Refugee Council of Australia

SUBMISSION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S IMMIGRATION DETENTION NETWORK 2011

INTRODUCTION

1. The Refugee Council of Australia (RCOA) is the national umbrella body for refugees and the organisations and individuals who support them. It has more than 150 organisational and 550 individual members. RCOA promotes the adoption of flexible, humane and practical policies towards refugees and asylum seekers both within Australia and internationally through conducting research, advocacy, policy analysis and community education. RCOA consults regularly with its members and refugee community leaders, and this submission is informed by their views.

2. RCOA welcomes the opportunity to contribute to this inquiry by the Joint Select Committee on Australia's Immigration Detention Network but must note that the issues being explored by the Committee are by no means new. A list of past submissions and reports on Australia's immigration detention system is available at Appendix A. This work includes extensive analysis and considered recommendations by the Joint Standing Committee on Migration, including a thorough investigation of the detention system in 2008-2009 (a summary of these reports is at Appendix B). A list of relevant media releases from RCOA is also attached at Appendix C for the Committee's information. The Committee should note that a number of the examples outlined in this submission were also provided in RCOA's submission to the recent Senate Legal and Policy inquiry into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*. RCOA felt that the information and examples were so compelling as to require inclusion in this inquiry.

3. As RCOA has voiced its concern about the challenges associated with Australia's current immigration detention network in past submissions and reports, RCOA will take a solutions-focused approach to this submission and will primarily focus on two (2) of the nineteen (19) terms of reference, with some additional points against any other relevant areas:

    - *Part (a) any reforms needed to the current Immigration Detention Network in Australia*
    - *Part (l) compliance with the Government's immigration detention values within the detention network*

4. It is worth noting that the issues outlined below and in other submissions have been inherent to the system of mandatory detention since its introduction in 1992 and to indefinite mandatory detention from 1994. Both Labor and Liberal-National governments have encountered problems since the introduction of the policy of indefinitely detaining asylum seekers who enter Australia without a visa.

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5. RCOA is not advocating for the continuation of mandatory detention; however, we recognise that this Government and previous governments have stated their commitment to mandatory detention, as well as outlining the purposes of it. Within this framework, RCOA believes that many issues can and should be addressed differently.

6. Among industrialised nations and among the 148 nations which have signed the Refugee Convention, Australia is alone in maintaining this policy of indefinite mandatory detention of asylum seekers who arrive without visas. While the Minister for Immigration and Citizenship has consistently said that detention is not designed as a deterrent but is a management tool for the purposes of identity, health and security checks[1], the detention of asylum seekers has not been restricted to managing risks associated with identity, health and security. RCOA is at a loss as to why this occurs, when greater risk is associated with prolonged and indefinite detention of vulnerable and traumatised people.

7. RCOA is proposing a system based genuinely on risk management – subjecting asylum seekers who enter Australia without visas to the same risk management processes applied to people who seek to enter the country on a temporary basis. Prudent risk management must also include releasing people from detention when those checking processes reveal no reason to continue detention, because past and current experience demonstrates the serious risks associated with needlessly prolonging detention.

8. Each year, more than four million non-citizens enter Australia on a temporary basis. Those people are able to enter Australia and enjoy full freedom of movement after being identified through the visa application and passport process, passing health checks if deemed necessary and passing a security checking process which generally involves a scan of the Department of Immigration and Citizenship (DIAC's) Movement Alert List database. If they apply for permanent residency while in Australia, they may (if deemed necessary) require a full security clearance by the Australian Security Intelligence Organisation (ASIO).

9. RCOA believes that the same principles should be applied to asylum seekers who enter without visas. They should be subject to the same level of scrutiny as other temporary entrants – an identification process, health screening and a security check – before being released into the Australian community on a temporary basis while their permanent status is determined. This security check should be of the same standard applied to other temporary entrants – generally a check against the Movement Alert List database. If no identity, health or security concerns are flagged, there is no case for continued detention. The full ASIO security clearance should occur, as it does with other temporary entrants, at the point just prior to granting permanent residency.

10. Further details about this alternative approach, as well as the case for reform and other measures that can be put into place are outlined below.

