



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

### **1. Introduction**

Oxfam Australia welcomes the opportunity to provide a submission to the Inquiry of the Joint Select Committee on Australia's Immigration Detention Network.

We note that there have been numerous Parliamentary, statutory body and independent Government-commissioned inquiries and reports relating to Australia's immigration detention system during the almost two decades since the introduction of mandatory immigration detention.<sup>1</sup> Many of the associated recommendations remain unheeded, despite being relevant to current circumstances. Reform of Australia's policies and practices relating to immigration detention is much needed.

### **2. About Oxfam Australia**

Oxfam Australia is an independent, not-for-profit, secular international development agency. We are a member of Oxfam International, a global confederation of 15 Oxfam entities that work with others to overcome poverty and injustice in almost 100 countries around the world. Oxfam Australia provides emergency response during disasters and conflicts, supports more than 400 long-term development projects across Asia, the Pacific, Africa and Australia, and undertakes research, advocacy and campaigning for policy and practice changes which promote human rights and justice.

Oxfam works at the cutting edge to protect the rights of vulnerable people in times of humanitarian crisis as well as undertaking long-term development programs with communities to support them to achieve their rights. As such, Oxfam Australia has a strong interest in the Australian Government's policies and practices with regard to refugees, asylum seekers and other vulnerable displaced persons, both within Australia and elsewhere.

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<sup>1</sup> See for instance those listed in the Refugee Council of Australia's submission to Joint Standing Committee on Migration's Inquiry into Immigration Detention, August 2008  
<http://www.aph.gov.au/house/committee/mig/detention/subs/sub120.pdf>

Oxfam Australia has undertaken, participated in and supported research and advocacy relating to the costs of the 'Pacific Solution', alternatives to detention for asylum seekers, the impacts on asylum seekers and refugees of Australia's border control arrangements with neighbouring countries, and frameworks for strengthening regional refugee protection. We are represented on the steering committees of the International Detention Coalition (IDC) and the Asia Pacific Refugee Rights Network (APRRN). Oxfam regularly engages with the Australian Government, the United Nations High Commissioner for Refugees (UNHCR) and other inter-governmental and non-government organisations, at domestic, regional and international levels, regarding the policies and practices required to protect vulnerable people.

### **3. Focus of this submission**

Our submission addresses specific terms of reference within the context of this important Inquiry as well as aspects of the broader debate regarding Australia's response to asylum seekers who arrive to Australia by boat. Specifically, we address:

- the scope of the Inquiry;
- some of the important questions posed by the Secretary of the Department of Immigration and Citizenship (DIAC), Mr Andrew Metcalfe, in his opening address to the Committee on 16 August 2011; and
- Terms of Reference 1(a) relating to required reforms, 1(g) relating to the impact, effectiveness and costs of mandatory detention and any alternatives, and 1(l) relating to current compliance with Government's Immigration Detention Values.

Oxfam Australia is primarily focused upon the regional and international dimensions of Australia's response to refugees, asylum seekers and other vulnerable displaced persons. However, we hold long-standing concerns regarding the devastating human impacts of Australia's immigration detention network and are interested in the nexus between Australia's domestic arrangements and those which it funds and seeks to negotiate elsewhere within the region. We note that these dual realms of operation have been highlighted by the recent High Court judgment in the matters of *M70/2011 and M106/2011 v Minister for Immigration and Citizenship & Anor* [2011] HCA 32, and their implications for the future extraterritorial processing of claims made by adult and unaccompanied child asylum seekers who have arrived to Australia by boat.

