groups, academics and individuals working around the world providing legal, social, medical and other services, carrying out research and reporting, and doing advocacy and policy work on behalf of refugees, migrants, and asylum seekers. The IDC has more than 200 members from 50 countries, including more than 15 Australian member organizations.

IDC staff have visited a number of Australian immigration detention centres and been involved in policy discussions with the Department of Immigration and key stakeholders.

## 2. IDC Submission Summary

As an international organization, this submission will focus primarily on where Australia's immigration detention law, policy and practice is located within the international human rights legal framework, and highlight international comparative research relevant to the Australian domestic legislation and policy on detention. The IDC's concerns with extra-territorial processing are not included in this submission.

The submission focuses on the following Terms of Reference:

- (a) any reforms needed to the current Immigration Detention Network in Australia;
- (b) the impact of length of detention and the appropriateness of facilities and services for asylum seekers;
- (e) the impact of detention on children and families, and viable alternatives;
- (g) the impact, effectiveness and cost of mandatory detention and any alternatives, including community release;
- (l) compliance with the Government's immigration detention values within the detention network;
- (n) the management of good order and public order with respect to the immigration detention network;
- (s) any other matters relevant to the above terms of reference.

The submission draws from the findings of:

- (1) IDC and La Trobe University research, *'There are Alternatives'*.<sup>1</sup>
- (2) IDC Guide: *'International legal framework governing the detention of refugees, asylum seekers and migrants'*.<sup>2</sup>
- (3) The IDC and UNHCR Canberra hosted *'Alternatives to Detention Expert Roundtable'* held in Canberra in June 2011. (See Appendix 1).

Australian immigration detention law and policy lags far behind most developed countries in terms of legal and procedural safeguards. While a number of countries require some form of mandatory detention for screening purposes, Australia stands alone in the requirement for ongoing mandatory detention for the entire period of processing without access to judicial review or standard administrative conditional or provisional release following identity, health and security checks.

The submission concludes that indefinite, mandatory detention, often in remote environments is having a detrimental impact on the mental health and functioning of many immigration detainees, including children, refugees, torture survivors, women at risk, the elderly, people with a disability, those with physical health concerns and other vulnerable groups.

For Australia to meet its international obligations and to ensure immigration detention law and policy is in line with international human rights standards, the 2008 Detention Values Statement must be enshrined in law. A number of international best practice recommendations are included in the submission and appendixes; such as examples of how States are practically ensuring their use of immigration detention is only ever as a last resort in exceptional circumstances.

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<sup>1</sup> *Legal framework and standards relating to the detention of refugees, asylum seekers and migrants*, Melbourne: The International Detention Coalition, 2011.

<sup>2</sup> Sampson, R., G. Mitchell and L. Bowring: *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition, 2011.

### **3. International Human Rights Legal Standards**

International human rights legal standards state that there should be a presumption against the detention of refugees, asylum seekers and migrants. If individually assessed as required, detention must only ever be a last resort in exceptional circumstances, for limited periods, ensuring adequate conditions, judicial review and independent monitoring.<sup>3</sup>

Alternatives such as supervised release, regular reporting requirements or posting bail, should be considered and pursued before detention. A person should only be deprived of his/her liberty if this is in accordance with a procedure prescribed by law and if after a careful examination of the necessity and proportionality of deprivation of liberty in each individual case, the authorities have concluded that resorting to non-custodial measures (alternatives to detention) would not be sufficient.

Where detention is considered to be absolutely necessary and authorized under international, regional and national standards, governments should ensure that it is used only for initial identification of persons or for legitimate removal or security purposes and only as a last resort. Any decision to detain must be subject to regular judicial review and the time period must be reasonable.

Refugees, asylum seekers and migrants must not be subject to indefinite detention. Conditions of detention must comply with human rights standards, and there must be regular independent monitoring of places of detention. Certain groups – such as pregnant or lactating women, children, survivors of torture and trauma, elderly persons or the disabled – should not be placed in detention.

### **4. Comparative analysis of Australia's immigration detention law, policy and practice**

In 1992 Australia introduced a policy of mandatory, non-reviewable and indefinite immigration detention. Under the Australian Migration Act, anyone reasonably suspected of being an unlawful non-citizen was detained until removed. This legislation made no distinction for individual circumstance, age or need, did not provide for judicial review and has led to long-term detention, including cases of individuals being detained for more than seven years, as well as the detention of thousands of children.

