Human Rights and
Equal Opportunity Commission

Mr Owen Walsh
Secretary
Legal and Constitutional Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

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Dear Chair

Inquiry into the administration and operation of the Migration Act 1958 – HREOC Submission

Thank you for inviting the Commission to make a submission to the Senate Legal and Constitutional References Committee's Inquiry into the administration and operation of the *Migration Act 1958* (Cth) ('Migration Act').

For over a decade this Commission has expressed its serious and grave concerns about the mandatory detention of unauthorised arrivals and the conditions and treatment of children and adults detained under this regime. These concerns remain.

The Commission has undertaken extensive work relating to the human rights of people detained under the Migration Act; particularly, but not exclusively, those people detained pursuant to sections 189 and 196. That work has taken many forms, including:

- Four major reports dealing with broad systemic issues;
- Numerous reports to parliament prepared pursuant to the Commission's function of inquiring into individual complaints of human rights violations;
- Appearances before and evidence to federal parliamentary committees and inquiries;
- Annual visits to all Immigration Detention Facilities (IDFs) by the Human Rights Commissioner;
- Numerous letters and personal representations to the Minister for Immigration and Secretary, Department of Immigration; and
- Speeches and opinion pieces prepared by the President of HREOC and the Human Rights Commissioner.

In regard to the first dot-point above, the reports are:

- 'A last resort?' – Report of the Inquiry into Children in Immigration Detention, May 2004;[1]
- 'A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001', October 2002;[2]
- 'Immigration Detention: Human Rights Commissioner's 1998-99 Review', December 1999;[3]
- 'Those who've come across the seas: Detention of unauthorised arrivals', May 1998.[4]

In the time available for preparing this submission, the Commission has sought to provide to the Committee references to the above work, focussing on the areas identified in the terms of reference.

A) The administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia

1. Processing and assessment

The Commission has previously expressed some general concerns regarding the nature of the current system for processing and assessing applications for protection visas. In particular, the Commission refers to its submissions to the *Senate Select Committee on Ministerial Discretion in Migration Matters*.[5] Without reiterating the detail of that submission, the Commission's concerns may be summarised as follows:

- Australia has obligations under the *Refugees' Convention*,[6] the *International Covenant on Civil and Political Rights*[7] (ICCPR), the *Convention on the Rights of the Child*[8](CRC) and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[9] (CAT), not to 'refoule' people - that is, an obligation not to return people to the frontier of a state where they face torture and certain other forms of ill treatment.

- The definitions of 'refoulement' under the ICCPR, CRC and CAT differ from and are in some respects wider than the definitions in the Refugees Convention.

- The visa regime for asylum seekers under the Migration Act is primarily directed to protecting those who fall within the scope of the Refugees' Convention.

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[1] Available at http://www.humanrights.gov.au/human_rights/children_detention/index.html
[2] Available at http://www.humanrights.gov.au/human_rights/idc/index.html
[3] Available at http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html
[4] Available at http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html
[5] Available at http://www.humanrights.gov.au/human_rights/migration_matters.html
[6] The term 'Refugees' Convention' is used to refer to the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).
[7] Opened for signature 16 December 1966, [1980] ATS 23, (entered into force for Australia 13 November 1980).
[8] Opened for signature 20 November 1989, [1991] ATS 4, (entered into force for Australia 16 January 1991).
[9] Opened for signature 10 December 1984, [1989] ATS 21, (entered into force for Australia 8 August 1989).

- The Commonwealth asserts that those who do not fall within the scope of the Refugees Convention may nevertheless be protected from refoulement through the exercise of the non-compellable and non-reviewable ministerial discretion under section 417 of the Migration Act (and now also under s195A of the Migration Act – see further below).

- The Commission is of the view that reliance upon the discretionary powers of the Minister is inadequate, particularly given the nature of the rights and potential harm involved. It is also the Commission's view that reliance upon that approach has contributed to delay and the making of unmeritorious visa applications (see the Commission's submissions to the Senate Legal and Constitutional Bills Committee on the Migration Litigation Reform Bill 2005[10]).

