Australian Human Rights Commission
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Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011

Australian Human Rights Commission Submission to the Senate Standing Committees on Legal and Constitutional Affairs

23 June 2011

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Standing Committees on Legal and Constitutional Affairs in their Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011.

2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Background

3. This submission draws on extensive work the Commission has undertaken on Australia's immigration detention system for over a decade, including:

    a. two national inquiries – *A last resort?* (National Inquiry into Children in Immigration Detention)[1] and *Those who've come across the seas: Detention of unauthorised arrivals*[2]

    b. annual inspections of and reports on conditions in immigration detention facilities[3]

    c. investigating complaints from individuals in immigration detention[4]

    d. examining proposed legislation and making submissions to parliamentary inquiries.[5]

4. The Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 (the Bill) proposes to reform the *Migration Act 1958* (Cth) (the Migration Act) and *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) by:

    a. repealing Australia's policy of excising territories from the migration zone

    b. ensuring that detention is only used as a measure of last resort, thereby ending the policy of mandatory detention

    c. ending indefinite and long-term detention

    d. restoring the rights of asylum seekers to procedural fairness

    e. introducing a system of judicial review for periods of detention of over 30 days.

3 Summary

5. Australia continues to have one of the strictest immigration detention systems in the world – it is mandatory, it is not subject to time limits and people are not able to challenge the need for their detention before a court. The Commission has, for many years, called for an end to this system because it leads to breaches of Australia's human rights obligations.

6. The Commission's concerns about immigration detention in Australia have escalated over the past year, with ongoing troubling incidents occurring across the detention network. These have included six deaths in detention, five of which appear to have been the result of suicide; suicide attempts; serious self-harm incidents including lip-sewing; riots; protests; fires; breakouts and the use of force against people in detention on Christmas Island by Australian Federal Police. In the Commission's view, the need for reform has become urgent.

7. The Commission is of the view that the Bill proposes positive and long-overdue reforms to Australia's migration laws and policies. The amendments proposed by the Bill should, in the Commission's view, be supplemented by increased use of community-based alternatives to holding people in immigration detention facilities, such as alternatives to detention including bridging visas, and alternative forms of detention like Community Detention.[6]

4 Recommendations

Recommendation 1: The Commission recommends that the Bill be passed.

Recommendation 2: The Migration Act should be amended to provide that detention of unlawful non-citizens in immigration detention facilities must only be used as a measure of last resort. There should be a clear presumption against the detention of children for immigration purposes.

Recommendation 3: A decision to detain a person, or to continue a person's detention, should be subject to prompt review by a court. To comply with Australia's international obligations, the court must have the power to order the person's release if their detention is not lawful. The lawfulness of detention is not limited to domestic legality – it includes whether the detention is compatible with Australia's international obligations relating to liberty and arbitrary detention.

Recommendation 4: Immigration detention, when it occurs, should only be for the shortest practicable time. An individual assessment of whether it is necessary, reasonable and proportionate to hold each individual in an immigration detention facility should be completed as soon as possible after a person is detained. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in community-based alternatives while their immigration status is resolved.

Recommendation 5: A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention.

Recommendation 6: The provisions of the Migration Act relating to excised offshore places should be repealed and the policy of processing some asylum claims through a separate 'non-statutory' process should be abandoned. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

Recommendation 7: The provisions of the Migration Act that limit judicial review, including privative clauses, and restrictions on the application of natural justice should be removed from the Migration Act.

Recommendation 8: Section 198A of the Migration Act should be repealed to remove the potential for asylum seekers to be removed to third countries for processing.

Recommendation 9: The Department of Immigration and Citizenship and the Minister for Immigration and Citizenship should make greater use of community-based alternatives to holding people in immigration detention facilities for prolonged and indefinite periods. This should include alternatives to detention such as bridging visas, and alternative forms of detention like Community Detention.

5 Mandatory detention

8. The Bill will amend the Migration Act to remove the requirement that unlawful non-citizens in or seeking to enter the migration zone must be detained.[7] The Bill will further amend the Migration Act to insert the principle that detention in immigration detention facilities must only be used a measure of last resort.[8] The effect of these reforms should be to end Australia's system of mandatory detention and replace it with a system by which the detention of unlawful non-citizens is the exception, rather than the rule.

9. The Commission supports these amendments and continues to call for an end to Australia's system of mandatory detention, as it has for over a decade.

