

GOVERNMENT OF WESTERN AUSTRALIA

SUBMISSION TO THE JOINT STANDING COMMITTEE ON MIGRATION: INQUIRY INTO IMMIGRATION DETENTION IN AUSTRALIA

1. Introduction

On 29 May 2008 the Joint Standing Committee on Migration adopted an inquiry into immigration detention in Australia. The Government of Western Australia was invited to make a submission to the inquiry, addressing the terms of reference of which the committee is investigating.

This document collaborates officer-level contributions from a number of Western Australian Public Sector agencies, including The Office of Multicultural Interests (Department for Communities), the Department of Health, Department of Education and Training as well as the Department of Corrective Services. It is provided without prejudice and does not necessarily represent the views of the Government.

The Submission addresses each of the Terms of Reference (with the exception Terms of Reference 4 and 5) and commences with a brief summary of relevant international and national legislation and other instruments which are referred to throughout the document.

A summary of recommendations is included at Attachment A.

2. International and National Legal Context

2.1 International legal context

A number of international legal instruments are relevant to immigration detention and the treatment of asylum seekers and refugees. Australia has signed and ratified these instruments.

2.1.1 *International Covenant on Civil and Political Rights*

The United Nations International Covenant on Civil and Political Rights (CCPR), ratified by Australia in 1980, contains the following relevant provisions:

- Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [*Article 2(1)*].
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law [*Article 9(1)*];
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful [*Article 9(4)*];
- Everyone has the right everywhere to be recognised as a person before the law [*Article 16*].
- All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [*Article 26*].

2.1.2 *International Covenant on Economic, Social and Cultural Rights*

The United Nations International Covenant on Economic, Social and Cultural Rights (CESCR), ratified by Australia in 1976, contains the following relevant provisions:

- The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right [*Article 6(1)*].
- The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance [*Article 9*].
- The States Parties to the present Covenant recognize the right of everyone to the attainment of the highest attainable standard of physical and mental health [*Article 12(1)*].

2.1.3 Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees

The 1951 United Nations Convention Relating to the Status of Refugees (CRSR), and the 1967 United Nations Protocol Relating to the Status of Refugees (PRSR), both ratified by Australia in 1973. The definition of a refugee, in Article 1A(2) of the CRSR, is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

An asylum seeker is a person who is awaiting the determination of his or her claim for refugee status. Once a person's claim has been accepted he or she is described as a refugee. Neither the United Nations Convention nor the Protocol Relating to the Status of Refugees requires asylum seekers to obtain a visa to enter a country in which they seek recognition of their status as refugees.

2.1.4 Convention on the Rights of the Child

The 1990 United Nations Convention on the Rights of the Child (CROC), ratified by Australian in 1990 is relevant to the treatment of asylum seekers who are children. Provisions relevant to this submission include:

- States shall take all appropriate measures to ensure that children are protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians, or family members [*Article 2*];
- The best interests of the child shall be a primary consideration [*Article 3*];
- Children should not be separated from their parents against their will, except when competent authorities determine that such separation is necessary for their best interests [*Article 9*];
- States shall take all appropriate measures to protect children from physical or mental violence, abuse and neglect [*Articles 19 and 34*], and to promote recovery and social reintegration of children subject to neglect, exploitation, abuse, torture or armed conflict [*Article 39*];
- All asylum seeking and refugee children, unaccompanied or accompanied, should receive appropriate protection, humanitarian assistance [*Article 22*], and education [*Article 28*];
- Mentally or physically disabled children should enjoy a full and decent life and should be given special care and assistance [*Article 23*];

- All children are to be provided with a standard of living adequate for their physical, mental, spiritual, moral and social development [*Article 27*];
- Detention of children should be used only as a measure of last resort and for the shortest appropriate period of time [*Article 37*].

2.1.5 Convention Relating to the Status of Stateless Persons and Convention on the Reduction of Statelessness

The *1954 Convention Relating to the Status of Stateless Persons* (CRSSP), and the *1961 Convention on the Reduction of Statelessness* (CRS) were both ratified by Australia in 1973.

These Conventions require States to provide assistance and protection, including equal treatment and rights as is accorded to nationals in relation to certain subjects. In addition, both Conventions require Australia as a Contracting State to, as far as possible, facilitate the naturalisation of, or grant nationality to, stateless persons e.g. Article 32 of the CRSSP, Article 1 of the CRS.

2.2 National legislative context

The provisions of the CROC are implemented through the Commonwealth Government's *Human Rights and Equal Opportunity Commission Act 1986* (*HREOC Act*), which refers to the CROC as a "relevant international instrument relating to human rights and freedoms." The other international instruments mentioned above have not yet been declared to be relevant international instruments under the *HREOC Act*.¹

The *Migration Act 1958* specifies the treatment of asylum seekers arriving in Australia, including mandatory immigration detention for certain categories of asylum seeker and liability of non-citizens for the cost of their detention in Australia.

¹ The CROC, and the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief, are the only international instruments that have been declared under the *Act* to be relevant international instruments.

3. Terms of Reference

3.1 “The criteria that should be applied in determining how long a person should be held in immigration detention.”

3.1.1 *Office of Multicultural Interests (OMI)*

No mandatory detention without appeal or review

(i) The United Nations Human Rights Committee (HRC) has found on several occasions that Australia’s use of mandatory immigration detention constitutes arbitrary detention, thereby contravening article 9(1) of the CCPR. In particular, the HRC has found that the lack of any effective means of appeal or review of detention renders such detention arbitrary.² HREOC made a similar finding in 2002.³

OMI believes that, in accordance with international human rights instruments ratified by Australia and the 1999 HRC Guidelines on Detention of Asylum Seekers,⁴ Australian immigration law should not permit require nor permit arbitrary detention (as this term is understood by the HRC). Specifically, any decision to place a person in immigration detention should be open to periodic review,⁵ and persons who are detained should have the right to challenge their detention in court (Article 9(4) of the CCPR).