The Commission has also expressed its concerns regarding certain matters associated with the processing of visa applications by asylum seekers – in particular, the fact that some such persons have been kept in 'separation detention' for lengthy periods of time. The Commonwealth justifies such detention on the basis that it is necessary to maintain the '*integrity of Australia's visa determination process*'.[11] While the Commission agrees that some period of separate detention may be required, the President has found that its use in a number of instances has breached article 10(1) of the ICCPR - see in that regard the *Commission's Report of an inquiry into complaints by immigration detainees concerning their detention at the Curtin Immigration Reception and Processing Centre* (HREOC Report No. 28).[12] The President made a number of recommendations in that report, including that detention in separation detention should not continue beyond a maximum of 28 days, save in exceptional circumstances.[13]

2. Immigration detention – consistency of the overall scheme with Australia's human rights obligations

Both *Those who've come across the seas* and *A last resort?* made recommendations for fundamental changes to those parts of the Migration Act dealing with detention. For example, in *A last resort?*, the Commission recommended that:

> *Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the Convention on the Rights of the Child.*
>
> *In particular, the new laws should incorporate the following minimum features:*
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> - *There should be a presumption against the detention of children for immigration purposes.*
> - *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).*
> - *There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.*

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[10] Available at http://www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/submissions/sublist.htm

[11] See comments made by DIMIA reproduced in *Commission's Report of an inquiry into complaints by immigration detainees concerning their detention at the Curtin Immigration Reception and Processing Centre* (HREOC Report No. 28), section 3. Available at http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_28.htm

[12] Available at http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_28.htm

[13] See recommendation 5.

- *All courts and independent tribunals should be guided by the following principles:*
    - *detention of children must be a measure of last resort and for the shortest appropriate period of time*
    - *the best interests of the child must be a primary consideration*
    - *the preservation of family unity*
    - *special protection and assistance for unaccompanied children.*
- *Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.* [14]

In *Those who've come across the seas*, the Commission recommended the adoption of an alternative detention model along similar lines[15] (although those recommendations were not primarily focussed upon children, as was necessarily the case with *A last resort?*).

Since the tabling of *A last resort?*, the Migration Act was amended by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth). Those amendments:

- affirm the principle that children shall only be detained as a last resort. That principle is not directly enforceable;
- confer upon the Minister a new power (which is non-compellable and non-reviewable) to grant a visa to a person in immigration detention where the Minister is satisfied that it is in the public interest to do so;
- confer upon the Minister the power to specify alternative arrangements for a person in immigration detention, which will enable the Minister to allow families with children to reside in the community in a specified place. Again this power is non-compellable and non-reviewable; and
- confer upon the Commonwealth Ombudsman the function of reviewing the cases of people who have been in immigration detention for more than two years. While the ombudsman is further empowered to make recommendations regarding such people (including as to the appropriateness of their ongoing detention) such recommendations will not be binding upon the Minister.

While the Commission welcomes and congratulates the government on those positive amendments, they do not, in the Commission's view, go far enough. In particular, in contrast to the recommendations made in *Those who've come across the seas* and *A last resort?*, the amendments do not create enforceable rights and depend entirely upon an exercise of Ministerial discretion. The Commission considers that, as a consequence, Australia is not meeting its obligations to provide 'effective remedies' for violations of human rights.[16] The Commission considers that those obligations are best met by providing that the ongoing appropriateness of detention be periodically reviewed by a Court empowered to order release on the grounds discussed in the passage extracted above from *A last resort?*

[14] Recommendation 2 at p5.
[15] See the 'alternative model' discussed in chapter 16.
[16] As required under eg article 2(3) of the ICCPR.

Further, it is important to recall that the use of the power to specify 'alternative arrangements' still involves a form of detention, the conditions of which will be specified by the Minister. That point was made in *A Last Resort?* where it was said (in relation to the Residential Housing Projects and the home-based detention arrangements):

> The Inquiry agrees that these initiatives represent a positive step forward regarding the conditions in which women and children are detained. However, it must be remembered that these places are not alternatives *to* detention, but rather alternative *forms* of detention. The Department retains full control and responsibility for everything that happens to children in these places[17]

As such, the power to specify alternative arrangements may still raise issues in terms of Australia's international obligations: particularly the obligation to only detain children as a measure of last resort. In that regard, it is relevant to note that the 'affirmation' of the principle that children shall only be detained as a last resort in the recently inserted section 4AA(1) of the Migration Act is qualified by section 4AA(2), which states:

> For the purposes of subsection (1), the reference to a minor being detained **does not** include a reference to a minor residing at a place in accordance with a residence determination (emphasis added).

That approach is inconsistent with the broad meaning of detention accepted in international law.[18]

It is also relevant to note, in this context, that the amendments do nothing to alter the power of the Commonwealth to subject a person to so-called 'indefinite detention' under the Migration Act. Detention of that nature has arisen where a person is unable to be removed from Australia. The Commission has intervened in a number of matters before the courts to argue that such detention is unlawful by reason of constitutional and legislative limitations.[19] In those submissions, the Commission has also argued that such detention violates Australia's international obligations. By 4:3 majority, the High Court ultimately held that such detention is in fact permissible under the Constitution and the terms of the Migration Act.[20] The *Migration Amendment (Detention Arrangements) Act 2005* (Cth) does not alter that position. Detention of an indefinite nature is still permissible under the Migration Act.[21]

A nation with a proud human rights history like Australia should not permit such a law to remain on its statute books. It should be amended.