Australia's immigration detention practice has been criticized by non-government organizations, the Australian Human Rights Commission and within government commissioned reports, including the Palmer and Comrie reports. These reports highlighted the lack of transparency in the immigration detention system, a failure of monitoring and a lack of administrative and judicial review mechanisms. The reports have also drawn attention to the conditions and treatment of detainees and the use of offshore detention facilities that denied a range of rights to detainees. The negative impact of detention on mental health has been widely reported, particularly on children and long-term detainees.<sup>4</sup>

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<sup>3</sup> For full legal references see: *Legal framework and standards relating to the detention of refugees, asylum seekers and migrants*, Melbourne: The International Detention Coalition, 2011.

<sup>4</sup> See IDC Report: *The Australian Experience*, 2009, page 1 for references. <http://idcoalition.org/idc-report-case-management-as-an-alternative-to-detention-the-australian-experience/>

Following IDC research into the international legal standards into immigration detention, international practice and visits to immigration detentions in the Americas, Asia, Europe, the Middle East and Africa, the IDC concludes that:

- (1) Indefinite, mandatory detention, often in remote environments is having a detrimental impact on the mental health and functioning of many immigration detainees, including children, refugees, torture survivors, women at risk, the elderly, the disabled and unwell and other vulnerable groups.
- (2) Australia's immigration detention law does not meet international human rights standards and remains one of the harshest in the world in terms of denial of legal and procedural safeguards for people detained for administrative migration related purposes.

#### **4.1 Impact on rights, health and wellbeing**

Mental health in immigration detention in Australia is at crisis point, with five suicides in six months, self-harm, hunger strikes and individuals on suicide watch.

As highlighted in the IDC and La Trobe University research into alternatives to immigration detention, *'There are Alternatives'*, the use of detention for the purposes of deterrence or political gain is inconsistent with international human rights law. Human rights law establishes the right to liberty and protection from arbitrary detention. As detention interferes with an individual's human rights, it must be applied only in those circumstances outlined in national law; in proportion to the objectives underlying the reason for the detention; when necessary in that particular case; and applied without discrimination. Less restrictive measures must be shown to be inadequate before detention can be applied. As such, detention must be shown to be necessary in each individual case rather than being applied en masse, as is often the case when detention is used to convey a message of deterrence to potential irregular arrivals and a message of border control to citizens.

A major concern is that the potential impact of detention on the health of those detained is so severe that its use as a form of control cannot be justified. Research into detention in Australia and internationally has demonstrated that being in detention is associated with poor mental health including high levels of depression, anxiety and post-traumatic stress disorder (PTSD) and that mental health deteriorates the longer someone is detained. One study by the Physicians for Human Rights found clinically significant symptoms of depression were present in 86% of detainees, anxiety in 77%, and PTSD in 50%, with approximately one quarter reporting suicidal thoughts. The impact on children is particularly disturbing, especially as the consequences for their cognitive and emotional development may be life-long. For adults, it has been found that the debilitating impact of detention extends well beyond the period of confinement, especially for those detained for prolonged periods. Searching for alternatives that do not rely on confinement is all the more important in light of the evidence of the harm that it can produce.<sup>5</sup>

Given these concerns, issues of political authority and public sentiment are best addressed without recourse to detention, such as through strong leadership and

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<sup>5</sup> See references on pages 11 and 12: Sampson, R., G. Mitchell and L. Bowring: *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition, 2011. <http://idcoalition.org/handbook/>

confidence in the effectiveness of migration policy and its implementation. Other programs must be used when attempting to regulate irregular migration. Addressing the root causes of irregular migration and stay can include increasing investment in development and peace-building endeavours in major source countries; expanding legal avenues to enter the country either temporarily, as with short-term working visas, or long-term as is needed for family reunion; increasing the resettlement of people with protection needs directly from countries of first asylum; developing complementary protection mechanisms to address the needs of the range of forced migrants; and providing avenues for regularisation.

In addition, it is noted that experiences of long-term immigration detention have led to incidents of hunger strikes, rioting and protests around the world. In a number of countries where this has occurred, such as Japan and Sweden, the government has undertaken a review and reform of their detention policies, to ensure individuals are treated with dignity and respect, and better informed of their rights, which have in turn reduced these incidents.<sup>6</sup>

#### **4.2 Detention does not deter**

Existing international evidence and government statements suggest a policy of detention is not effective in deterring asylum seekers, refugees and irregular migrants. Despite increasingly tough detention policies being introduced over the past 20 years, the number of irregular arrivals has not reduced.