### **4. Summary of Recommendations**

***Recommendation 1: That the Australian Government invests increased efforts and resources in initiatives designed to strengthen access to fair and timely claims assessments, humane reception arrangements, and lasting safety for asylum seekers within our region.***

***Recommendation 2: That the Australian Government ensures its rescue at sea capabilities are robust and conform to relevant international laws as well as UNHCR guidelines relating to maritime rescue and asylum.***

***Recommendation 3: That immigration detention never be used, in policy or practice, for the purpose of determining asylum seekers' claims. And that when deemed necessary under law to temporarily hold a person in immigration detention, the conditions and location of that detention do not to obstruct the fairness and timeliness of a person's status resolution.***

***Recommendation 4: That all necessary amendments be made to ensure the full compliance of the domestic legal and policy framework governing Australia's immigration detention system with Australia's international obligations and recognised human rights standards.***

***Recommendation 5: That all immigration detention arrangements funded, administered or established by the Australian Government, within Australia or elsewhere, be brought into full operational compliance with Australia's international obligations and recognised human rights standards.***

***Recommendation 6: That consideration be given to the costs, impact and any reforms required to the immigration detention arrangements which Australia has funded and negotiated in other countries, as well as Australia's domestic immigration detention arrangements.***

***Recommendation 7: That the Australian Government invests increased efforts and resources into the expansion, refinement and modeling of humane alternatives to detention.***

## **5. Scope of the Inquiry**

We welcome the breadth of the Terms of Reference for this Inquiry, within the domestic parameters prescribed. However, in our view, it is time to move beyond the scope of previous inquiries of this nature to consider, not only the immigration detention network *in* Australia, but rather the costs, impact and integrity of Australia's immigration detention 'footprint' within the region and more broadly.

A robust engagement with this issue requires consideration of detention and other reception arrangements that the Australian Government has negotiated, funded and promoted in other countries within our region, in conjunction with our own domestic systems. There is also a need to consider the arrangements in other countries that are both specific and non-specific

to asylum seekers who have come to Australia by boat. Specifically, it should consider past extraterritorial arrangements for the detention and processing of claims made by asylum seekers deported from Australia, as well as past and current arrangements for the detention, reception and processing of claims by asylum seekers who may not have attempted to seek protection in Australia.<sup>2</sup>

As reflected in Term of Reference 1(l), it is time to consider the extent to which Australia's immigration detention policies and practices are aligned in the domestic context. However, it is equally time to look at the extent to which our policies and practices are aligned with the approaches which are funded and negotiated by the Australian Government in other countries. The basis for any disparities ought also to be examined. For instance, we note that in the bilateral arrangement with Malaysia, it was specified that transferred asylum seekers would uniformly be detained for a maximum period of 45 days (with a shorter anticipated average), prior to release into the community with permission to work and access to certain services.<sup>3</sup> Why, if considered deliverable in Malaysia, is a similar standard for release not being applied within the Australian domestic context?

## **6. Questions posed to the Inquiry**

In his opening statement to the Inquiry, DIAC Secretary Mr Andrew Metcalfe posed a number of "policy conundrums" for consideration by parliamentarians. They included the following:

*What is the balance between our international obligations to protect refugees and our need for strong border controls? Is immigration detention a deterrent? Does immigration detention facilitate case resolution?*

We agree that these are highly important questions and address them below.

### **6.1 What is the balance between our international obligations to protect refugees and our need for strong border controls?**

Australia's sovereign right and responsibility to safeguard its borders by regulating those entering and staying within its territory is in no way compromised by the honouring of Australia's protection obligations under the Refugee Convention and other international

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<sup>2</sup> See for instance S. Taylor and B. Rafferty-Brown, 'Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesian Solution' (2010) 22(4) *International Journal of Refugee Law* 558-592, and S. Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and PNG: All Care but No Responsibility?' (2010) 33(2) *UNSW Law Journal* 337-359

<sup>3</sup> We note that the Senate Legal and Constitutional Affairs Committee Inquiry into Australia's agreement with Malaysia in relation to asylum seekers, which was running concurrently with this Inquiry, has been suspended following the High Court's ruling that the Minister's declaration of Malaysia as a country to which asylum seekers could be sent was invalid.

human rights treaties to which it is a party. Extensive guidance has been provided to States by the UNHCR regarding protection-sensitive border management systems.<sup>4</sup>

The Australian Government's Cabinet-endorsed 'New Directions in Detention' policy also sets out a framework for managing any risks to national security or to the safety of the Australian public that could potentially be posed by unauthorised arrivals. In announcing the policy in 2008, the then Minister for Immigration and Citizenship, the Hon. Senator Chris Evans, stated: "Strong border security and humane and risk-based detention policies are not incompatible. They are both hallmarks of a mature, confident and independent nation."<sup>5</sup>

