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Committee Secretary
Joint Standing Committee on Migration
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

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Dear Secretary,

Inquiry into immigration detention in Australia

Thank you for the opportunity to make a submission to the Committee's inquiry into immigration detention in Australia. We are legal academics at the Australian National University, with experience and expertise relevant to the Committee's inquiry. We have attached brief biographical information at the end of this submission.

Fundamental principle

Liberty of person is the most fundamental of all human rights. It lies at the foundation of our democratic system,[1] informing the ancient writ of habeas corpus, enshrined in constitutional documents such as Magna Carta and the Petition of Right, and jealously protected by the judicial branch of government. The liberty and security of the person are protected by Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), which guarantees that arrest or detention will not be arbitrary or unlawful, and establishes procedural guarantees to help ensure enjoyment of these rights.

Any restriction of the right to liberty must be able to be closely scrutinised by the courts, and be consistent with democratic and constitutional principles. Arbitrary deprivation of liberty not only denigrates the individual, but undermines the social and political fabric of our society.

This principled approach to limiting the right to liberty has been recognised not just by the common law, which is our legal and cultural inheritance, but in the international human rights and refugee regimes that Australia helped create, and has pledged to comply with. International jurisprudence on the principles that inform legitimate restrictions of this fundamental right has been promulgated by bodies whose expertise and authority have been recognised by the Australian government. The jurisprudence emphasises a guarantee of humane, rights-compliant treatment of people including unlawful arrivals:

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[1] A point made repeatedly by the House of Lords and the European Court of Human Rights. See discussion in *A v Secretary of State for the Home Department* [2004] UKHL 56 (Belmarsh case), [36] (Lord Bingham); also *Brogan v United Kingdom* (1988) 11 EHRR 17 and *Askoy v Turkey* (1966) 23 EHRR 553 [76], both of which emphasised the importance of judicial review of detention to the rule of law; *Garcia Alva v Germany* (2001) 37 EHRR 335 [39].

- The right to liberty in Article 9 has been expanded upon by the UN Human Rights Committee in *General Comment 8: Article 9: Right to Liberty and Security of Persons*, (Sixteenth session, 1982, A/37/40 (1982) 95), which includes 'immigration control' as one of the situations to which the Article applies.
- A number of cases before the Human Rights Committee have considered detention for the purposes of immigration, including *A v Australia* (Human Rights Committee, Communication No 560/1993) (1997), The meaning of 'arbitrary detention' has been expanded upon in this and related cases (notably *Hugo van Alphen v. The Netherlands* (305/1988), 23 July 1990, U.N. Doc.CCPR/C/39/D/305/1988). The views of the Human Rights Committee in these matters confirm that 'arbitrariness' is to be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of the law. In the context of remand in custody, detention must be necessary in all the circumstances, for instance, to prevent flight, interference with evidence or the recurrence of crime.
- In *A v Australia*, the Committee concluded (at 9.4): '... detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.'
- In the context of refugee law, in 1999 the United Nations High Commission for Refugees promulgated (Executive Committee Conclusion No.44) *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, in particular Guideline 3, 'Exceptional Grounds for Detention', explicitly endorsed by the UN General Assembly.[2]

We urge the Committee to recognise that a humane, rights-compliant approach to immigration detention cannot be achieved while retaining the current system of detention that is mandatory, non-reviewable, and potentially indefinite. Although we welcome recent steps to ameliorate the worst aspects of the detention regime, a policy of mandatory detention is a blunt instrument that inevitably breaches international human rights norms, and fails to adhere to basic principles of humane treatment and respect for human dignity.

Australia's approach to date

Before considering the details of Australia's practice of immigration detention, it is necessary to be clear about Australia's commitment to internationally recognised standards for dealing with unlawful arrivals.

Australia does not adequately state, as a matter of policy or principle, the standards to which it is committed when dealing with unlawful arrivals and immigration detainees. Australia's migration law and policy, including the treatment of unlawful non-citizens has been guided by, and premised upon, the sovereign right and prerogative. The international community is now moving towards re-conceptualising a state's sovereignty to emphasise the 'responsibility' to protect not only its own citizens but also those who are in need of assistance and protection.[3] By ratifying key international human rights instruments such as *Refugee Conventions*, the ICCPR, and the *Convention on the Rights of the Child*, Australia committed itself to be a 'good international citizen'. The Government is therefore obliged to achieve and maintain the highest moral and legal standards in dealing with unlawful non-citizens and immigration detainees.

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[2] 41st Session, Suppl No 53, p 181, para 7, Resolution 41/24, 4 December 1986.

[3] See, eg, International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001); Francis M Deng, et al, *Sovereignty As Responsibility* (1996).