A clear finding of both the IDC and La Trobe University research, and also recent UNHCR research<sup>7</sup>, has been that detention does not deter asylum seekers and irregular migrants. Detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals. Studies have shown asylum seekers and irregular migrants either are:

- Not aware of detention policy or its impact in the country of destination
- May see it as an inevitable part of the journey, and
- Do not convey the deterrence message back to those in country of origin<sup>8</sup>

UNHCR research on alternatives to detention, *Back to Basics*, states:

‘Pragmatically, there is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum. In fact, as the detention of migrants and asylum-seekers has increased in a number of countries, the number of individuals seeking to enter such territories has also risen, or has remained constant. Globally, migration has been increasing regardless of governmental policies on detention’.<sup>9</sup>

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<sup>6</sup> <http://idcoalition.org/asylum-seekers-in-sweden/>

<sup>7</sup> *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*  
Alice Edwards, UNHCR 2011 <http://www.unhcr.org/4dc949c49.html>

<sup>8</sup> See references on pages 11: Sampson, R., G. Mitchell and L. Bowring: *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition, 2011. <http://idcoalition.org/handbook/>

<sup>9</sup> *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, Page 1  
Alice Edwards, UNHCR 2011 <http://www.unhcr.org/4dc949c49.html>

### 4.3 Comparative analysis

Australian immigration detention law and policy lags far behind most developed countries in terms of international human rights standards. As noted, Australia's immigration detention law remains one of the harshest in the world in terms of denial of legal and procedural safeguards for people detained for administrative migration related purposes, and has had a devastating impact on individuals detained, extremely costly and has not had any deterrent effect.<sup>10</sup>

While a number of countries require some form of mandatory detention for screening purposes, Australia stands alone in the requirement for ongoing mandatory detention for the entire period of processing without access to judicial review or standard administrative conditional or provisional release following identity, health and security checks.

#### 4.3.1 Detention Review Processes

Australia does not have a judicial review process for individuals subject to immigration detention.

Article 9 of the ICCPR states that: '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 IDC believe it is vital that a detainee is informed of the reason they are detained, for how long, how this can be reviewed, and what legal recourse and advice is available to them. These are fundamental rights of individuals detained.

The IDC would like to highlight the importance of a review process enshrined in law in Australia that is independent and which incorporates both a judicial review and standard administrative conditional or provisional release process, following identity, health and security checks.

There are a number of international examples to explore in relation to the review of detention:

- 1) **Sweden:** The Swedish immigration detention system includes both administrative and judicial review mechanisms. All detainees in Sweden are aware of their rights in detention and the length of time they can be held in detention. All detainees have a right under Swedish law to appeal their being held in detention. They can appeal each category that they are held on, firstly to the Local Court and then to the Alien Appeals Board. Asylum Seekers are kept in detention only for the period of time it takes to ascertain their identities, not for the duration of their asylum procedure.<sup>11</sup>
- 2) **South Africa:** The majority of asylum seekers in South Africa enjoy freedom of movement. Detention, however, is permissible if (a) an asylum seeker fails to appear, (b) fails to renew his or her temporary residence permit in time, (c) contravenes conditions of that permit, or (d) if the claim is deemed

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<sup>10</sup> See page 52: Sampson, R., G. Mitchell and L. Bowring: *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition, 2011. <http://idcoalition.org/handbook/>

<sup>11</sup> <http://idcoalition.org/asylum-seekers-in-sweden/>



manifestly unfounded or fraudulent. Asylum seekers detained under the Refugees Act must appear before a judge of the High Court after 30 days.<sup>12</sup>

- 3) **New Zealand:** The new immigration legislation/policy from 2009, states that as of 1 November 2010, legal aid will also become available for asylum seekers challenging their detention in a court. Their immigration Act 1987 states: *(2) Every person who is arrested under this section shall be brought before a District Court Judge as soon as possible, and shall in no case be detained for more than 48 hours unless, within that period, a District Court Judge issues a warrant of commitment under section 79 of this Act for the detention of that person in custody.*<sup>13</sup>
- 4) **Other international examples:** For example Canada, South Korea, Argentina, Israel, most European countries and many others have some form of judicial review, as well as administrative review procedures.<sup>14</sup>

#### 4.3.2 Time limits on immigration detention

International human rights standards are clear that no one should be subject to indefinite detention. Detention should be for the shortest possible time with defined limits on the length of detention, which are strictly adhered to.

A number of countries have introduced time limits on immigration detention to ensure it is for the shortest possible time frame, and individuals are aware of their rights and entitlements during this period.

For example, according to Swedish Immigration Law all asylum seekers who arrive in Sweden without documentation are detained until their identification has been investigated, taking usually from two weeks to two months. However the government has also stipulated that detention in Sweden shall only be employed if supervision is deemed inadequate. In practice this means that asylum seekers may be signed into the detention centre and subsequently released into an open reception centre after an initial assessment.<sup>15</sup>

In line with the position of the Refugee Council of Australia, the IDC would argue that identity, health and security checks should and can be completed within 30 days and any detention after this period should be decided by independent judicial review. This is particularly noted now that the new ASIO/DIAC triage security assessment process has been found to be able to undertake screening in as little as one day.<sup>16</sup>

This time frame is in line with international examples, for example, the average time to assess and undertake identity, health and security checks in South Africa is 30 days, in Sweden is 14 days, (see above) and in the US, 85% of cases are assessed and release decided within 14 days.