10. Reform of the system of mandatory detention is necessary because it leads to breaches of Australia's human rights obligations. People in detention are particularly vulnerable to infringements of certain human rights that Australia is bound to respect and protect, including:

    a. the right to be free from arbitrary detention[9]
    b. the right to be free from torture and cruel, inhuman or degrading treatment or punishment[10]
    c. the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person[11]
    d. the right to freedom from interference with the family[12]
    e. the principle that children must only be detained as a last resort[13]
    f. the right of children seeking refugee status to receive appropriate protection and humanitarian assistance.[14]

11. The Commission has, in the past, found the Commonwealth responsible for breaches of some of these human rights with respect to people who have been mandatorily detained.[15] Routine breaches of Australia's international obligations may continue to occur for as long as Australia continues to mandatorily detain unlawful non-citizens.

12. Under the Australian Government's 2008 New Directions in Detention policy (New Directions), immigration detention is meant to be used as a last resort, people are meant to be detained in the least restrictive environment appropriate to their individual circumstances and there is meant to be a presumption that people will be permitted to reside in the community unless they pose an unacceptable risk.[16]

13. Unfortunately, these principles have not been enshrined in legislation. Further, the Commission seriously questions the extent to which they are being implemented in practice, given the high number of people in immigration detention facilities around Australia. The Commission is particularly concerned that these principles are not being implemented in the case of asylum seekers who arrive by boat and people whose visas are cancelled under section 501 of the Migration Act.

14. The Commission believes that the Government's failure to implement the New Directions in Detention policy demonstrates the need for legislative reform of Australia's system of mandatory detention.

15. The Commission acknowledges that use of immigration detention *may* be legitimate for a strictly limited period of time. However, to avoid detention becoming arbitrary, the need to detain should be assessed on a case-by-case basis taking into consideration individual circumstances. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in community-based alternatives while their immigration status is resolved – if necessary, with appropriate conditions imposed to mitigate any identified risks.

16. The system of mandatory detention and the human rights breaches to which it can lead have a devastating human impact. The Commission has observed this firsthand during the visits to immigration detention facilities it conducts as part of its role in monitoring Australia's immigration detention system.[17]

17. Over the last year, the Commission visited immigration detention facilities that were harsh, restrictive, overcrowded and, in some places, prison-like. The Commission found that some people in detention had limited access to essential services such as physical and mental health services; few if any opportunities for external excursions; and inadequate access to support networks, communication facilities, recreational facilities and educational activities.[18]

18. The Commission also monitored the conditions of detention for children. Immigration detention facilities that accommodate children are generally less restrictive than the high-security immigration detention centres that hold adults, but they are still closed detention facilities from which children and their families are not free to come and go. The Commission heard that the detention of children was of grave concern to parents, many of whom were extremely anxious about their children's wellbeing.[19]

19. The fact of mandatory, prolonged and indefinite detention as well as the conditions in detention facilities was causing considerable distress among people in detention. The Commission spoke with detainees who expressed immense frustration and a lack of comprehension about why it was considered necessary to detain them for the duration of their immigration processing.[20] This distress was manifested in deterioration in the mental health of people in detention, and disturbing levels of self-harm including attempts at suicide.[21]

Recommendation 2: The Migration Act should be amended to provide that detention of unlawful non-citizens in immigration detention facilities must only be used as a matter of last resort. There should be a clear presumption against the detention of children for immigration purposes.

6 Prolonged, indefinite and arbitrary detention

6.1 Judicial review of detention

20. The Bill will amend the Migration Act to create a scheme of judicial oversight of immigration detention. Under the Bill, the Migration Act will provide that a person in immigration detention may apply to a magistrate for an order that he or she be released because there are no reasonable grounds to justify his or her detention or continued detention.[22] If the magistrate is satisfied that it is not appropriate for the person to be detained, the magistrate may make any order he or she sees fit, including an order that the person be released or granted a visa including a bridging visa.[23] The effect of this amendment would be to allow people currently in immigration detention to challenge the reasonableness of their detention and, when detention is found to be unreasonable, to be released.

21. The Commission supports the amendment of the Migration Act to allow a person in immigration detention to challenge the reasonableness of that detention. Assessment of the reasonableness of detention includes consideration of whether the detention complies with Australia's international human rights obligations, including the requirement to ensure that no one is arbitrarily detained. The Commission has, for many years, called for the creation of a scheme of independent judicial oversight of immigration detention to protect against breaches of detainees' fundamental human rights.[24] The Commission is particularly concerned that the immigration detention of children is not subject to judicial oversight.