4. Immigration detention – specific aspects

The matters discussed in section 3 relate to the consistency of the overall scheme with Australia's human rights obligations. The Commission has also investigated complaints regarding specific acts or practices undertaken in the course of implementing the detention

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[17] See section 6.4.

[18] See eg *Amuur v France* (1992) 22 EHRR 533.

[19] See the Commission's submissions in *Luu v Minister for Immigration & Multicultural Affairs* (2002) 127 FCR 24**;** *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 78 ALJR 1156 and *Al Kateb v Godwin* (2004) 78 ALJR 1099. Those submissions are available on the Commission's website at http://www.humanrights.gov.au/legal/intervention_info.html

[20] *Al Kateb v Godwin* (2004) 78 ALJR 1099 per McHugh, Hayne, Callinan and Heydon JJ, Gleeson CJ, Gummow and Kirby JJ dissenting.

[21] Albeit with the additional scrutiny provided by the recommendations discussed above in relation to the powers of the Commonwealth Ombudsman and the additional (non-compellable and non-reviewable) powers of the Minister to grant visas or make alternative detention arrangements.

provisions under the Migration Act. The Commission has upheld such complaints in the following matters: [22]

- *Johnson v Department of Immigration and Multicultural Affairs* (conditions of detention);
- *Report of an inquiry into a complaint by Mr Hocine Kaci of acts or practices inconsistent with or contrary to human rights arising from immigration detention*; *Report of an inquiry into a complaint by Mr Duc Anh Ha of acts or practices inconsistent with or contrary to human rights arising from immigration detention* and *Report of an inquiry into a complaint by six asylum seekers concerning their transfer from immigration detention centres to State prisons and their detention in those prisons* (use of state prison facilities to detain immigration detainees);
- *Qing & Fei v Department of Immigration and Multicultural Affairs* (access to legal advice);
- *Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained*;
- *Kiet & Ors v. Department of Immigration and Multicultural Affairs* and *Report of an inquiry into a complaint by Mr XY concerning his continuing detention despite having completed his criminal sentence* (lengthy detention of people subject to deportation orders in state prisons);
- *Report of an inquiry into complaints by five asylum seekers concerning their detention in the separation and management block at the Port Hedland Immigration Reception and Processing Centre* (use of separation detention and conditions of detention)
- *Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)* (relating to the ongoing detention of a child in circumstances where his mental health was adversely affected); and
- *Report of an inquiry into a complaint by Ms KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002* (regarding a child who was struck with a baton whilst in immigration detention).

5. Deportation

In relation to this issue, the Commission wishes to raise concerns that the current system does not sufficiently protect against the risk that a person will be deported or removed to a state where they face persecution.

As noted in section A.1, protection visas granted under the Migration Act are tied to Australia's obligations under the Refugees Convention. A person to whom Australia owes protection obligations under the ICCPR, CRC or CAT (but not the Refugees Convention) has no right to such a visa. Rather they must **hope** that the Minister exercises her or his discretion to grant them a visa. If a visa is not granted, they have no review rights.

Moreover, the review rights for those protection visa applicants who do raise matters within the Refugees Convention are currently subject to certain restrictions and will be further restricted if the Migration Litigation Reform Bill 2005 is passed by the Parliament. As noted above, the Commission made submissions to this Committee regarding the effect of the proposed amendments in that Bill.[23]

[22] These reports are all available at http://www.humanrights.gov.au/legal/reports_hreoca.html
[23] Available at http://www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/submissions/sublist.htm

These features of the current system increase the risk that a person who has a valid protection claim is, as a result of administrative error, deported or returned to a situation where they face death, torture or lesser forms of ill-treatment. In raising that possibility, the Commission is not seeking to criticise the Department or the Minister. It is inevitable that administrative decision makers will make a variety of mistakes. A sound model of administrative decision making recognises that inevitability and provides review rights to correct such mistakes. That is particularly important in an area where fundamental human rights are involved. Indeed, as noted above, Australia is obliged to provide effective remedies for the breach of such rights.

B) The activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia

The Commission has not specifically considered this issue and does not wish to make a submission on it.