Australia's system for dealing with unlawful arrivals has repeatedly come under scrutiny for failing to comply with international standards.[4] We do not propose to reiterate the various ways in which Australia has been found to be in breach of international law in recent years. These are notorious, and have involved critiques from various treaty bodies and human rights mechanisms, domestic and international. Even the usually reticent UNHCR has repeatedly spoken out against mandatory detention as being inconsistent with both the letter and spirit of the Refugees Convention, insisting that Australia's policy of mandatory detention of all asylum-seekers arriving illegally is not consistent with applicable international standards, including Executive Committee Conclusions[5] and guidelines on criteria and standards relating to the detention of asylum-seekers.[6]

Australia's failure to respect the considered views of international bodies with competence to interpret core treaties to which it is a party has brought the country into disrepute on the international stage.[7] The policy has inflicted serious and lasting psychological injury on untold numbers of people who have been through the system, many of whom (especially amongst the asylum-seekers) are already highly vulnerable. These effects of detention have been documented in numerous professional, academic and even government reports,[8] and continue to be evident in the monthly reports of the Commonwealth Ombudsman.

Australia has interpreted grounds for detention so broadly as to allow, effectively, for indefinite detention, asserting that detention to determine the elements of a claim allows for detention for the entire determination period.[9] But a presumption of liberty is manageable when coupled with readily ascertainable criteria for detention that familiar to, and capable of application by, both administrative decision-makers and the judiciary.

Inadequacy of Policy Statements in ameliorating the inhumanity of mandatory detention

We recognise that there have been improvements made to the detention regime in recent years. We welcome the cooperation between the Department of Immigration and independent authorities such as HREOC and the Ombudsman office in formulating a rights-compliant statement of principles in the Immigration Detention Standards (IDS), as well as the greater powers of scrutiny of detention which these bodies have been granted. Similarly, we welcome the 2005 legislative amendment incorporating the Parliament's affirmation as a matter of principle that a minor shall only be detained as a measure of last resort. Training of compliance officers, especially in their understanding of the 'reasonable suspicion' test in section 189, is also a crucial component of a more humane detention system. We acknowledge too the 2005 legislative amendment that vested the 'public interest' powers in the Minister, providing some

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[4] See generally, Office of the High Commissioner for Human Rights, website at <http://tb.ohchr.org/default.aspx?country=au> (last accessed 28 July 2008).

[5] See Submission to the National Inquiry into Children in Immigration Detention (2004).

[6] UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (February 1999), available via <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844> (last accessed 28 July 2008).

[7] anecdotal evidence appears in Charlesworth, Williams, Chaim and Hovell, *No County is an Island* (2006, UNSW Press), and Spencer Zifcak, *Mr Ruddock goes to Geneva* (2003, UNSW Press)

[8] A sample of some of the literature was submitted to the High Court in *Re Woolley*, including Silove et al, "Risk of Retraumatisation of Asylum-Seekers in Australia", (1993) 27 *Australian and New Zealand Journal of Psychiatry* 606 at 609-610; Sultan and O'Sullivan, "Psychological disturbances in asylum seekers held in long term detention: a participant-observer account", (2001) 175 *Medical Journal of Australia* 593; Mares et al, "Seeking refuge, losing hope: parents and children in immigration detention", (2002) 10 *Australian Psychiatry* 91; Zwi et al, "A child in detention: dilemmas faced by health professionals", (2003) 179 *Medical Journal of Australia* 319; McEntee, "The Failure of Domestic and International Mechanisms to Redress the Harmful Effects of Australian Immigration Detention", (2003) 12 *Pacific Rim Law & Policy Journal* 263 at 267-269.

[9] See Department of Immigration, Multicultural and Indigenous Affairs, 'Article 31 - refugees unlawfully n the country of refuge: an Australian perspective' (2002)

leeway so that some detainees, particularly those most vulnerable, can be granted a visa or stay in community detention.

But these steps are not sufficient to ensure a principled approach to immigration detention:

- the Minister's powers are discretionary and non-compellable.
- the IDS are a non-binding policy, and are impossible to enforce and difficult to access: a search of Department's website merely brings up a description of the standards, not the standards themselves
- administrative scrutiny is limited and *ex post facto*: there is very limited review of detention itself, whether by a merits review body that can consider specific detention criteria, or by judicial review of a decision to detain.
- oversight by the Ombudsman is not a panacea for a harsh regime that continues to operate with such severe personal consequences for those caught in the net of mandatory detention; the Ombudsman's regular reports reveal this sobering reality.

The current treatment of unlawful arrivals and non-citizens is based on political considerations, not principle. It is based on an outdated and ill-conceived notion of national sovereignty which insists that unlawful non-citizens must be deprived of the most fundamental right of liberties. Mandatory detention, in other words, has been presented as if it is the logical, natural and thus necessary policy stance of any sovereign state.