(ii) Decisions to place a person in immigration detention should be made on a case-by-case basis,⁶ with regard to the particular circumstances of the person. Immigration detention may be imposed only in those cases where it is reasonable and necessary (for example, where there is good reason to believe that a particular individual is likely to abscond, and where less restrictive alternatives to detention would be insufficient to prevent absconding).

(iii) All people who are detained under Australian immigration laws should be promptly informed of their rights while they are being held in detention, including the right to challenge their detention, in language that they understand. In some cases, the provision of interpreter services will be necessary to ensure that people understand their rights.

OMI recommends:

² See Field, O. with Edwards, A. (2006). "Alternatives to detention of asylum seekers and refugees." United Nations High Commission on Refugees, Legal and Protection Policy Research Series, p. 56.

³ HREOC (2002). Media statement by President Professor Alice Tay AM and Dr Sev Ozdowski, Human Rights Commissioner OAM. 6 February 2002. http://www.hreoc.gov.au/about/media/media_releases/2002/05_02.html [accessed 7 July 2008].

⁴ HRC (1999).

⁵ The requirement for periodic review, while not directly stated in the CCPR, has been supported in several findings by the HRC, including in relation to Australia’s system of immigration detention. *A v Australia* Human Rights Committee Case Number 560/1993; *C v Australia* Human Rights Committee Case Number 900/1999.

⁶ Field (2006), p.9.

1. *Any decision to place a person in immigration detention should be open to periodic review, and persons thus detained should have the right to challenge their detention in court.*
2. *The decision whether to place a person in immigration detention should be made on a case-by-case basis, with regard to the particular circumstances of that person.*
3. *All persons held in immigration detention should be promptly informed of their rights while being held in detention, in language that they understand.*
4. *Interpreter services be available, and be used where necessary, to ensure that persons held in detention understand their rights while being held in detention.*

Detention of adults during initial identity, health and security checks

(i) Detention of adult asylum-seekers for an initial, temporary period may be reasonable for the purpose of verifying their identity, and to conduct health and security checks. These reasons for detaining asylum seekers are recognised by the HRC as reasonable, and as not contravening relevant international human rights instruments.⁷

However, decisions as to whether to detain adults, even during the completion of initial checks, should still be made on a case-by-case basis, and should take into account the particular circumstances of each person. For example, there may be good reason to provide alternative accommodation to people identified as having been highly traumatised prior to arrival in Australia, and who would be likely to suffer further trauma if held in immigration detention even for the duration of initial checks.

(ii) OMI supports the HREOC recommendation that the Government establish a maximum processing time for the completion of the initial checks specified above. HREOC and the Refugee Council of Australia have both proposed ninety days as a maximum processing time; HREOC has further suggested that while ninety days be set as an absolute maximum, the standard period for completion of initial checks should be thirty days.⁸

OMI recommends:

5. *The decision to hold a person in immigration detention for the purposes of initial identity and security checks be made on a case-by-case basis.*

⁷ Field (2006), p.11.

⁸ HREOC (2007). Refugee Council of Australia (2000). Protests at Woomera Detention Centre. Media Release. <http://www.refugeecouncil.org.au/docs/releases/2000/mr-09072000.pdf> [accessed 11 July 2008].

6. *The Commonwealth Government establish a maximum processing time, of no greater than 90 days, for the completion of initial identity and security checks.*

Accommodation of children and family groups pending completion of initial checks

(i) In accordance with Article 3 of the CROC, the best interest of the child should always be a primary consideration in any decision concerning them. Given substantial evidence of the adverse effect of immigration detention on children's mental health, OMI endorses current policy under which detention of children is to be used only as a last resort, where there is no available alternative.

(ii) Where detention of a child is the only possible alternative, the child should be detained for the shortest period possible, and in any case for no longer than seven days, in accordance with international best practice.⁹ Unaccompanied children should be released into supervised accommodation in the community; conditions of accommodation should not be so restrictive as to constitute detention.¹⁰

(iii) Family groups that include children should be released into supervised accommodation in the community, rather than being held in immigration detention centres, pending the completion of initial checks. Accommodation that is suitable for families, such as ordinary housing or group housing offering separate accommodation for each family unit, should be available for family groups in community detention. Conditions of accommodation should not be so restrictive as to constitute detention.¹¹

OMI recommends:

7. *Children be held in immigration detention only as a last resort, and only after the consideration of all possible alternatives.*
8. *Where detention of a child is the only available option, the child be detained for the shortest possible period, and in any case for no longer than seven days.*
9. *Unaccompanied children and family groups that include children should generally be placed in supervised accommodation in the community, rather than in immigration detention centres, pending the completion of initial checks.*

⁹ Crawley, H. and Lester, T. (2007). No place for a child: children in UK immigration detention: impacts, alternatives and safeguards. Save the Children, p.55. Sweden, for example, does not allow detention of children for more than six days.

¹⁰ For further details see 3.4.2 and 3.4.5 below.

¹¹ For further details see 3.4.2 and 3.4.5 below.

Mechanisms to support case-by-case decisions regarding detention

(i) To ensure that individuals are in the most appropriate form of accommodation, all asylum seekers' circumstances and level of risk should be impartially and regularly assessed, following the initial assessment recommended in 3.1.2 above. If decisions whether to detain are to be made on a case-by-case basis, a mechanism is needed to make such decisions efficiently and impartially.

At present, all decisions about the use of alternatives to immigration detention must be made by the Minister for Immigration. The *Migration Act 1958* provides the Minister for Immigration with a non-compellable, non-delegable public interest power to specify alternative detention arrangements for a person's detention and conditions to apply to that person. Amendment of the *Migration Act 1958*, to make the Minister's power delegable, and to require such a panel to consider each case, would be needed to enable efficient case-by-case decision-making regarding use of alternatives to immigration detention.

(ii) One alternative would be to establish an independent case assessment panel to monitor risk on an ongoing basis; panel members could include a representative of HREOC and a representative of the Australian Federal Police. Establishment of an independent panel would ensure that assessments of individuals' levels of risk are, and are seen to be, independent. It would also have the added benefit of enabling more detailed documentation and reporting of the rates of absconding relative to identified risk levels, to supplement available studies on this topic.