The US has introduced a Revised Parole Policy for Arriving Aliens with Credible Fear Claims. Effective on January 4, 2010, under the new policy, undocumented

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<sup>12</sup> <http://www.globaldetentionproject.org/countries/africa/south-africa/introduction.html>

<sup>13</sup> <http://www.legislation.govt.nz/act/public/1987/0074/latest/DLM108018.html>

<sup>14</sup> See pages 46, 47: Sampson, R., G. Mitchell and L. Bowring: *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition, 2011. <http://idcoalition.org/handbook/>

<sup>15</sup> <http://idcoalition.org/asylum-seekers-in-sweden/>

<sup>16</sup> <http://www.theage.com.au/national/security-checks-on-asylum-seekers-fasttracked-20110526-1f6f7.html>

aliens who arrive in the United States at a port of entry and are found to have a credible fear of persecution or torture will automatically be considered by for release following an assessment of their case.

The US government has stated:

‘ICE (Immigration and Custom’s Enforcement) is committed to detention reform that ensures criminal and violent aliens remain in custody while establishing effective alternatives for non-violent, non-criminal detainees commensurate with the risk they present,” said Assistant Secretary Morton. “These new parole procedures for asylum seekers will help ICE focus both on protecting against major threats to public safety and implementing common-sense detention policies.’<sup>17</sup>

The majority of undocumented asylum seeker cases since mid 2010 have been released following this parole review process, with immigration detention used now primarily for ‘criminal aliens’ facing deportation.

The US government reports that 85% of the cases are interviewed and decided in relation to credible fear within 14 days of arrival.<sup>18</sup>

#### **4.3.3 Management in the community – The CAP Model**

IDC and La Trobe University research into alternatives to detention also found immigration detention is not necessary in the majority of cases to manage and process undocumented or irregular individuals. This can be effectively undertaken in the community.

The research found that irregular migration is an every day occurrence in most countries, and is becoming a normal part of operating government. How governments manage irregular migration greatly differs however.

Some countries for example have various forms of mandatory detention, which are only used for initial security checks, not for the entire duration of the process as occurs in Australia. Many countries effectively manage similar populations in the community, without the use of detention and use a range of effective mechanisms states can use to manage individuals in the community. The IDC have combined these mechanisms into one five-step framework to assist in the exploration of alternatives to detention, called the Community Assessment and Placement (CAP) Model.

The CAP model draws together a range of mechanisms to prevent unnecessary detention and outlines a number of possible alternatives to detention, underpinned by legitimate migration management concerns of governments. These concerns include compliance with release conditions, timely case resolution and cost, while minimizing harm and upholding individual rights and dignity. CAP draws from examples being implemented in a range of countries to enforce immigration law through mechanisms that do not rely heavily on detention. Such targeted

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<sup>17</sup> <http://www.aila.org/content/fileviewer.aspx?docid=30815&linkid=212700>

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<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b8d046d56a388210VgnVCM100000082ca60aRCRD&vgnnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD>



enforcement provides a sophisticated response to the diverse population of irregular migrants and asylum seekers within national territories. (See Appendix 2)

A number of governments are using the CAP model to assess their immigration detention law and policy, and to explore examples and models, which may ensure that it is only used as a last resort. The IDC encourages the Australian government to assess its current immigration detention policy against this model, and to explore legislative and policy reform to ensure immigration detention is only used as a last resort.

In exploring the application of the CAP model in the Australian context, it is important to note that the research found that asylum seekers and irregular migrants were found to be a low risk to abscond if they are in a lawful process awaiting a decision on their case in their destination country. They are also better able to comply and cooperate in the community if they:

- Are able to meet their basic needs
- Have been through a fair and informed process, and
- Are supported to achieve sustainable long-term solutions while awaiting a decision on their case.

Secondly, undertaking individual screening and assessment of individual circumstances, such as vulnerability, identity, health and security, individual case factors and the community context, allowed governments to make informed decisions on whether to detain or not, and under what conditions. This assisted in achieving higher compliance rates while reducing unnecessary and costly and damaging detention. It also allowed governments to send a strong message to the public that they are detaining where necessary, particularly in cases of security, while avoiding unnecessary detention.

This is seen as a preventative approach to unnecessary immigration detention, and is used in countries such as Canada, Sweden, Belgium, Finland, and more recently the United States. Interestingly a number of the preventative models we identified operate in a mandatory detention context.