## **6.2 Is immigration detention a deterrent?**

Item 1 of the Co-Chair's Summary Statement of the recent UNHCR-IDC Expert Roundtable on Alternatives to Detention records agreement by participants that "immigration detention is not a deterrent to migration and has a negative impact on the health and wellbeing of individuals concerned".<sup>6</sup> In addition, the IDC has observed "the use of detention for the purposes of deterrence or political gain is inconsistent with international human rights law".<sup>7</sup>

Oxfam Australia recognises the serious risk to lives posed by asylum seekers undertaking hazardous sea journeys. We note that, throughout the history of boat arrivals, asylum seekers who reach Australia by this route have overwhelmingly been found to be refugees.

In order to mitigate the risk of loss of lives, Australia needs to focus on strengthening opportunities for refugees and others owed international protection to gain access to lasting safety from elsewhere within our region. The Australian Government also needs to ensure that its rescue at sea capabilities are robust and conform to relevant international laws as well as UNHCR guidelines relating to maritime rescue and asylum.

Oxfam is strongly of the view that Australia should shift away from its focus upon deterrence of asylum seekers arriving by boat, towards a focus upon ensuring humane reception conditions, and fair and timely status resolution for all asylum seekers, linked to corresponding, lasting solutions. The latter include resettlement and local integration for refugees, and for those found not to be owed international protection, a dignified return to lasting safety. This goal should be pursued within our region through well-targeted development initiatives buttressed by effective diplomacy. Tackling the root causes of flight

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<sup>4</sup> See for instance UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, Geneva, February 2011 <http://www.unhcr.org/refworld/pdfid/4d9430ea2.pdf>

<sup>5</sup> The Hon. Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Australian National University, 29 July 2008 <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

<sup>6</sup> 'Co-Chair Summary Statement' (19 July 2011), UNHCR-IDC Expert Roundtable on Alternatives to Detention, Canberra, 9-10 June 2011 [http://www.unhcr.org.au/unhcr/images/2011-07-19\\_ATD%20Joint%20Statement%20by%20the%20Co-Chairs%20\\_Final\\_.pdf](http://www.unhcr.org.au/unhcr/images/2011-07-19_ATD%20Joint%20Statement%20by%20the%20Co-Chairs%20_Final_.pdf)

<sup>7</sup> G. Mitchell, 12 August 2011, 'Submission of the Immigration Detention Coalition to the Joint Select Committee on Australia's Immigration Detention Network', p.4, Submission 69 [http://www.aph.gov.au/Senate/committee/immigration\\_detention\\_ctte/immigration\\_detention/submissions.htm](http://www.aph.gov.au/Senate/committee/immigration_detention_ctte/immigration_detention/submissions.htm)

by forcibly displaced persons, and strengthening opportunities for fair claims assessments and access to lasting safety from elsewhere within the region, will greatly diminish the factors driving people to undertake hazardous sea journeys.

Opportunities for strengthening protection in the region could be leveraged through the Regional Cooperation Framework agreed at the Ministerial Conference of the Bali Process in March of this year. The integrity of Australia's own domestic response to asylum seekers, including our approach to immigration detention, will be key to the viability of any efforts pursued through this mechanism. At present, Australia's immigration detention network provides a poor model for regional protection.

***Recommendation 1: That the Australian Government invests increased efforts and resources in initiatives designed to strengthen access to fair and timely claims assessments, humane reception arrangements, and lasting safety for asylum seekers within our region.***

***Recommendation 2: That the Australian Government ensures its rescue at sea capabilities are robust and conform to relevant international laws as well as UNHCR guidelines relating to maritime rescue and asylum.***

### **6.3 Does immigration detention facilitate case resolution?**

Immigration detention ought not to be used for the purpose of determining asylum seekers' claims<sup>8</sup>. International research demonstrates negligible absconsion rates amongst asylum seekers awaiting a final outcome on their claims whilst being managed in a community setting<sup>9</sup>. Where it has been deemed necessary to temporarily hold a person in immigration detention, the conditions and location of that detention ought not to obstruct the fairness and timeliness of a person's status resolution. For instance, there should be ready access to appropriate legal, psychological, physical and social support systems at all times. The remoteness from metropolitan centres and distressing conditions observed within many facilities across the Australian immigration detention network are not conducive to this aim.