22. Independent review of immigration detention is essential to prevent prolonged, indefinite or otherwise arbitrary detention. Australia has binding obligations not to subject people to arbitrary detention, under article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the *Convention on the Rights of the Child* (CRC).[25] The United Nations Human Rights Committee has said that 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and proportionality.[26] This finding has been echoed by Australian courts.[27] Detention may therefore be found to be arbitrary where it is prolonged or indefinite in circumstances which are inappropriate, are unjust or lack predictability or proportionality.

23. Article 9(4) of the ICCPR and article 37(d) of CRC provide an essential safeguard for ensuring respect for the right to liberty: the requirement that any person who has been arrested or otherwise detained be permitted to challenge the lawfulness of his or her detention before a court or another competent, independent and impartial authority.[28] For detention to be 'lawful' in this context, it must not only comply with domestic law but also be consistent with article 9(1) of the ICCPR.[29]

24. Accordingly, in order to guarantee the prohibition on arbitrary detention in article 9(1) of the ICCPR and article 37(b) of the CRC, it is essential that the decision to detain, or to continue to detain, is subject to prompt review by a court. The court must have the power to review the lawfulness of detention under both domestic legislation and Australia's binding international obligations, including under article 9(1) of the ICCPR and article 37 of the CRC to not subject anyone to arbitrary detention. The court must also have the authority to order the person's release if the detention is found to be arbitrary.

25. The Commission's concerns that Australian law does not provide for judicial review of immigration detention are reflected among people in immigration detention. During its recent visit to immigration detention facilities at Villawood, for instance, the Commission spoke with people who expressed disbelief and a sense of injustice that in a country like Australia, they could be detained indefinitely without the ability to challenge their detention before a judge.

26. Under the New Directions, the Australian Government has acknowledged that 'detention that is indefinite or otherwise arbitrary is not acceptable'.[30] In the absence of judicial review of detention, the New Directions committed to the length and conditions of detention being subject to 'regular review'. Once in detention, a person's situation should be reviewed by a senior Department of Immigration and Citizenship (DIAC) officer every three months to ensure that his or her continued detention is justified. In addition, each person should have their detention reviewed by the Commonwealth Ombudsman every six months.

27. The Commission has welcomed these review mechanisms in the past, but has expressed concern that they are not sufficient to prevent indefinite or arbitrary detention, in particular because the DIAC reviews are not conducted by an independent body and the Ombudsman is not able to enforce his recommendations.[31] In recent reports the Commission has expressed concerns about the limited transparency surrounding the review processes and outcomes.[32]

28. In the Commission's view, such concerns demonstrate that the scheme of review provided by the New Directions is not sufficient to ensure Australia's compliance with its international obligations in relation to arbitrary detention.

Recommendation 3: A decision to detain a person, or to continue a person's detention, should be subject to prompt review by a court. To comply with Australia's international obligations, the court must have the power to order the person's release if their detention is not lawful. The lawfulness of detention is not limited to domestic

legality – it includes whether the detention is compatible with the Australia's binding international obligations relating to liberty and arbitrary detention.

6.2 Time limit on detention

29. The Bill will amend the Migration Act to provide a time limit for immigration detention. Under the Bill, a person cannot be detained under section 189 of the Migration Act for longer than 30 days unless a magistrate makes an order for the person's continued detention.[33] The effect of this amendment is to prescribe a maximum period for which an individual may be detained in immigration detention without court approval.

30. The Commission supports the establishment of a time limit into Australia's system of immigration detention.

31. However, the Commission reiterates that there should be an individual assessment of whether it is necessary, reasonable and proportionate to hold each individual in an immigration detention facility, as soon as possible after a person is taken into detention. As noted above, a person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way.