For example, some countries have laws that act as or require mandatory detention similar to Australia – but for only initial screening and processing to ensure public safety and national security. Canada, Sweden, the Philippines and Hong Kong, require mandatory detention but use a range of preventative mechanisms we don't use in Australia. Sweden for example requires detention for identity, health and security purposes, but has screening and release mechanisms for individuals deemed as low risk. They also have time limits on detention and judicial review as a further safeguard. In Canada, Germany and Finland, immigration officers have the discretion to release arriving undocumented asylum seekers who are cooperating with the identity check process, or to release vulnerable individuals directly into open reception arrangements.

Other countries have mandatory screening to determine where a person should be placed – which may or may not occur in a detention facility. For example undocumented individuals in South Africa, Spain and Belgium require identification and screening, which could occur in a range of locations, from the airport, border,

detention centre or immigration office in the country- and this is a requirement by law, but they are not necessarily detained.

In Belgium for example, an undocumented asylum seeker at the border is screened to determine are they are they an irregular migrant with no legal grounds to remain, or are they an asylum seeker, in which case they are transferred to an open reception centre.

Detention in these contexts above, unlike Australia, are generally for non-compliance or security concerns, not for standard processing of cases, which occur in the community as the norm.

These forms of mandatory detention and screening differ significantly from Australia's mandatory detention, which is for the entire period of processing and case resolution.

This occurs despite the fact that Australia has some of the world's best practice in relation to community case resolution, including extensive experience with alternative to detention programs. Australia's leadership in alternatives to immigration detention has been widely praised around the world, following the 2005 Palmer and Comrie reports, and provided inspiration for the development of the CAP model. A number of countries including the UK, the Netherlands and Belgium drawing from Australia's experience in their detention reform efforts.

IDC research found Australia has a wide range of alternatives, from bond, bridging visas, including the Removal Pending Bridging Visa, reporting, return programs, case management, Community Detention, and the Community Assistance Scheme. The IDC found that many of these programs have had very successful outcomes in terms of compliance on appearance and voluntary return. The Community Care Pilot, now the CAS program, had 94% compliance and 60% voluntary return for example, which are almost identical to the figures in Canada.<sup>19</sup>

These programs however need to be expanded to all unauthorized arrivals and undocumented individuals and linked to early security and identity screening and judicial review.

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<sup>19</sup> See pages 51, 52: Sampson, R., G. Mitchell and L. Bowring: *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition, 2011. <http://idcoalition.org/handbook/>

## **6. Recommendations for Australia**

### **Summary of Recommendations to the Australian Government**

#### **Length, Review and Oversight**

- Australia must end the use of indefinite mandatory immigration detention, in line with international standards and Australia's obligations.
- A legislative and detention policy framework should be developed in accordance with UNHCR guidelines, international human rights standards and the 2008 Detention Values Statement in relation to purpose, length, review, release and rights of immigration detainees.
- An independent detention review process, incorporating an administrative and judicial process, must be developed
- Immigration detention must only be used as a last resort and for the shortest possible time and defined in law, policy and practice.
- Identity, health and security checks must be completed within 30 days and any detention after this period should be decided by independent judicial review
- Australia should implement a National Preventative Mechanism (NPM) under its obligations to the Optional Protocol of the Convention Against Torture (OPCAT)
- The use of remote and offshore facilities should cease, considering the logistical and psychological impacts.

#### **Screening and Release**

- Australia should develop an early identity, health and security risk assessment process, linked to provisional and conditional release mechanisms, and an expansion of the existing triaging to enable initial screening within the detention framework.
- Australia should develop an open reception system for low-risk, high need, vulnerable irregular and undocumented migrants, drawing from practice in Europe, New Zealand and elsewhere.
- Various mechanisms should be expanded and implemented to manage individuals in community contexts where possible, including screening and assessment, documentation, and monitoring mechanisms, and building on existing alternative to detention programs such as the Community Assistance Scheme and the Community Detention program.
- Early legal advice, case management and health and welfare support are essential components to effective community reception models and should be expanded.
- In addition, a range of areas of consideration are also found in Appendix 1, the Joint Statement of the Co-Chairs of the UNHCR-IDC Expert Roundtable on Alternatives to Detention, which details relevant areas relating to improving security clearances.

#### **The needs of children and families**

- Children and their caregivers should not be detained in immigration detention facilities, or within the Immigration Detention Network in Australia. In line with moves in countries such as Belgium, the Netherlands and the UK, Australia should ensure community reception arrangements for all families.
- No unaccompanied minor should be detained in Australia, and must be enshrined in law.