***Recommendation 3: That immigration detention never be used, in policy or practice, for the purpose of determining asylum seekers' claims. And that when deemed necessary under law to temporarily hold a person in immigration detention, the conditions and location of that detention do not to obstruct the fairness and timeliness of a person's status resolution.***

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<sup>8</sup> See for example point 4, 'Co-Chair Summary Statement', UNHCR-IDC Expert Roundtable on Alternatives to Detention

<sup>9</sup> Sampson, R., Mitchell, G. and Bowring, L. (2011), *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne, The International Detention Coalition, p.17

## 7. Reforms required to Australia's approach to immigration detention

Australia's system of mandatory immigration detention has attracted extensive scrutiny and censure by international and domestic authorities and other experts since its inception. This has included numerous findings relating to breach of Australia's international obligations. Indeed, in announcing the Government's '*New Directions in Detention*' policy, Senator Evans observed that over the preceding decade the UN Human Rights Committee had found Australia to be in breach of the prohibition on arbitrary detention in 14 separate cases of immigration detention.<sup>10</sup>

On the basis of its international legal research and inspection of immigration detention facilities worldwide, the IDC has concluded:

*Australia's immigration detention law does not meet international human rights standards and remains one of the harshest in the world in terms of denial of legal and procedural safeguards for people detained for administrative migration related purposes.*<sup>11</sup>

The IDC also observes:

*Australia stands alone in the requirement for ongoing mandatory detention for the entire period of processing without access to judicial review or standard administrative conditional or provisional release following identity, health and security checks.*<sup>12</sup>

In order to be consistent with international human rights law, immigration detention must only be used as a measure of last resort, where deemed necessary in the individual case, for the shortest possible time and in the least restrictive possible environment. It must also be subject to periodic review by the judiciary or another independent authority empowered to order release if detention cannot be objectively justified.<sup>13</sup>

With respect to required reforms, first and foremost, all necessary amendments must be made to ensure the full compliance of the domestic legal and policy infrastructure governing Australia's immigration detention system with Australia's international obligations and recognised human rights standards. Furthermore, all necessary steps should be taken to ensure that all immigration detention arrangements funded, administered or established by the Australian Government, anywhere, are brought into full operational compliance with these standards. All facilities used for immigration detention purposes should be subject to regular independent monitoring.

A domestic framework for the reception of asylum seekers which falls short of full compliance with Australia's international obligations and recognised human rights standards is an unsound and ineffectual foundation for collaborative, solutions-oriented initiatives that tackle the complex global and regional challenges of forced displacement. Every step that

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<sup>10</sup> <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

<sup>11</sup> See Submission 69 to this Inquiry p.4

<sup>12</sup> *ibid.* p.2

<sup>13</sup> UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, (February 1999) Guideline 3.

the Australian Government takes to align its domestic approach with its international obligations will signal its commitment to responsibility-sharing and good global citizenship throughout our region and beyond. Conversely, every failure to do so, and every implication that Australia's response to asylum seekers is driven by the overwhelming goal of deterring boat arrivals, significantly compromise Australia's capacity to exercise genuine leadership in this area.

***Recommendation 4: That all necessary amendments be made to ensure the full compliance of the domestic legal and policy framework governing Australia's immigration detention system with Australia's international obligations and recognised human rights standards.***

***Recommendation 5: That all immigration detention arrangements funded, administered or established by the Australian Government, within Australia or elsewhere, be brought into full operational compliance with Australia's international obligations and recognised human rights standards.***

## **8. Impact, effectiveness and cost of mandatory detention and any alternatives**

The devastating and often enduring psychological and physical harm sustained by asylum seekers subjected to protracted, indefinite and non-reviewable immigration detention both in Australia and under Australia's auspices elsewhere, have been extensively documented including in submissions to this Inquiry and those preceding it.