OMI recommends:

10. The Migration Act 1958 be amended to enable the Minister for Immigration to delegate decisions regarding the most appropriate type of accommodation.

An independent case assessment panel be established, and be required under the Migration Act 1958, to regularly re-assess individuals' circumstances and level of risk, with the level of risk used to determine the appropriate level of security for accommodation.

3.1.2 Department of Correct Services (DCS)

When determining how long a person should be held in immigration detention; the type of accommodation a person is placed in; and the supervision and release considerations, WA DCS is of the view that consideration should be centred around the:

- assessed level of risk to national security;
- assessed level of risk to the community, and individual, or property; and
- assessed level of flight risk.

WA DCS is of the view that the time spent by individuals in immigration detention should be minimalised whenever possible. This is of particular importance for children and young people who should not be held in detention for any significant period of time. Additionally, the Commonwealth has a duty of care to ensure that the needs of these detainees are met. The Department's principal concerns focus on:

- the detention of children and young people for non-criminal activities (other than entering Australia illegally);
- detention without conviction;
- the possibility of children and young people being detained with adults (other than members of their family);
- the possible psychological harm done to children and young people in detention; and
- the principle of detention as a sentence of last resort.

The factors mentioned above are based on obligations under international covenants such as the United Nations Convention on the rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

3.2 “The criteria that should be applied in determining when a person should be released from immigration detention following health and security checks.”

3.2.1 Office of Multicultural Interests (OMI)

Presumption of release from immigration detention after completion of initial checks

(i) Persons held in immigration detention for the purpose of initial checks should generally be released into alternative accommodation as soon as the checks are completed. Criteria for continuing detention after the completion of initial checks should be in accordance with relevant international human rights instruments. The decision to detain a person after the completion of checks should, as per 3.1.1 above, be made on a case-by-case basis, and after consideration of the particulars of each case.

(ii) It may be justifiable in exceptional circumstances to detain asylum seekers after the completion of initial checks. The types of case that are recognised by the HRC as justifying an exemption, after consideration of the particulars, are detailed below:¹²

- Risk to national security: A person judged to pose a serious risk to national security may be detained in immigration detention, subject to the conditions

¹² See for example United Nations High Commission on Refugees (HCR) (1999). “Revised guidelines on applicable criteria and standards relating to the detention of asylum-seekers.” <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> [accessed 14 July 2008], p. 4.

specified in 3.1.1 above regarding regular review and the right to challenge detention in court.

As advised by the HRC following the attack on the World Trade Center in 2001, continued detention may only be applied on grounds of a risk to national security “if necessary in circumstances prescribed by law and subject to due process safeguards.”¹³

- Risk of absconding: Asylum seekers rarely seek to abscond once they have arrived in a destination country such as Australia.¹⁴ However, a case-by-case assessment may determine that a person poses a high risk of absconding. In such cases, the person may be detained in immigration detention, subject to the conditions specified in 3.1.1 above (regular review and the right to challenge detention in court) and 3.2.6 below (treatment of failed asylum seekers who cannot be returned).
- Refusal to comply with the verification of identity process: The United Nations High Commission on Refugees (HCR) recognises that detention may be used in cases “where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.”¹⁵

The HCR also notes that: “What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.”

It should be noted that, given the available evidence, immigration detention is unlikely to be judged necessary on the above grounds for more than a small minority of cases.

OMI recommends:

11. *People held in immigration detention during initial identity, health and security checks be released as soon as checks are completed, except where they are judged to be a high risk case (i.e. they pose a serious risk to national security, a high risk of absconding, or they refuse to comply with the verification of identity process).*

¹³ United Nations Human Rights Committee Department of International Protection (2001). “Addressing security concerns without undermining refugee protection,” section D, para. 10, quoted in Field (2006), p.11.

¹⁴ Field (2006), p. 40. A destination country is a country where asylum seekers hope to settle permanently.

¹⁵ HCR (1999), p. 4.

12. Unless a person is judged to be a high risk case, alternatives to immigration detention should be used (in conjunction with measures such as supervision or restriction on movement if judged necessary).

Detention of parents after completion of initial checks

Where possible, family groups with children should not be separated. However, in some instances, a risk assessment may determine that a parent needs to be detained because they pose a high security or absconding risk, and no lower-security accommodation option would be adequate to manage the risk in question. Options for accommodating children in such cases are either to move the whole family into detention or to split the family, detaining only the parent for whom detention is required.

In such cases, the Swedish model may be considered. Where immigration detention is judged necessary and reasonable for a parent, Swedish authorities let the family decide what is in the best interests of the child. Most parents prefer to split the family, with one parent released to care for the child. Where there is only one parent, and that parent is detained, the usual practice is to release the child into a group home for unaccompanied children, with regular access visits to the parent.¹⁶ However, the Swedish immigration system rarely detains parents and typically allows them to live in accommodation centres with daily reporting requirements, reflecting the reality that families with young children are very unlikely to abscond in destination countries.¹⁷

OMI recommends:

13. Where immigration detention is judged to be necessary and reasonable in the case of a parent, the family be allowed to decide whether the child(ren) remain in detention with the parent(s) or be released from immigration detention.

Release from detention prior to completion of identity checks

The HRC suggests that if a person's identity cannot be established within the maximum processing time for the completion of initial checks, but the person has cooperated with the verification of identity process, and is not considered a risk to national security or at high risk of absconding (see 3.2.1 above), they should be released from immigration detention.¹⁸ OMI supports this view.

In cases where there is judged to be a moderate, but not a high, risk of a person's absconding, some form of supervision or restriction on movement, such as curfews, daily reporting requirements or release on bail, may be used to discourage absconding;

¹⁶ Mitchell, G. (2004). "The Swedish model of detention." <http://www.refugeecouncil.org.au/current/alt-swedish.html> [accessed 14 July 2008].

¹⁷ Field (2006), p. 40.