Yet Australia is alone in holding this view: no other nation has such a blunt mechanism enshrined in legislation that requires detention of all persons present without authorisation, with no criteria for detention other than unlawfulness, no time limit on detention, and no meaningful means of review. This is so even though all other countries of the developed world have much more porous borders than our own, and face much heavier flows of people across their borders.

The political concerns informing mandatory detention inevitably overwhelm any other objectives that might appear in a policy document such as the IDS. Without a detailed incorporation of legislative principles of humane treatment, and an explicit commitment to detention as a last resort, Australia's detention regime will continue to be in breach of international norms.

Necessary steps to comply with international standards

In light of the above considerations we recommend the following changes to Australia's detention system if Australia is to comply with international standards and constitutional principle.[10]

1. That Australia explicitly commit to implementing the UNHCR *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*
2. That the *Migration Act* be amended to state, as an object of the Act, that humane human rights-compliant treatment of people who are potentially subject to immigration detention.[11]
3. That ss 189 and 196 of the *Migration Act* be amended, to abandon mandatory detention as the default or presumptive means of dealing with unlawful non-citizens, and to adopt a presumption of a right to liberty and a concomitant presumption against detention.
4. That the *Migration Act* be amended to embrace principles of humane treatment of all detainees and detention as a last resort and a requirement in any discretionary decision-

[10] While there is no express 'constitutional principle' of liberty in our written constitution, the right to personal liberty, as reflected in common law principles of statutory interpretation and the ancient writ of habeas corpus, is widely recognised as a reflection of constitutional values developed over centuries in England and inherited by the Australian legal system on the acquisition of sovereignty. Belmarsh…

[11] This can be based on CRC article 37(c) – that all children be treated with humanity and respect for their inherent dignity

making power of detention that consideration be given to the potential vulnerabilities of individual to long term detention.

5. That unlawful non-citizens be detained only when it is *reasonably necessary* to do so, on the basis of specific and exceptional grounds prescribed by law, and where detention is proportional to achieving those grounds.
6. That grounds for detention be based on the internationally recognised criteria in the UNHCR Detention Guidelines, [12] and on the Human Rights Committee's interpretation of Article 9 of the ICCPR.[13]
7. That an individual be deprived of their liberty only to verify identity; to conduct a preliminary interview to establish the elements of their claim to remain; to protect national security, public health or public order; to deal with cases where asylum seekers have destroyed their travel and/or identity documents or have fraudulent documents with which they intend to mislead the authorities of the state in which they intend to claim asylum; and where there is a demonstrable likelihood that the person will abscond.[14]
8. That the *Migration Act* be amended to include an interpretative clause which provides that these criteria for detention be read consistently with the right to liberty of the person
9. That the *Migration Act* be amended to make explicit that 'establishing the elements of a claim' does not allow for detention for the entire status determination period.
10. That consistently with a presumption of liberty, all unlawful arrivals be granted bridging visas or alternatively be admitted to community detention after preliminary interviews subject only to an assessment of risk on public health and national security grounds and to a transitory period of arranging their return not longer than seven days.
11. That all detainees be immediately informed of the availability of, and provided with access to, independent legal advice and merits review.
12. That a detention decision be internally reviewed quarterly, consistent with international precedents.[15]
13. That the *Migration Act* be amended to provide for a maximum period of lawful detention. Although international jurisprudence indicates the length of detention is but one factor in determining arbitrariness in a particular instance, there is persuasive international precedent for fixing a time of six months.[16]
14. That the Commonwealth Ombudsman be empowered to review the cases of persons who have been in immigration detention for a period or periods totalling of 6 months.
15. That immigration detention take place only in detention centres in urban environments in order to ensure proper access for relevant communities, organisations and services, to ameliorate the sense of isolation and despair which being placed in remote centres engenders, and to reduce costs on the pubic purse.
16. That immigration detention security be maintained only at a level necessary to meet needs of public health and the safety of community. Unnecessarily tight security hinders

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[12] See UNHCR, 1999 Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, especially Guideline 3, Exceptional Grounds for Detention; UNHCR Excom Conclusion No.44.

[13] Notably, *A v Australia*, Communication No. 560/1993, 30 April 1997: UN Doc. CCPR/C/59/D/560/1993.

[14] We bring the Committee's attention to the considered approach to these criteria in HREOC's report, *Those who've come across the seas: Detention of unauthorised arrivals* (1998). With respect to the formulation of the likelihood of absconding criterion, see Rivett, 'Is there an alternative to mandatory detention' (2001) 9(1) *People and Place* 9.