In 2007 Oxfam Australia and A Just Australia reported on the immensely high human and financial costs incurred by the 'Pacific Solution' (over \$1 billion to process the claims of less than 1, 700 asylum seekers offshore), as well as its extremely detrimental impacts on Australia's democratic and legal system, regional relationships, and the international system of refugee protection.<sup>14</sup> In announcing 'New Directions in Detention', Senator Evans charted similar realms in describing the costs of Australia's approach to immigration detention, namely:

- 'severe impacts on the physical and mental health of detainees';
- 'immigration detention staff left bruised by the policies they were asked to implement';
- 'public loss of confidence in the fairness and integrity of our immigration system';
- 'massive cost to the taxpayer'; and
- 'enormous damage to our international reputation'.<sup>15</sup>

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<sup>14</sup> Oxfam Australia and A Just Australia, *A Price too High: The Cost of Australia's Approach to Asylum Seekers*, August 2007 <http://www.oxfam.org.au/resources/filestore/originals/OAus-PriceTooHighAsylumSeekers-0807.pdf>

<sup>15</sup> <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

The recent UNHCR-IDC Expert Roundtable on Alternatives to Detention, held in Canberra, has recommended that ‘further research be conducted into the actual cost of Australia’s detention regime, based on appropriate and accepted methodology’.<sup>16</sup>

In its handbook on alternatives to detention, the IDC has calculated that examples of community case resolution in Australia have proven significantly cheaper than immigration detention, and demonstrated high rates of immigration compliance, including in complex cases.<sup>17</sup> It has further observed that, notwithstanding the immense problems apparent across the immigration detention network and harshness of Australia’s corresponding law and policies by international standards, Australia has also demonstrated innovation and achievements in alternatives to detention, which have formed the basis for models implemented elsewhere.<sup>18</sup> We underscore the evident importance of ensuring that access to livelihoods form part of any community-based alternative arrangements.

***Recommendation 6: That consideration be given to the costs, impact and any reforms required to the immigration detention arrangements which Australia has funded and negotiated in other countries, as well as Australia’s domestic immigration detention arrangements.***

## **9. Non-compliance with Government’s immigration detention values**

Notwithstanding the risk-based approach articulated in the Government’s Cabinet-endorsed ‘*New Directions in Detention*’ policy, thousands of asylum seekers and some recognised refugees who have come to Australia by boat are being held in immigration detention for prolonged and indefinite periods, without access to a legal remedy.

While some of the seven stipulated immigration detention values are being adhered to, others patently are not. The policy states:

*The presumption will be that persons will remain in the community while their immigration status is resolved. If a person is complying with immigration processes and is not a risk to the community then detention in a detention centre cannot be justified. The department will have to justify a decision to detain.*

The key concern is that this standard appears to have been overridden, with asylum seekers who have arrived by boat subject to immigration detention until a visa has been granted or a departure from Australia effected. Completion of checks is being taken to mean security clearance, following a refugee status determination. Categories of people who are gravely affected under the current system include:

- Those who have been found not to be owed Australia’s protection but are unable to be returned to their countries of origin or habitual residence due to safety considerations or statelessness

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<sup>16</sup> Point 17, ‘Co-Chair Summary Statement’, UNHCR-IDC Expert Roundtable on Alternatives to Detention

<sup>17</sup> Sampson, Mitchell and Bowring (2011), op.cit. p.40

<sup>18</sup> See Submission 69 to this Inquiry, p.10

- Those who have been found to be owed Australia's protection but have been the subject of an adverse security assessment
- Those who have been affected by delays in processing of ASIO security clearances or delays in processing of asylum claims, particularly where affected by the former suspensions on processing claims by Afghan and Sri Lankan asylum seekers.

The Refugee Council of Australia, the Australian Human Rights Commission, the IDC and numerous other expert organisations have called for the enshrinement of the 'New Directions in Detention' policy. We support this call with the dual caveats that we do not concur with Immigration Detention Value 1 under the policy, and we do not support the policy of excision, which is explicitly retained within 'New Directions'.

***Recommendation 7: That the Australian Government invests increased efforts and resources into the expansion, refinement and modeling of humane alternatives to detention.***