## **7. Conclusion**

Australia's law and policy on mandatory detention does not fully comply with international refugee and human rights law, and does not adequately protect against arbitrary detention. There should be a presumption against the use of immigration detention and where deemed necessary, detention should be used as a last resort, for the shortest possible period and only when necessary, reasonable and proportionate. Detention should be reviewable and independently monitored, with alternatives to detention utilized in the first instance.

This submission concludes that indefinite, mandatory detention in often remote environments in Australia has a detrimental impact on the mental health and functioning of many immigration detainees, including children, refugees, torture survivors, women at risk, the elderly, the disabled and unwell and other vulnerable groups.

In addition, despite almost 20 years of one of the harshest policies in the world, irregular arrivals have been deterred by immigration detention in Australia, in line with international research.

Despite Australia's leadership in alternatives to immigration detention, Australian immigration detention law and policy lags far behind most developed countries in terms of legal and procedural safeguards. While a number of countries require some form of mandatory detention for screening purposes, Australia stands alone in the requirement for ongoing mandatory detention for the entire period of processing without access to judicial review or standard administrative conditional or provisional release following identity, health and security checks. The use of detention for migration related purposes must be time-limited and for the purposes of screening rather than full processing of refugee status.

For Australia to meet its international obligations and to ensure immigration detention law and policy is in line with international human rights standards, the 2008 Detention Values Statement must be enshrined in law, ensuring detention is a last resort and that identity, health and security checks are completed within 30 days and any detention after this period should be decided by independent judicial review.

The IDC research identified that key to ensuring detention is only used as a last resort is to explore how cases can be quickly screened and assessed, particularly how vulnerable cases can be identified, and secondly how conditional release mechanisms can be introduced much earlier in the process to prevent unnecessary immigration detention.

These mechanisms fully explore and utilise alternatives to detention in the individual case. They also assist in reducing the financial and human cost of immigration detention, while providing reassurance for the government on compliance.

The 'Immigration Detention Values' statement released by the Government provides an important starting point to the implementation of a fair and humane detention policy in Australia. The IDC believes however that this statement needs to be followed by a clearly defined legislative and policy framework, aimed at developing

mechanisms to review, oversee and transition detainees from detention, based on Australia's international obligations and UNHCR guidelines.

There is an urgent need for strong political and public leadership to develop community confidence in Australia's strong and long history of effective management of immigration in community settings, with a move away from detention as the primary migration management tool.

In addition the IDC believes it is vital that the Government and DIAC continue to dialogue with UNHCR, NGOs and welfare groups on any proposed changes.

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12<sup>th</sup> August 2011

*Grant Mitchell is a social anthropologist in international migration and is Director of the International Detention Coalition, a global network of 200 NGOs in 50 countries. Grant has extensive experience in asylum and detention policy in Europe, US, Australia and the broader Asia Pacific region. His work includes developing case management and alternative to detention models for asylum seekers in Australia at Hotham Mission and overseeing the Community Detention and Community Care Pilot programs at the Red Cross. He is a member of the US Government's Department of Homeland Security (DHS)-NGO Working Group and is Deputy Chair of the Immigration Detention Working Group of the Asia Pacific Refugee Rights Network.*

*Grant won the Australian Human Rights Award (HREOC) in 2002 for his work at Hotham Mission in developing alternatives to detention, and was nominated for the 2004 French Human Rights Prize for his work in assisting women and children in detention.*

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

**Summary Report**

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

**I. SETTING THE SCENE**

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

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

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

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

**Challenge**

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

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

- A solid international legal framework exists for detention standards.
- There is no empirical evidence that detention deters irregular immigration, and deterrence is not a permissible consideration.
- Alternatives are a key starting point to ensure that every decision to detain is a 'risk-based' and individualized process that is used as a last resort, and which is strictly governed by principles of necessity and proportionality of detention.



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

#### Conclusions: Domestic Context

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

#### Conclusions: Public Perceptions

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

## II. THEME 1: NATIONAL SECURITY AND HEALTH

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

### Challenges

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

### Conclusions

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

- Even if security or character concerns are present at the lower scale, alternatives to immigration detention can still be explored, such as conditional release and community-based supervision arrangements. Examples were provided of jurisdictions such as Canada, Germany and Finland that allow the release of undocumented individuals who are complying with identity and security check processes.

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

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

#### Challenge

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

#### Conclusions

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

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

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

##### Challenges

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

##### Conclusions

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

#### **V. RECENT RESEARCH INTO ALTERNATIVES TO DETENTION**

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

##### Challenges

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

## Conclusions

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

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

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

### Challenges

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

### Conclusions

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

and detention is largely unrelated to responding to irregular, non-refugee migrants. There is a need to shift away from an unlawful non-citizen approach to a refugee-focussed approach to irregular arrivals in Australia as an issue of reception and humanitarian response, which encourages future settlement and self-reliance outcomes.