¹⁸ Field (2006), p. 11.

such restrictions have been shown to be effective for this purpose in destination countries.¹⁹

OMI recommends:

14. *People whose identity has not been established within the maximum processing time but who have cooperated with the verification of identity process, and who are not considered a serious risk to national security or at high risk of absconding, be released from immigration detention.*

Treatment of failed asylum seekers

Failed asylum seekers are those who are found not to be in need of international protection, and who have exhausted all avenues of appeal. Failed asylum seekers should be accommodated in the same way as individuals awaiting determination of their claim for refugee status.

Based on existing international evidence, there is a somewhat higher rate of failed asylum seekers absconding while awaiting deportation, compared with those awaiting determination of their claim for refugee status. However, this fact alone does not justify detention for all failed asylum seekers, as there is also evidence from Australia that, given appropriate caseworker support and counselling, a high proportion of failed asylum seekers voluntarily comply with a removal order.²⁰

Of the finally refused asylum seekers in the [Hotham Mission] study, 85% voluntarily left Australia on receiving a final decision [...]. The other fifteen per cent were detained and then forcibly returned. Nobody absconded. The researchers concluded from this evidence that detention was usually unnecessary to ensure the availability for removal of persons not found to be in need of international protection.

Accordingly, like other asylum seekers, failed asylum seekers' circumstances and level of risk should be regularly re-assessed as per 3.2.4 above; failed asylum seekers should not be held in immigration detention prior to deportation unless they are judged to fall into a high risk category (as per 3.2.1 above).

OMI recommends:

15. *Failed asylum seekers should not be detained unless they are judged to fall into a high risk category, under which they pose a serious risk to national security or a high risk of absconding.*

¹⁹ Field (2006), p. 9.

²⁰ Hotham Mission (2003). "Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, research and evaluation," November 2003. <http://www.hothammission.com.au>, quoted in Field (2006), p. 42. Similar evidence is available internationally; see for instance Stone C. (2000). "Supervised release as an alternative to detention in removal proceedings: some promising results of a demonstration project." *Georgetown Immigration Law Journal*, 14(3), pp. 673-687; Root, O. (n.d.) "The Appearance Assistance Program:" an alternative to detention for non-citizens in U.S. immigration removal proceedings." http://www.vera.org/publication_pdf/aap_speech.pdf [accessed 10 July 2008].

16. Failed asylum seekers' circumstances and level of risk should be regularly re-assessed by an independent assessment panel.

Treatment of failed asylum seekers who cannot be returned

At present Australia's immigration detention system allows for the indefinite detention of people whose claim for refugee status has been unsuccessful, but who cannot be returned to their country of origin for whatever reason, including reasons that are beyond their control. Such detention constitutes arbitrary detention either if it is indefinite, or if the person is detained after it has been established that deportation is not possible.

Failed asylum seekers who cannot be returned to their country of origin, and whom no other country will accept, are *de facto* stateless persons. Australia has not incorporated the provisions of the *1954 Convention Relating to the Status of Stateless Persons* or the *1961 Convention on the Reduction of Statelessness* into legislation. Nor has it established any procedures for formally determining statelessness, including the lack of any visa for people who arrive in Australia and are found to be stateless.

To date the issue of statelessness has only really arisen in issues incidental to the refugee determination process. The problem has been that people claiming to be stateless have had difficulties in meeting the definition of a "refugee". Given that a protection visa claim is currently the only avenue for making a claim for refugee status, stateless persons are forced to go through a lengthy application process to DIAC and then to the Refugee Review Tribunal which is not able to properly consider such claims. It may not be until a person has been through all of the procedures that it is discovered that their country of origin will not recognise them as a national.

To address this issue, at the 2008 Ministerial Council on Immigration and Multicultural Affairs, WA proposed the resolution that "the Council calls on the Commonwealth Government to develop new procedures for people who found to be stateless to be given the opportunity to obtain a permanent visa." The Council noted that the Australian Government is considering introduction of a formal system of complementary protection, including provision for people found to be stateless.

OMI recommends:

- 17. That in developing a new system of complementary protection, the Commonwealth Government give consideration to:*
- a. the model for complementary protection developed by the Refugee Council of Australia, Amnesty International Australia and the National Council of Churches being adopted²¹;*

²¹ <http://www.refugeecouncil.org.au/docs/current/comp-protection-model.pdf>

- b. *in assessing a claim, the definitions of statelessness in the 1954 and 1961 Conventions be the determining criterion as per the manner in which the refugee definition is currently the determinative factor for temporary protection claims;*
- c. *those who are not legally stateless but are in the position of being de facto stateless i.e. do not possess effective nationality; placing a focus on determining whether the person is stateless and not (as is currently the case) on their non-removability.*

3.3 “Options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing, Immigration Transit Accommodation (ITA) and community detention.”

3.3.1 Department of Health

The Migrant Health Unit (Department of Health WA) provides a health screening service to refugees settling in WA under the Commonwealth Humanitarian settlement program and to asylum seekers living in the community on bridging visa E.

Post arrival health screen

All unauthorised arrivals should be offered a health screen to detect infectious diseases that may be endemic in their country of origin or transit e.g. tuberculosis and malaria. The health screen should be conducted in a culturally appropriate setting with the use of accredited interpreters if the client is from a non-English speaking background. Screening protocols should be consistent with the Australian Society for Infectious Diseases guidelines and the National Tuberculosis Advisory Committee guidelines.

Detention health services

The Department of Health WA notes that the Department of Immigration and Citizenship (DIAC) commissioned the Royal Australian College of General Practitioners (RACGP) to write *Standards for health services in Australian immigration detention centres*. Health WA endorses these guidelines and requests feedback on whether these standards have been introduced across all immigration detention centres and what mechanisms are in place to monitor compliance with these standards.

Continuity of care

Follow up of former detainees with chronic medical and mental illness released into the community is a major concern.

The Department of Health WA recommends:

18. That detention health centres formally refer clients with significant health issues to an appropriate community or tertiary health service, so that they may receive timely follow up and management.