32. Further, in the Commission's view, the Bill makes insufficient provision for review of the detention of children. In *A last resort?*, the Commission recommended that Australia's immigration laws should be amended as a matter of urgency to provide for independent review by a court or tribunal of the need to detain children for immigration purposes within 72 hours of initial detention.[34] The Commission found that such reform was necessary in order for Australia to comply with its obligations under the CRC.[35]

33. As Australian law and policy provide no limit to the length of time for which people may be detained for immigration purposes, high numbers of people – including children – are being detained for prolonged periods.[36] This situation risks breaching Australia's human rights obligations, including those relating to arbitrary detention.[37] As noted above, detention may be found to be arbitrary where it is prolonged or indefinite in circumstances which are inappropriate, are unjust or lack predictability or proportionality.[38]

34. Prolonged detention may also amount to inhumane, cruel or degrading treatment, in breach of Australia's obligations under articles 7 and 10(1) of the ICCPR and article 37(a) of the CRC, because it can cause serious psychological harm. The United Nations Human Rights Committee has found that mandatory immigration detention amounted to cruel, inhuman or degrading treatment in circumstances where it was prolonged, arbitrary and contributed to a detainee's mental health problems, when the authorities were aware of this but they delayed releasing the detainee from immigration detention.[39]

35. The Commission has seen evidence firsthand of the psychological harm to which prolonged and indefinite detention can lead. On its recent visit to

immigration detention facilities at Villawood, many people spoke to the Commission of feelings of frustration, distress and demoralisation after being detained for a long period of time, and many spoke of the uncertainty and anxiety caused by being detained for an indefinite period of time. People also spoke about the psychological impacts of their prolonged detention, including high levels of sleeplessness, feelings of hopelessness and powerlessness, thoughts of self-harm or suicide, and feeling too depressed, anxious or distracted to take part in recreational or educational activities. The Commission was troubled by the palpable sense of frustration and incomprehension expressed by many people. This appeared to have contributed to marked levels of anxiety, despair and depression, leading to high use of sedative, hypnotic, antidepressant and antipsychotic medications and serious self-harm incidents.[40] The situation of people experiencing prolonged and indefinite detention in immigration detention facilities is of serious concern to the Commission.

36. The potential impacts of prolonged and indefinite detention on children are also of significant concern. Children in detention are an especially vulnerable group. In *A last resort?,* the Commission found children detained for long periods are at high risk of serious mental harm.[41]

37. In the Commission's view, a mechanism to ensure that there is that there is a maximum time limit to detention for immigration purposes should be established as a matter of urgency to prevent the human rights breaches and significant human costs to which prolonged and indefinite detention can lead.

Recommendation 4: Immigration detention, when it occurs, should only be for the shortest practicable time. An individual assessment of whether it is necessary, reasonable and proportionate to hold each individual in an immigration detention facility should be completed as soon as possible after a person is detained. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in community-based alternatives while their immigration status is resolved.

Recommendation 5: A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention, for example for the purposes of health, identity or security checks.

7 Offshore processing

38. The Bill will repeal the provisions of the Migration Act relating to excised offshore places.[42] The effect of this reform will be to end Australia's excision regime, under which various islands are designated 'excised offshore places', and 'offshore entry persons' are barred from submitting a visa application under the Migration Act unless the Minister for Immigration and Citizenship determines that it is in the public interest to allow them to do so.[43]

39. The Commission supports this amendment. The Commission has consistently raised concerns about the practice of processing the claims of asylum seekers

in offshore places such as Christmas Island, and has called for the repeal of the provisions of the Migration Act relating to excised offshore places.[44]

40. The Commission remains opposed to the excision regime because it establishes a two-tiered system under which asylum seekers are treated differently based on their place and mode of arrival. Asylum seekers arriving in excised offshore places are barred from the refugee status determination system that applies under the Migration Act. They are barred from submitting a valid application for any visa, including a protection visa – this only becomes possible if the Minister exercises his or her discretion to allow an application to be submitted.

41. Article 31 of the *Convention Relating to the Status of Refugees* (Refugee Convention) prohibits state parties from penalising asylum seekers on account of their unlawful entry where they are coming directly from a territory where their life or freedom was threatened.[45] Australia's differential treatment of asylum seekers based on their place and method of arrival arguably breaches this obligation, as well as the right to equality and non-discrimination under article 26 of the ICCPR.[46]

42. In addition, Australia is obliged under the Refugee Convention not to expel or return people to countries where they would face persecution because of their race, religion, nationality, membership of a particular social group or political opinion.[47] Australia also has *non-refoulement* obligations under the ICCPR, CRC and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).[48] The non-statutory Protection Obligations Determination process may increase the risk of *refoulement*.