## **VII. ALTERNATIVES TO DETENTION**

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

### Challenges

To identify alternatives to and within detention which emphasize a risk-based approach to detention, based on clear and transparent criteria to complete identity, health and security checks relating to release into the community, and the implementation of graduated restrictions on freedom of movement, where necessary, which prevent, rather than react to, long-term detention; and to ensure that assessments of vulnerability are made in a timely and robust fashion.

### Conclusions

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

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

### Challenges

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



## Conclusions

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

UNHCR Regional Representation  
Canberra, 19 July 2011

International Detention Coalition  
Melbourne, 19 July 2011

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

**Co-Chair Summary Statement**

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

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

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

# THERE ARE ALTERNATIVES

A handbook for preventing unnecessary immigration detention

## INTRODUCTION FOR POLICY MAKERS

**This handbook is drafted for legislators and policy makers wanting to know more about alternatives to detention.**

Governing issues of irregular migration in a way that satisfies the need to demonstrate control of national territories while also dealing with irregular migrants in a humane and dignified manner can be challenging.

While international human rights laws and standards make clear that immigration detention should be used only as a last resort in exceptional cases after all other options have been shown to be inadequate in the individual case, there is limited practical guidance available over how this can be achieved systematically.

The International Detention Coalition's (IDC) *Handbook for preventing unnecessary immigration detention* aims to address this gap. This handbook identifies and describes a range of mechanisms to prevent unnecessary detention and outlines a number of possible alternatives to detention. The pragmatic

approach adopted in this handbook is shaped by the legitimate migration management concerns of governments. These concerns include compliance with release conditions, timely case resolution and cost, while minimizing harm and upholding individual rights and dignity. Drawing on a number of international examples – from countries such as Argentina, Belgium, Canada, Hong Kong, New Zealand, Philippines, Spain and the United Kingdom, – the handbook outlines a new approach to alternatives to detention: a 5-step conceptual and practical framework, called the **Community Assessment and Placement (CAP) model**.

The policies described in this handbook, as outlined in the CAP model, are currently being implemented in a range of countries to enforce immigration law through mechanisms that do not rely heavily on detention. **Such targeted enforcement provides a sophisticated response to the diverse population of irregular migrants and asylum seekers within national territories.**



**International  
Detention Coalition**  
Human rights for detained refugees,  
asylum seekers and migrants

# KEY FINDINGS OF NEW RESEARCH<sup>1</sup>

The research focused on three key areas to assess the success of any alternative to detention program; compliance, cost and health and wellbeing. A number of identified benefits for government, the community and the individual, achieved by adopting preventative mechanisms and alternatives to detention, include:

## Cost less than detention

For example: A cost saving of 93% was noted in Canada and 69% in Australia on alternatives to detention compared to detention costs. In addition independent returns in the EU save approximately 30% compared to escorted removals.

## Increase independent return rates for refused cases

Examples in Canada, Australia and the US of both asylum seekers and irregular migrants had return rates of between 60% and 69%, while Sweden reported an 82% rate of independent return among refused asylum seekers.

## Maintain high rates of compliance and appearance

For example: A recent study collating evidence from 13 programs found compliance rates ranged between 80% and 99.9%. For instance, Hong Kong achieves a 97% compliance rate with asylum seekers or torture claimants in the community, and Belgium an 82% compliance rate among families who might otherwise be subject to detention and removal.

## Reduce wrongful detention, litigation, overcrowding and long-term detention

For example: Wrongful detention has led to litigation, costly compensation and public criticism in a range of countries including Australia, South Africa and the UK. For instance, court rulings in Hong Kong required the government to demonstrate the reasons for detention, leading a number of policy changes including the introduction of individual case assessment.

## Improve client health and well being, integration outcomes and respect human rights obligations

For example: Appropriate management in the community has been found to be more likely to uphold human rights and support wellbeing, improving ability to contribute fully to society if residency is secured or to face difficult futures such as return.

The research found asylum seekers and irregular migrants rarely abscond while awaiting the outcome of a status determination or other lawful process and are better able to comply with release conditions or a negative final decision if they: **can meet their basic needs in the community; if they have been through a fair and efficient determination process; if they have been informed through the process, including legal advice and have been provided advice on all options to remain in the country legally.**

## THE CAP MODEL

Common factors that contribute to successful community-based programs include understanding the diversity within the population of asylum seekers and irregular migrants, as well as understanding those contexts that promote good outcomes for a range of stakeholders. Individual case and community assessment assists in making informed decisions on appropriate placement, the setting of conditions if required, and the provision for basic needs, legal advice and individual case management while awaiting a final outcome. These factors are part of a 5-step conceptual and practical framework, called the Community Assessment and Placement (CAP) model, which prevents and reduces the likelihood of unnecessary detention and effectively manages individuals in the community:

## THE CAP MODEL

Community Assessment and Placement model

### DECISION MAKING PROCESS



**Not detain**  
Open accommodation

**Conditional release**  
Alternatives to detention

**Detain**  
Last resort with review

### PLACEMENT OPTIONS

1. R.Sampson, G.Mitchell and L.Bowring, *There are alternatives: Handbook for preventing unnecessary immigration detention*; IDC, 2011.