C) The adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention

The Commission dealt extensively with healthcare issues in *Those who've come across the seas* and *A last resort?* The latter report is most likely more relevant by reason of its relative currency. See in particular chapters 9 and 10. We have extracted below the summaries of those chapters (see pp13 -15 of the report):

> ***Chapter 9: Mental Health of Children in Immigration Detention***
>
> *The overwhelming evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to protect and promote the mental health and development of children in immigration detention over the period of the Inquiry and therefore breached the CRC.*
>
> *With respect to some children, the Department failed to implement the clear - and in some cases repeated - recommendations of State agencies and mental health experts that they be urgently transferred out of detention centres with their parents. This failure not only constitutes a breach of a child's right to mental health, development and recovery, it also amounts to cruel, inhuman and degrading treatment.*
>
> *It is no secret that the institutionalisation of children has a negative impact on their mental health. The experiences of children detained for long periods in Australia's immigration detention centres prove this point many times over. The longer children were in detention the more likely it was that they suffered serious mental harm.*
>
> *Children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour including attempted and actual self-harm. The methods used by children to self-harm included hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing. Some children were also diagnosed with specific psychiatric illnesses such as depression and post traumatic stress disorder.*

Mental health experts told the Inquiry that a variety of factors can cause mental health problems for children in detention including pre-existing trauma, negative visa decisions and the breakdown of the family unit. These factors are either the direct result of, or exacerbated by, long-term detention in Australia's detention centres. Living behind razor wire, locked gates and under the constant supervision of detention officers also caused a great deal of stress. While many officers treated children appropriately, some used offensive language around children and, until 2002, officers in some centres called children by number rather than name.

Although individual mental health staff tried to assist children, there was no routine assessment of the mental health of children on arrival, insufficient numbers of mental health staff to deal with the needs of those children and inadequate access to specialists trained in child psychiatry. Children suffering from past torture and trauma had no access at all to the relevant specialist services.

The only effective way to address the mental health problems caused or exacerbated by detention, is to remove the children from that environment. The three case studies at the end of this chapter illustrate the importance of this measure.

Chapter 10: Physical Health of Children in Immigration Detention

The evidence before the Inquiry demonstrates that the Commonwealth failed to take all appropriate measures to protect the physical health of children over the period of the Inquiry resulting in a breach of the CRC.

The quality of health care in immigration detention centres varied over time. The Inquiry recognises the significant efforts of individual staff members and the improvements made during 2002. However, children in immigration detention over the period of the Inquiry were not in a position to enjoy the highest attainable standard of health, as required by the CRC, due to the following factors:

- *extreme climate and physical surroundings of the remote centres*
- *insufficient cooling and heating and inadequate footwear for the terrain at certain times in certain centres*
- *overcrowding, unsanitary toilets and unclean accommodation blocks at certain times in certain centres*
- *failure to individually assess pre-existing nutritional deficiencies*
- *food was not tailored to the needs of young children, was of variable quality and great monotony*
- *uneven provision of baby formula and special food for infants*
- *failure to conduct comprehensive initial assessments focussed on the health vulnerabilities of child asylum seekers*
- *inadequate numbers of health care staff with the paediatric and refugee health expertise needed to identify and treat particular problems faced by child asylum seekers*
- *inadequate numbers of health care staff to deal with the demands of children*

- *delays in accessing the appropriate secondary health care services, due to the remote location of centres and unclear referral procedures at certain points in time*
- *inadequate numbers of on-site interpreters for the purpose of medical examinations, especially in Port Hedland*
- *inadequate preventative and remedial dental care for children detained for long periods.*

Other services and facilities were discussed in chapters 11 (*Children with disabilities in immigration detention*), 12 (*Education for children in immigration detention*), 13 (*Recreation for children in immigration detention*) and 15 (*Religion, culture and language for children in immigration detention*).

As noted above, the Commission has dealt with other issues under this head in its investigations of individual complaints. In particular, we refer the Committee to the reports in the matters of:

- *Qing & Fei v Department of Immigration and Multicultural Affairs* (access to legal advice); and
- *Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained*.

D) The outsourcing of management and service provision at immigration detention centres

See generally as regards this issue sections 5.3 and 17.4.8 of *A last resort?*

Note in addition that the the Commission raised a related issue in a press release 14 July 2005, commenting on the Palmer Report, where it was said:

> *... HREOC still believes that Recommendation 4 of 'A last resort?' namely that Parliament should codify in legislation the minimum standards that should apply to immigration detention standards with respect to children, should be widened to cover all immigration detainees and should incorporate every aspect of departmental interaction with its clients…This could also include a review of the perceived shortcomings of the contract between DIMIA and the detention centres' service provider...*

The Commission is concerned that it remains the case that the manner in which detention centres are managed is largely unregulated by legislation and does not have the transparency and accountability required by Australian public servants in the provision of government services and programs.

Again, thank you for the opportunity to make this submission.

Yours sincerely

John von Doussa QC
President