43. Further, the CRC affirms the right of child asylum seekers and refugees to receive appropriate protection and assistance.[49] The principle of non-discrimination in the CRC means that all children seeking asylum are entitled to the same level of assistance and protection of their rights, regardless of how or where they arrive.[50]

44. The Commission reiterates its view that the excision system be abandoned and that all people seeking asylum in Australia should have their claims assessed under the provisions of the Migration Act.

Recommendation 6: The provisions of the Migration Act relating to excised offshore places should be repealed and the policy of processing some asylum claims through a separate 'non-statutory' refugee assessment process should be abandoned. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

8 Procedural fairness

45. Part 4 of the Bill aims to 'restore fair process and procedural fairness.' This part, together with the intended amendment of the ADJR Act, essentially attempts to do this by:

a. removing privative clauses from the Migration Act

b. repealing sections which currently provide for exhaustive statements of natural justice.

46. The use of privative clauses is relatively controversial, as they potentially limit judicial review of administrative decisions.[51] Commentators have suggested that the intention behind the introduction of the privative clause contained in section 474 of the Migration Act, which would be repealed if the Bill was passed, was essentially to limit challenges to instances where decisions have involved bad faith.[52] Despite this intention, the High Court has interpreted this restriction of the privative clauses in a relatively minimalist way, allowing for the review of migration decisions involving jurisdictional error.[53] Review for jurisdiction error can encompass cases where there is alleged to be a denial of procedural fairness, failure to comply with statutory procedures, error of law, the inflexible application of policy, consideration of irrelevant material and failure to consider relevant material.

47. Similarly, the provisions which currently provide for exhaustive statements of natural justice arguably impose a limit on procedural fairness by limiting the content of rules around natural justice to the specific provisions contained in the Act, as opposed to allowing the courts to determine what the common law would require in the circumstances.[54]

48. Procedural fairness is a necessary precondition for the protection of fundamental human rights. The Commission considers that measures designed to limit procedural fairness and the operation of natural justice potentially prevent the review of administrative decisions which have resulted in a breach of a person's fundamental human rights.

49. The Commission believes that legislative provisions aimed at limiting judicial review and restricting the application of principles relating to procedural fairness and natural justice, such as those currently contained in the Migration Act, are inherently unfair and unjust. They are generally undesirable due to their potential to limit avenues of challenge for a person affected by a decision under the Migration Act. The Commission also notes that the removal of provisions which limit judicial review and restrict the principles of natural justice would be a positive step towards realising the *Key Immigration Detention Values* that formed part of the New Directions policy, including importantly, that 'people in detention will be treated fairly and reasonably within the law'.

Recommendation 7: The provisions of the Migration Act that limit judicial review, including privative clauses, and restrictions on the application of natural justice should be removed from the Migration Act.

9 Third country processing

50. Under the Bill, section 198A of the Migration Act would be repealed.[55] Section 198A allows the Minister to declare specified countries to which officers may remove offshore entry persons. The repeal of this section would exclude the

potential for third-country processing of asylum seekers who arrive in Australia at excised offshore places.

51. The Commission supports the repeal of section 198A and the removal of the potential for third-country processing of asylum seekers who arrive in excised offshore places.[56] All people who make claims for asylum in Australia should have their claims assessed under the refugee status determination system that is set out in the Migration Act.

52. The Commission recognises the need for regional and international cooperation on asylum seekers. However, the Commission has serious concerns about sending people who claim asylum in Australia to other countries for processing.

53. Regional processing of asylum seekers who arrive in Australia at excised offshore places may lead to breaches of Australia's international human rights obligations. As stated above, Australia is bound by a number of international obligations relating to asylum seekers and refugees. For instance, Australia is

    a. prohibited from penalising asylum seekers on account of their unlawful entry where they are coming directly from a territory where their life or freedom was threatened[57]
    b. obliged to respect and protect the right to equality and non-discrimination of people in its jurisdiction[58]
    c. required to ensure that all child asylum seekers and refugees receive appropriate protection and assistance, regardless of how or where they arrive.[59]

54. A regime by which asylum seekers who arrive at excised offshore places are sent to third countries for processing, while those who arrive on the mainland may have their claims processed in Australia, would arguably breach Australia's obligations to treat asylum seekers humanely and in a non-discriminatory manner. Furthermore, the Minister for Immigration and Citizenship is currently the guardian of unaccompanied minors who may be subject to third country processing and is obliged under the CRC to act in their best interests at all times.