Medicare entitlement for Bridging Visa E holders

Some asylum seekers released into the community are placed on Bridging Visa E. These individuals are not entitled to income support from Centrelink and are not eligible for Medicare services or Pharmaceutical benefits. Anecdotal evidence from medical practitioners and Non-Governmental organisations in WA is that these individuals do not present to primary care health services when they are unwell because they are unable to pay private medical fees. They often present at Emergency departments when their conditions have worsened. This can lead to adverse health outcomes for the individual but also has an impact on Department of Health WA services. Some families on bridging visa E include young children and pregnant women. The lack of access to health care for this group is of particular concern and there is the potential for adverse obstetric outcomes and outbreaks of vaccine preventable diseases.

The Department of Health WA recommends:

19. That all asylum seekers on Bridging Visa E are given limited Medicare and Pharmaceutical benefits access for non-elective and essential treatment including antenatal care and childhood immunisation.

3.3.2 Office of Multicultural Interests (OMI)

Public sector priority

Detention services to all immigration detention facilities, including health services, should be managed and provided by the public sector, to minimise the potential for conflict between the achievement of policy objectives and the pursuit of profit. Public provision of detention services is also likely to increase transparency and accountability in the operations of immigration detention centres and alternative forms of accommodation.

OMI WA recommends:

20. All detention services, including detention health services, be managed and provided by the public sector.

3.4 Options for additional community-based alternatives to immigration detention by

- a) inquiring into international experience;**
- b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;**

- c) comparing the cost effectiveness of these alternatives with current options.”

3.4.1 Department of Education and Training

Community- based alternatives to immigration detention require adequately funded support services such as general and special language education services.

In Western Australia rather than being detained in detention centres, unaccompanied minors, for instance, now reside in the community and attend local schools. This places additional pressure on public schools which are already struggling to cope with high numbers of new arrivals who have limited competence in English. It also places pressure on specialist programs such as English as a Second Language, which detained minors usually require but cannot always access because of limits on funded places (the cost for intensive English tuition is in the vicinity of \$5 800 per year).

3.4.2 Office of Multicultural Interests

Note on the definition of ‘detention’

As stated by the HRC, Article 9(1) of the CCPR is not an absolute protection against detention, but a substantive guarantee against detention that is arbitrary or unlawful.²² For detention not to be arbitrary or unlawful, the detention must:

- be authorised by law
- be reasonable or necessary in all the circumstances (including being proportionate and non-discriminatory)
- be subject to periodic review, and
- be subject to judicial review.²³

In other words, detention may be judged to contravene Article 9(1) of the CCPR if it does not meet one or more of the above four conditions, whether a person is being held in a formal immigration detention centre, or in alternative detention such as a house in a suburban residential area. For example, accommodation in Australian Immigration Residential Housing (IRH) may constitute arbitrary detention even if conditions relating to periodic and judicial review were met, because, given the low

²² HRC (1982). General Comment No. 8 on Article 9 (Right to liberty and security of the person).

²³ Field (2006), p. 20. See also HRC (1999). “Revised guidelines on applicable criteria and standards relating to the detention of asylum seekers,” February 1999. <http://www.unhcr.org/cgi-in/texis/vtx/refworld/rwmain?docid=3c2b3f844> [accessed 8 July 2008], p.5 (Guideline 5: Procedural Safeguards).

risk of absconding among asylum seekers arriving in Australia, detention in IRH may be unreasonable or unnecessary in some cases.²⁴

To ensure that Australia's immigration detention system complies with Article 9(1) of the CCPR, the focus should be on developing *alternatives to detention*, and not *alternative forms of detention*.

Available studies of international experience

There is substantial documentation of international experiences with community-based alternatives to immigration detention, for example in the HRC's comprehensive 2006 report "Alternatives to detention of asylum seekers and refugees." International research documented in this report shows consistently low rates of absconding for asylum seekers awaiting a determination of their case in destination countries.²⁵ This mirrors the available evidence for Australia, such as that conducted by Hotham Mission which found a nil rate of absconding for asylum seekers provided with social and financial support while awaiting determination of their claim.²⁶

Several community-based alternatives to immigration detention discussed in the HRC report are associated with high levels of compliance, a rate of absconding lower than 20% (in some cases, including in Australia, at or close to zero²⁷), and are unlikely to constitute detention. Commencing with the least intrusive options, these include:

- a. release with an obligation to register one's place of residence with the relevant authorities and to notify them or obtain their permission prior to changing that address;
- b. release upon surrender of one's passport and/or other documents;
- c. registration, with or without identity cards or other documents;
- d. release with the provision of a designated case worker, legal referral and an intensive support framework (possibly combined with some of the following more enforcement-oriented measures);
- e. supervised release of unaccompanied children to local social services;

²⁴ Details regarding Immigration Residential Housing were drawn from Department for Immigration and Citizenship (2008). "About Immigration Residential Housing (IRH)." <http://www.immi.gov.au/managing-australias-borders/detention/facilities/about/rhcs.htm> [accessed 11 July 2008] and HREOC (2007).

²⁵ Hotham Mission (2005). "Absconding and asylum seekers: the real figures." <http://www.hothammission.org.au/index.cgi?tid=27> [accessed 14 July 2008]; Field (2006), p. 25.

²⁶ Hotham Mission (2003). Field (2006) reports that in FY1995-1997, no asylum seeker absconded from reporting requirements in Australia, and in FY1994, only 4.3% of asylum seekers breached their reporting requirements and 1.6% forfeited their sureties. A similar program in the US, run by the Vera Institute of Justice, had an appearance rate of 93% for asylum seekers released with reporting requirements, plus referrals to legal and social services. Root (n.d.) p.6.

²⁷ Studies from Australia and the US suggest much lower rates of absconding – between nil and 7% for programs offering variations on option (d), in conjunction with options (f), (g), (h) or (i). See footnotes 21 and 27 above for further details and references.