[15] See, for instance, *Bezicheri v Italy* (1990) 12 EHRR 210

[16] See, for instance, the discussion in *Zadvydas v Davis* 533 U.S. 678 (2001), which concerned detention for the purpose of removal or deportation.

access for relevant communities, organisations and services and helps develop non-transparent, unaccountable management

17. That the exclusion of certain parts of territory from the migration zone, such as Christmas Island, should be abolished, as it is not consistent with Australia's obligations under the *Refugee Conventions*; remote detention and immigration-process facilities should be used only temporarily for arrivals on the northern coastline.
18. That an independent regulatory authority – made up of the representatives of the Department of Immigration, HREOC, and the private contractors – be established to monitor and report on the operation of private contractors running the immigration detention centres.
19. That those released on bridging visas be granted basic subsistence rights as conditions on their visa, notably the right to work, the right to social security, and the right to the highest attainable standard of health.[17]

Please let us know if we can assist the Committee further.

Yours sincerely,

By email

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[17] The right to work in such circumstances has been recognised recently by the House of Lords in *Regina v. Secretary of State for the Home Department ex parte Adam* [2005] UKHL 66 (which concluded that the denial of work rights in the circumstances amounted to a breach of the right not to be subjected to inhuman or degrading treatment). See also Parliament of Australia, Research Brief no. 13 2006–07 *Asylum seekers on Bridging Visa E* (June 2007); HREOC Factsheet: *The impact of bridging visas restrictions on human rights* (2008); and Network of Asylum Seeker Agencies Victoria, *Seeking Safety, Not Charity: A report in support of work-rights for asylum-seekers living in the community on Bridging Visa E*, 2005.

Dr Hitoshi Nasu joined the ANU College of Law in December 2006. Prior to his appointment to the ANU, he was a part-time lecturer at the University of Sydney, teaching international law. He completed a PhD in 2006 by submitting a doctoral thesis on *Precautionary Approach to International Security Law: A Study of Article 40 of the UN Charter.*

Recent publications include Hitoshi Nasu, 'Reform of Subclass 457 Visa Scheme: Proposal of Three Models' (2008) *Alternative Law Journal* forthcoming; Hitoshi Nasu, 'Chapter VII Powers and the Rule of Law: The Jurisdictional Limits' (2007) 26 *Australian Year Book of International Law* 87-117; Hitoshi Nasu, 'The Responsibility to React? Lessons from the Security Council's Response to the Southern Lebanon Crisis of 2006' (2007) 14(3) *International Peacekeeping* 339-352; Kristen Daglish and Hitoshi Nasu, 'Towards a True Incarnation of the Rule of Law in War-Torn Territories: Centring Peacebuilding in the Will of the People' (2007) 54 *Netherlands International Law Review* 81-114; Kent Anderson and Hitoshi Nasu, 'Sins of the Mother: Australia, West Papuans, Japan and Visas' (2007) 18 *Public Law Review* 5-9.

Mr Matthew Zagor has a degree in Religious Studies with Social Anthropology from the School of Oriental and African Studies, University of London, and an LLB from the University of New South Wales. He worked on the India desk at the International Secretariat of Amnesty International (AI), and as the refugee coordinator and government liaison officer at the Australian Section of AI. Matthew practiced as a solicitor in several community legal centres and the Commonwealth Legal Aid Commission, working primarily with migrants and asylum-seekers. As a federal public servant, he worked in the Australian Greenhouse Office, the Migration Review Tribunal, and the Attorney General's Department. He was a part-time Member on the MRT (03-06), and a Visiting Fellow at the LSE in 2006

Recent publications include Matthew Zagor 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127-160.

Associate Professor Simon Rice has worked as a volunteer, staff member, board member and consultant in many community legal centres, since 1981. He has been Director of the NSW Law and Justice Foundation, a Board member of the NSW Legal Aid Commission, and a consultant to the NSW Law Reform Commission. From 2000-2004 he was President of Australian Lawyers for Human Rights. Simon was a lecturer in the UNSW Law Faculty 1989-1995, and taught at Sydney University Law Faculty in 2000 and 2001. He was a senior lecturer in the Division of Law at Macquarie University from 2005-2007. Since 1996 he has been a part-time judicial member of the NSW Administrative Decisions Tribunal in the Equal Opportunity Division. In 2002 he was awarded a Medal in the Order of Australia for legal services to the economically and socially disadvantaged.

Recent publications include Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials*, The Federation Press, Sydney, 2008; Simon Rice and Scott Calnan, *Sustainable Advocacy: capabilities and attitudes of Australian human rights NGOs*, Australian Human Rights Centre, Sydney, 2007; Gordon Renouf, Simon Rice and Roger West, *Review of the NSW Community Legal Centres Funding Program: Final Report*, Legal Aid Commission of NSW, Sydney, 2006; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice; Human Rights Law in Australia*, The Federation Press, Sydney, 2004.