55. Moreover, a policy of third country processing may increase the risk of Australia breaching *non-refoulement* obligations under the Refugee Convention.[60] Third country processing may also result in Australia breaching its *non-refoulment* obligations under the ICCPR, CRC and CAT. Asylum seekers sent to third countries may experience violations of their human rights, such as the right to freedom from arbitrary detention and inhumane treatment.

Recommendation 8: Section 198A of the Migration Act should be repealed to exclude the potential for asylum seekers who arrive in excised offshore places to be removed to third countries for processing.

10 Conclusion

56. The Commission is of the view that Australia's system of mandatory and indefinite immigration detention should be reformed as a matter of urgency, because it leads to breaches of Australia's human rights obligations. In the Commission's view, the Bill proposes positive and long-overdue amendments to the Migration Act which go some way towards addressing the Commission's concerns in relation to immigration detention in Australia.

57. The Commission supports an end to mandatory detention and the principle that detention should only be used as a measure of last resort. The Commission is of the view that where detention is used, it should be subject to a maximum time limit. The Commission agrees that there should be judicial review of immigration detention which continues past the prescribed maximum time limit.

58. The Commission supports the removal from the Migration Act of provisions purporting to limit judicial review, including privative clauses, and restrictions on the application of natural justice.

59. The Commission supports the removal from the Migration Act of provisions relating to excised offshore places, non-statutory processing of asylum claims made by offshore entry persons, and third-country processing of asylum claims made by people who initially arrive in Australia. In the Commission's view, all unauthorised arrivals who make claims for asylum in Australia should have those claims processed through the refugee status determination system that applies under the Migration Act.

60. Finally, the Commission is of the view that the reforms proposed by the Bill should be supplemented by increased use of community-based alternatives to holding people in immigration detention facilities, such as alternatives to detention including bridging visas, and alternative forms of detention like Community Detention. An immigration system based on such initiatives and incorporating the reforms proposed by the Bill would be a more humane system which would better meet Australia's international human rights obligations.

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[1] Human Rights and Equal Opportunity Commission, *A last resort?* (National Inquiry into Children in Immigration Detention) (2004). At http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm (viewed 3 June 2011).
[2] Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998). At http://www.humanrights.gov.au/human_rights/immigration/seas.html (viewed 3 June 2011).
[3] The Commission's reports on inspections of immigration detention facilities are available at http://www.hreoc.gov.au/human_rights/immigration/index.html (viewed 3 June 2011).
[4] Reports of inquiries into complains by people in immigration detention are available at http://www.hreoc.gov.au/legal/humanrightsreports/index.html (viewed 3 June 2011).
[5] The Commission's submissions on immigration issues are available at http://www.humanrights.gov.au/legal/submissions/index.html#refugees (viewed 3 June 2011).

[6] See Australian Human Rights Commission, *Immigration detention at Villawood* (2011), at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html (viewed 15 June 2011), section 7.
[7] Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011, items 2-4.
[8] Above, item 1.
[9] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(b) (entered into force 2 September 1990).
[10] *International Covenant on Civil and Political Rights*, above, art 7.
[11] Above, art 10.
[12] Above, arts 17 and 23; *Convention on the Rights of the Child*, note 9, art 16.
[13] *Convention on the Rights of the Child,* above, art 37(d).
[14] Above, art 22(1).
[15] See the Commission's reports under the *Australian Human Rights Commission Act 1986* (Cth) at http://www.humanrights.gov.au/legal/humanrightsreports/index.html (viewed 14 June 2011).
[16] See C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008), at http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm (viewed 7 June 2011).
[17] See Australian Human Rights Commission, 'Inspections of immigration detention facilities', at http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3 (viewed 15 June 2011).
[18] See, for instance, *Immigration detention at Villawood*, note 6; Australian Human Rights Commission, *Immigration detention on Christmas Island* (2010), at http://www.humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.html (both viewed 15 June 2011).
[19] *Immigration detention on Christmas Island*, above, Part C and section 17.3(b); *Immigration detention at Villawood*, above, section 12.
[20] *Immigration detention at Villawood*, above, p 6.
[21] Above, sections 11.2 and 11.3; *Immigration detention on Christmas Island*, note 18, section 19.2(b).
[22] Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011, item 5.
[23] Above.
[24] See, for instance, Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry Migration Amendment (Immigration Detention Reform) Bill 2009*, Part 12, at http://www.humanrights.gov.au/legal/submissions/2009/20090731_migration.html; Australian Human Rights Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), pp 13-15 and 24-25, at http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html (both viewed 15 June 2011).
[25] *International Covenant on Civil and Political Rights*, note 9, art 9(1); *Convention on the Rights of the Child*, note 9, art 37(b).
[26] See *Van Alphen v The Netherlands,* Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988, [5.8]; *A v Australia,* Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, [9.2].
[27] See, for example, *MIMIA v Al Masri* (2003) 126 FCR 54, [152].
[28] *International Covenant on Civil and Political Rights*, note 9, art 9(4); *Convention on the Rights of the Child*, note 9, art 37(d).
[29] See United Nations Human Rights Committee, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.5. At http://www.unhcr.org/refworld/docid/3ae6b71a0.html (viewed 17 June 2011).
[30] *New Directions in Detention*, note 16.
[31] Australian Human Rights Commission, *Immigration detention and offshore processing on Christmas Island* (2009), at http://www.humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html (viewed 15 June 2011), section 9.2.