- f. supervised release to (i) an individual, (ii) family member/s, or (iii) nongovernmental, religious or community organisations, with varying degrees of supervision agreed under contract with the authorities;
- g. release on bail or bond, or after payment of a surety (often used in conjunction with (f));
- h. reporting requirements of varying frequencies, in person and/or by telephone or in writing, to (i) the police, (ii) immigration authorities, or (iii) a contracted agency (often used in conjunction with (f));
- i. designated residence in (i) state-sponsored accommodation, (ii) contracted private accommodation, or (iii) open accommodation centres.²⁸

Each of these options would be preferable to mandatory confinement in immigration detention centres, and all are also described as acceptable alternatives to detention by the HCR.²⁹

OMI WA recommends:

21. The Commonwealth Government consider further the available evidence regarding community-based alternatives to immigration detention, with particular attention to alternatives that do not themselves constitute detention.

Utilisation of international alternatives in Australia to broaden the options available within the current immigration detention framework

A version of option (d) above has already met with success in Australia, where it has been employed by the Hotham Mission Asylum Seekers Project (HMASP). The HMASP model provides individual case-management to asylum seekers released into the community on a Bridging Visa Class E, and provides a housing support worker to assist with meeting accommodation needs. Some (though not all) asylum seekers who participate in the HMASP have access to minimum financial entitlements through the Asylum Seeker Assistance Scheme.

Based on available evidence, the HMASP model has been highly effective in supporting asylum seekers to live with dignity in the community, and is associated with very low rates of absconding, not only for asylum seekers awaiting a determination of their case, but also failed asylum seekers awaiting deportation (where international evidence shows a higher average rate of absconding).³⁰

²⁸ Drawn from Field (2006). pp. 22-23. This report also lists electronic tagging, used at present in the United States and Canada. However, the report notes that electronic tagging is "a severe restriction on freedom of movement."

²⁹ HCR (1998), pp. 5-6. Most of the above options are also evaluated in a research paper by the European Council on Refugees and Exiles (ECRE). ECRE (1998). "Research paper on alternatives to detention: practical alternatives to the administrative detention of asylum seekers and rejected asylum seekers." <http://www.ecre.org/files/alterns.pdf> [accessed 15 July 2008].

³⁰ Hotham Mission (2003).

HMASP states of the model that “case work would play a pivotal role in preparing, supporting and empowering asylum seekers through the determination process.”³¹

Given the success of the HMASP model, consideration of an expansion of the arrangements established under the HMASP to cover all asylum seekers would seem a strong candidate as an alternative to immigration detention in Australia. Additional considerations support the use of some version of option (d), such as the HMASP. Option (d) is identified in the HRC’s report “Alternatives to detention of asylum seekers and refugees” as among the less intrusive alternatives to immigration detention currently in use internationally.³² It also has the advantage over options (a)-(c) of providing valuable support for asylum seekers released into a community with which they are not familiar.

A further advantage of the HMASP model is that it can be used in conjunction with additional restrictions (such as options (f), (g), (h) or (i) listed above), to reduce the risk of absconding. This would allow for a graduated approach to risk management, with different levels of restrictions imposed on the basis of the risk assessments conducted by the independent case assessment panel. Restrictions could be adjusted on a case-by-case basis to reflect changes in risk level.³³

OMI WA recommends:

22. *DIAC consider an expansion of the HMASP model, in conjunction with wider use of Class E bridging visas, as a comprehensive alternative option to the use of immigration detention centres.*

23. *DIAC consider use of additional restrictions, in conjunction with the HMASP, for cases judged by an independent assessment panel to pose a moderate level of risk, as an alternative to accommodation in an immigration detention centre for such cases.*

Increasing support for asylum seekers released into the community

HREOC has argued that restrictions on bridging visa holders “can impact significantly on their ability to exercise basic human rights,” including “the right to work, the right to social security, the right to an adequate standard of living and the right to the highest attainable standard of health.”³⁴ OMI supports HREOC’s position.

³¹ Hotham Mission (2004). Submission to the National Inquiry into Children in Immigration Detention. no. 174. http://www.hreoc.gov.au/human_rights/children_detention/submissions/hotham.html [accessed 11 July 2008].

³² Field (2006), p. 22.

³³ Of course, this would not apply in the case of a person who moves into the high risk category, indicating the need to confine them in a detention centre.

³⁴ HREOC (2008). “Factsheet: the impact of bridging visa restrictions on human rights.” http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visa_factsheet.html [accessed 11 July 2008]. Hotham Mission (2004). “Minimum standards of care for asylum seekers in the community.”

Restrictions on permission to work and on access to Government benefits (as currently imposed on some Class E bridging visas) should not be imposed on people living in community-based alternatives to immigration detention.³⁵ All asylum seekers living in community-based alternatives to immigration detention should be able to access the Asylum Seeker Assistance Scheme; current eligibility criteria leave some asylum seekers destitute. Permission to work and access to social security and health benefits would also function as compliance incentives, discouraging bridging visa holders from absconding.³⁶

OMI WA recommends:

24. The Commonwealth Government consider removing current bridging visa restrictions on undertaking paid work, and on access to health and social security benefits.

Alternatives to detention for unaccompanied children

(i) Option (d) discussed in 3.4.2 above does not fully address the issue of accommodation for unaccompanied children seeking asylum in Australia. At present, unaccompanied children are not held in immigration detention centres, but are placed in community detention. Further alternatives for children, such as option (e) mentioned in 3.4.2 above, could be further explored in the Australian context.

(ii) Unaccompanied children should be provided with accommodation suitable to their age and dependent status, consistent with the provisions of the CROC; Save the Children's "Statement of good practice" for unaccompanied child asylum seekers notes that accommodation could be with adult relatives, a foster-family, or in institutional accommodation with suitable provisions for minors. Detention conditions should not apply.³⁷

(iii) Given the importance of not detaining children, the provision of accommodation that allows for both short stays while initial checks are being completed, and longer-term stays pending the determination of claims for refugee status, may be the most cost-effective. An approach used in Sweden, the supervised group home, could be considered for application in Australia. Swedish supervised group homes are run jointly by the Immigration Department and Child Social Services, and are a version of

<http://www.asp.hothammission.org.au/index.cgi?tid=25> [accessed 11 July 2008]. To limit costs, Hotham Mission proposes that only bridging visa holders with "particular welfare needs" be allowed access to social security entitlements.