# HOW TO USE THE CAP MODEL

The Community Assessment and Placement model has been designed as a framework to assist governments in their exploration and development of alternatives to detention.

While Governments deal with detention and enforcement differently due to specific political systems and differing irregular migration experiences, there may be mechanisms within the model that work for an individual country.

The CAP model can assist in framing discussions and providing a shared understanding of some of the issues, while the practical examples of current implementation demonstrate that reducing detention through community management is achievable and beneficial for a range of parties. Although designed in this way, these five mechanisms correspond to the steps that can be taken in

individual cases to ensure detention is only applied as a last resort in exceptional cases.

**For example:** *If authorities screen out an individual from detention at step 2, then the individual is not detained and can be placed in an open accommodation setting. In most cases the first three steps will be sufficient to ensure effective compliance. However, if individual and community assessments identify serious concerns, then release into the community may only be possible through an alternative to detention placement involving additional conditions, as shown at Step 4. Re-evaluation in each case occurs at certain points, such as after a negative decision on a status application or when a set review period is reached for people in detention. It is not intended to imply that most cases end in detention.*

**Use the Community Assessment and Placement model for targeted enforcement; to ensure detention is not wrongful and used only where individually assessed as needed. CAP reduces the financial and human cost of immigration detention and maximizes management and case resolution in the community.**



**The CAP model is unique as it combines mechanisms to prevent unnecessary detention with strategies for effective management in the community.**



# STAGES IN EXPLORING AND IMPLEMENTING ALTERNATIVES AND PREVENTATIVE MECHANISMS

## Stage 1: Analyse the context

- Assess current legislation, policy and practice against international legal standards and identified good practice examples relating to the detention of refugees, asylum seekers and migrants
- Identify what available preventative mechanisms or alternatives exist but which may be underutilized
- Explore what alternatives can be tested or expanded without changing existing legislation
- Identify policy gaps and legislation which may require revision to ensure detention is a last resort.

## Stage 2: Assess the population

- Undertake an analysis of populations subject to or at risk of detention
- Identify particularly vulnerable populations to prioritize in pilot or national programs.

## Stage 3: Explore relevant models

- Undertake a study visit to countries already implementing preventative mechanisms and alternatives to detention
- Undertake research studies and an analysis of available local and national community services and placement options.

- Organize an expert roundtable and forums to explore preventative mechanisms and alternatives relevant in the national and local context.

## Stage 4: Build partnerships

- Develop partnerships with departments and agencies with expertise in community services, case management and working with complex cases, such as health, child protection and family services
- Identify international organizations, NGO and civil society groups to partner with, including service and legal providers and religious groups.

## Stage 5: Start implementing

- Develop local and national pilots and programs in partnership with government agencies, NGO service providers and international organizations
- Undertake policy development and legislative reform on immigration detention and the implementation of preventative mechanisms and alternatives to detention
- Monitor and evaluate the effectiveness of these programmes and share learnings and outcomes with relevant stakeholders.

## HOW THE INTERNATIONAL DETENTION COALITION CAN ASSIST:

- The IDC provides free training on alternatives to immigration detention and preventative mechanisms
- The IDC provides technical, programmatic, policy and legal assistance
- The IDC can connect to regional, national and local NGOs and civil society groups, including legal and service providers.

Contact Grant Mitchell IDC Director, for any enquiries: [gmitchell@idcoalition.org](mailto:gmitchell@idcoalition.org)

## International Detention Coalition

Immigration detention is a growing phenomenon of modern governance as governments strive to regulate growing cross-border migration and limit the number of migrants who do not have legal status on their territory. Detention capacity continues to expand despite well-established concerns that detention does not deter irregular migrants; that it interferes with human rights; and is known to harm the health and wellbeing.

The International Detention Coalition (IDC) brings together civil society organizations and individuals from more than 50 countries across the close working together to improve the human rights of detained refugees, asylum seekers and migrants. The Coalition undertakes research, training, advocacy and campaign initiatives, with a focus on children in detention, conditions and monitoring of places of detention and promoting the use of alternatives to detention.

To find out more or download the Handbook visit: <http://www.idcoalition.org> or email: [info@idcoalition.org](mailto:info@idcoalition.org)