[32] See *Immigration detention on Christmas Island*, note 18, section 10; Australian Human Rights Commission, *Immigration Detention in Darwin* (2010), section 5. At http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.html (viewed 19 June 2011).
[33] Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011, item 5.
[34] *A last resort?*, note 1, executive summary.
[35] Above.
[36] At 20 May 2011, over half of the 6729 people in immigration detention had been detained for longer than six months and more than 1800 people had been detained for longer than one year. See Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (20 May 2011). At http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20110520.pdf (viewed 19 June 2011).
[37] *International Covenant on Civil and Political Rights*, note 9, art 9(1); *Convention on the Rights of the Child*, note 9, art 37(b).
[38] See para 22 of this submission.
[39] *C v Australia,* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), para 8.4.
[40] *Immigration detention at Villawood*, note 9, section 11.2(a).
[41] *A last resort?*, note 1, see executive summary.
[42] Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011, pt 3.
[43] *Migration Act 1958* (Cth), s 46A.
[44] See *Immigration detention on Christmas Island*, note 18; *Immigration detention and offshore processing on Christmas Island*, note 31; *Submission on the Migration Amendment (Immigration Detention Reform) Bill 2009*, note 24; Australian Human Rights Commission, *Submission on Immigration Detention in Australia*, note 24.
[45] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 31 (entered into force 22 April 1954). At http://www.austlii.edu.au/au/other/dfat/treaties/1954/5.html (viewed 23 June 2011). Under United Nations High Commissioner for Refugees guidelines, this provision covers 'a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured.' It also covers 'a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there.' United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (1999), para 4. At http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844 (viewed 23 June 2011).
[46] *International Covenant on Civil and Political Rights*, note 9.
[47] *Convention Relating to the Status of Refugees*, note 45, 33(1).
[48] *International Covenant on Civil and Political Rights*, note 9; *Convention on the Rights of the Child*, note 9; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).
[49] *Convention on the Rights of the Child*, above, art 22.
[50] Above, art 2. See further *A last resort?*, note 1, pp 272-274.
[51] M Crock and E Santow, 'Privative Clauses and the limits of the law' in M Groves and H P Lee (eds), *Australian Administrative Law* (2007), pp 345-367.
[52] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009), p 41.
[53] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
[54] R French, 'Administrative law in Australia: Themes and values' in *Australian Administrative Law*, note 51, pp 15-33.
[55] Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011, item 22.
[56] See Australian Human Rights Commission, *Protection of the rights of the child in the context of migration: Information provided by the Australian Human Rights Commission to the OHCHR study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration* (2010), at http://www.hreoc.gov.au/legal/submissions/2010/201004_OHCHR_child_migration.html; *Immigration detention and offshore processing on Christmas Island*, note 31; *Submission on the Migration Amendment (Immigration Detention Reform) Bill 2009*, note 24; Australian Human Rights Commission, *Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2008), at

http://www.hreoc.gov.au/human_rights/immigration/idc2008.html; *Submission on Immigration Detention in Australia*, note 24; *A last resort?*, note 1, Part 6.4.4.

[57] See para 41 of this submission and *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, note 45.

[58] See para 41 of this submission.

[59] See para 43 of this submission.

[60] See para 42 of this submission.