³⁵ HREOC (2008). "Factsheet: the impact of bridging visa restrictions on human rights." http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visa_factsheet.html [accessed 11 July 2008]. Hotham Mission (2004). "Minimum standards of care for asylum seekers in the community." <http://www.asp.hothammission.org.au/index.cgi?tid=25> [accessed 11 July 2008]. To limit costs, Hotham Mission proposes that only bridging visa holders with "particular welfare needs" be allowed access to social security entitlements.

³⁶ Field (2006). p. 47.

³⁷ Save the Children. Statement of good practice. Separated Children's Program. http://www.separated-children-europe-programme.org/separated_children/good_practice/index.html [accessed 14 July 2008].

option (e) listed at 3.4.2 above. According to a review of the Swedish immigration detention system by Grant Mitchell of the Asylum Seeker Project:³⁸

Group homes are normally supervised with access to information, legal advice, counselling and recreation. All who live in the homes are involved in food preparation. There are also regular group meetings with consensus deciding all issues. Telephone translators are available whenever required.

In Sweden, the supervised group home can also accommodate unaccompanied children during the completion of initial checks, thus reducing the risk that children remain in immigration detention for an extended time awaiting placement in foster care.

OMI WA recommends:

25. DIAC consider introducing supervised group homes to accommodate unaccompanied child asylum seekers for the period of initial checks and for any further period during which they are awaiting placement in foster care.

Comparisons of cost effectiveness of alternatives to immigration detention

In Australia some research into costing alternatives to immigration detention has been conducted by community organisations as part of campaigns for the broader use of such alternatives. These costings show that costs of accommodation in immigration detention centres are higher than all other available alternatives.³⁹

Costings commissioned in 2003 by Justice for Asylum Seekers, an Australian alliance of church and community organisations, found that a mixed accommodation system, including community or hostel accommodation as well as detention, and accompanied by an individual case-management model, would be 18% cheaper than Australia's current detention system.⁴⁰ No specific costing has been conducted for the HMASP, although it is likely that per capita costs would be substantially cheaper than immigration detention.

OMI recommends:

26. The Commonwealth Government consider commissioning a comparative costing of a nation-wide roll out of an alternative to detention, based on the model developed by the HMASP, and detention in an immigration detention centre.

Recovering the costs of immigration detention

The costs of being held in mandatory immigration detention should not be borne by asylum seekers, whether or not they are subsequently granted refugee status in

³⁸ Mitchell (2004).

³⁹ Justice for Asylum Seekers (2003). Improving outcomes and reducing costs for asylum seekers. <http://www.melbourne.catholic.org.au/ccjdp/pdf/ImprovingOutcomesandReducingCostsforAsylumSeekers.pdf> [accessed 4 July 2008].

⁴⁰ Justice for Asylum Seekers (2003).

Australia. The current requirement in the *Migration Act 1958* permitting the imposition of this debt should be deleted so as to require future legislative amendment for such a debt to be imposed in future. All former detainees who have incurred a detention debt should, irrespective of their visa status, have their debt waived (permanently expunged).

At present, Section 209 of the *Migration Act 1958* requires that a non-citizen who is detained is liable to pay the Australian Government the costs of their detention. Costs include transportation to and from an immigration detention centre and the daily maintenance amount for each day spent in detention.

Immigration centre detainees are the only group in the Australian community who are charged for their detention; by comparison, detainees in prisons, mental hospitals and quarantine are not. The singling out of non-citizen detainees to pay detention debts is arguably inconsistent with the CCPR. Article 2(1) of the CCPR imposes a general prohibition on discrimination and article 26 affirms all individuals' rights to equal treatment before the law. The HRC has explicitly stated that the CCPR applies to all people in a state's territory, "irrespective of his or her nationality or statelessness." In addition, it clearly has the potential to be perceived as a form of punishment of people who already face very difficult circumstances.

Mandatory detention has been strongly linked with a rapid deterioration in mental health, including depression and posttraumatic stress disorder, and significantly increased suicide rates. The burden of a large detention debt, such as one WA case where a former detainee has a \$345,000 debt, places individuals under extreme financial and emotional pressure and has the potential to exacerbate mental health issues developed in detention. The imposition of this debt could therefore be considered to be inconsistent with the right to health under the CESC.

OMI WA recommends:

27. The Commonwealth Government amend the Migration Act 1958 to remove the requirement for detainees to repay the costs of their detention.

28. All former detainees who have incurred a visa debt should, irrespective of their visa status, have their debt waived.

3.4.3 Department of Corrective Services (DCS)

In the case of detainees who are released from immigration detention into the community whilst a decision on their immigration status is pending, WA DCS is of the view that the Commonwealth and not the States should retain responsibility for the costs and overall accountability for managing them.

4. Other Recommendations

4.1 Office of Multicultural Interests (OMI)

(i) One notable feature of Australia's current legislation pertaining to immigration is its inconsistency at various points with international human rights law. As discussed above, both the United Nations Human Rights Committee (HRC) and the Human Rights and Equal Opportunity Commission (HREOC) have found that Australia's mandatory detention regime breaches section 9(1) of the CCPR. Accordingly, measures such as amendment of the *Migration Act 1958* to comply with relevant international instruments such as the CCPR are included as recommendations in this submission.

(ii) However, there are additional, more comprehensive changes that the Commonwealth Government might consider taking to increase the prospect of ongoing consistency of Australian legislation and policy with the international instruments to which Australia is a signatory. The first, on which the Commonwealth Government has already acted in relation to the CROC, is to declare the CCPR, CESC, CRSR and PRSR to be "relevant international human rights instruments" under the *HREOC Act*. Referral to these instruments through the *HREOC Act* is one means of ensuring that they, like the CROC, have legal standing in Australia.

(iii) The Commonwealth Government might also take further steps towards recognition, in Australian law, of the human rights specified in international instruments ratified by this country. A public inquiry into "how best to recognise and protect the human rights and freedoms enjoyed by all Australians" is part of the Australian Labor Party's 2007 platform.⁴¹ Given the evidence that some human rights are not enjoyed by all Australians,⁴² let alone by those who come to Australia from other countries seeking asylum, such an inquiry would be an effective mechanism to address and make recommendations in relation to this issue.

OMI WA recommends:

29. *The Commonwealth Government declare the CCPR, CESC, CRSR and PRSR to be relevant international human rights instruments under the HREOC Act*

30. *The Commonwealth Government hold a public inquiry into the protection of human rights and freedoms in Australia.*

⁴¹ Australian Labor Party (2007). *National Platform and Constitution 2007*, p. 207, para. 7. http://www.alp.org.au/download/2007_platform_chapter13.pdf [accessed 11 July 2008].

⁴² For example the United Nations Special Rapporteur on Human Rights found that Australians have no justiciable right to adequate housing, as defined in international law (UDHR, Article 25(1)). Miloon Kothari (2006) Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia (31 July – 15 August 2006), p. 7.

List of recommendations

1. *Any decision to place a person in immigration detention should be open to periodic review, and persons thus detained should have the right to challenge their detention in court.*
2. *The decision whether to place a person in immigration detention should be made on a case-by-case basis, with regard to the particular circumstances of that person.*
3. *All persons held in immigration detention should be promptly informed of their rights while being held in detention, in language that they understand.*
4. *Interpreter services be available, and be used where necessary, to ensure that persons held in detention understand their rights while being held in detention.*
5. *The decision to hold a person in immigration detention for the purposes of initial identity and security checks be made on a case-by-case basis.*
6. *The Commonwealth Government establish a maximum processing time, of no greater than 90 days, for the completion of initial identity and security checks.*
7. *Children be held in immigration detention only as a last resort, and only after the consideration of all possible alternatives.*
8. *Where detention of a child is the only available option, the child be detained for the shortest possible period, and in any case for no longer than seven days.*
9. *Unaccompanied children and family groups that include children should generally be placed in supervised accommodation in the community, rather than in immigration detention centres, pending the completion of initial checks.*
10. *The Migration Act 1958 be amended to enable the Minister for Immigration to delegate decisions regarding the most appropriate type of accommodation.*
11. *An independent case assessment panel be established, and be required under the Migration Act 1958, to regularly re-assess individuals' circumstances and level of risk, with the level of risk used to determine the appropriate level of security for accommodation.*
12. *People held in immigration detention during initial identity, health and security checks be released as soon as checks are completed, except where they are judged to be a high risk case (i.e. they pose a serious risk to national security, a high risk of absconding, or they refuse to comply with the verification of identity process).*

13. *Unless a person is judged to be a high risk case, alternatives to immigration detention should be used (in conjunction with measures such as supervision or restriction on movement if judged necessary).*
14. *Where immigration detention is judged to be necessary and reasonable in the case of a parent, the family be allowed to decide whether the child(ren) remain in detention with the parent(s), or be released from immigration detention.*
15. *People whose identity has not been established within the maximum processing time but who have cooperated with the verification of identity process, and who are not considered a serious risk to national security or at high risk of absconding, be released from immigration detention.*
16. *Failed asylum seekers should not be detained unless they are judged to fall into a high risk category, under which they pose a serious risk to national security or a high risk of absconding.*
17. *Failed asylum seekers' circumstances and level of risk should be regularly re-assessed by an independent assessment panel.*
18. *That detention health centres formally refer clients with significant health issues to an appropriate community or tertiary health service, so that they may receive timely follow up and management.*
19. *That all asylum seekers on Bridging Visa E are given limited Medicare and Pharmaceutical benefits access for non-elective and essential treatment including antenatal care and childhood immunisation.*
20. *That in developing a new system of complementary protection, the Commonwealth Government give consideration to::*
 - a. *the model for complementary protection developed by the Refugee Council of Australia, Amnesty International Australia and the National Council of Churches being adopted;*
 - b. *in assessing a claim, the definitions of statelessness in the 1954 and 1961 Conventions be the determining criterion as per the manner in which the refugee definition is currently the determinative factor for temporary protection claims;*
 - c. *those who are not legally stateless but are in the position of being de facto stateless i.e. do not possess effective nationality;*
 - d. *placing a focus on determining whether the person is stateless and not (as is currently the case) on their non-removability*
21. *All detention services, including detention health services, be managed and provided by the public sector.*

22. *The Commonwealth Government consider further the available evidence regarding community-based alternatives to immigration detention, with particular attention to alternatives that do not themselves constitute detention.*
23. *DIAC consider an expansion of the HMASP model, in conjunction with wider use of Class E bridging visas, as a comprehensive alternative option to the use of immigration detention centres.*
24. *DIAC consider use of additional restrictions, in conjunction with the HMASP, for cases judged by an independent assessment panel to pose a moderate level of risk, as an alternative to accommodation in an immigration detention centre for such cases.*
25. *The Commonwealth Government consider removing current bridging visa restrictions on undertaking paid work, and on access to health and social security benefits.*
26. *DIAC consider introducing supervised group homes to accommodate unaccompanied child asylum seekers for the period of initial checks and for any further period during which they are awaiting placement in foster care.*
27. *The Commonwealth Government consider commissioning a comparative costing of a nation-wide roll out of an alternative to detention, based on the model developed by the HMASP, and detention in an immigration detention centre.*
28. *The Commonwealth Government amend the Migration Act 1958 to remove the requirement for detainees to repay the costs of their detention.*
29. *All former detainees who have incurred a visa debt should, irrespective of their visa status, have their debt waived.*
30. *The Commonwealth Government declare the CCPR, CESCR, CRSR and PRSR to be relevant international human rights instruments under the HREOC Act*
31. *The Commonwealth Government hold a public inquiry into the protection of human rights and freedoms in Australia.*