THE CASE FOR REFORM

Non-compliance with the immigration detention values

11. The government's seven key immigration detention values are:
    a. *Mandatory detention is an essential component of strong border control.*

[1] See http://www.theage.com.au/national/no-vacancy-20110209-1an3m.html

b. *To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:*
    - *all unauthorised arrivals, for management of health, identity and security risks to the community*
    - *unlawful non-citizens who present unacceptable risks to the community and*
    - *unlawful non-citizens who have repeatedly refused to comply with their visa conditions*
c. *Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.*
d. *Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.*
e. *Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.*
f. *People in detention will be treated fairly and reasonably within the law.*
g. *Conditions of detention will ensure the inherent dignity of the human person.*[2]

12. Areas of non-compliance with these values highlight many of the problems with the current system. RCOA notes that the Government wishes to maintain a policy of mandatory detention but is perplexed that the limits to mandatory detention outlined in the Government's *New Directions in Detention* policy are not being applied in practice to asylum seekers who enter Australia without visas.

13. The *New Directions in Detention* policy notes that people who pass health, identity and security checks do not need to be detained and allows for them to be moved into the community. Currently, this policy is only being used for asylum seekers who arrive by plane with a temporary visa, as well as for people who overstay their visas. People who enter Australia without visas for the purposes of seeking asylum are not in breach of the Migration Act – and the Refugee Convention protects them from being penalised for not having prior permission to enter the country. Overstayers who have breached the Migration Act (sometimes on multiple occasions) are released on Bridging Visas while people fleeing persecution find themselves deprived of their liberty for indefinite periods – often for many months and even for years.

14. *New Directions* states that detention that is indefinite or otherwise arbitrary is not acceptable. In the absence of legislated time limits; however, immigration detention remains indefinite, often with serious consequences for the health and wellbeing of detainees. The values also state that the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review. The avenues for seeking review of the length and conditions of detention remain inadequate. Detention is also used as the only option available, not as a matter of last resort, for entire categories of asylum seekers. It is applied for a length of time well beyond what is necessary to ensure public safety and security. Conditions in detention, through the restrictions they place on autonomy and their negative impact on health and wellbeing, fail to ensure the inherent dignity of detainees. These issues are well-highlighted through the examples presented below.

Legal protections against indefinite, arbitrary and harmful detention

15. Due to an absence of legal protections regulating the length and conditions of detention, detainees often face insurmountable hurdles when pursuing justice through

[2] http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm

Australia's legal system, even in cases where it has been irrefutably established that their detention is indefinite, arbitrary or has caused serious harm, as the following case study demonstrates.

Example 1: *Plaintiffs M168 to M175 of 2010 v Minister for Immigration and Citizenship*

This High Court case concerned an application to secure the release of young Afghan asylum seekers from immigration detention. At the time of the decision, the plaintiffs had been detained for almost a year, during which time their mental health had deteriorated significantly. While acknowledging that there was "strong and uncontested evidence" that the minors are at serious risk of psychological and other harm while in detention, the High Court ruled that the plaintiffs had not been able to establish that their detention was unlawful.

16. Coupled with this absence of legal protections against detention that is indefinite, arbitrary and/or has caused immense harm is evidence that the current policies and practices have been insufficient in preventing arbitrary and indefinite detention and may be a major cause of harm to detainees. The lack of minimum standards and conditions within the detention system has also led to a loss of the inherent dignity and the fair treatment for those people detained.

Example 2: Delays in notifications leading to arbitrary detention

RCOA, along with other organisations, including the Australian Human Rights Commission, has received reports of delays (from a few weeks to several months) in notifying asylum seekers in detention about decisions regarding their refugee status. As the Government asserts that people's time in detention is for administrative purposes, detaining them after their application for refugee status has been upheld and all necessary checks have been completed is arbitrary and often has the effect of prolonging detention indefinitely and unnecessarily. This contravenes the principle that immigration detention that is indefinite or arbitrary is unacceptable.

Example 3: Inconsistencies in service provision between IAAAS providers

There is inconsistent quality in representation offered by providers of the Immigration Advice and Application Assistance Scheme (IAAAS). It is not the role of IAAAS providers to refer an individual on to another legal provider if judicial review is an option. Some providers will do this; others will not. Given that there are strict time limits for application, it is not known how many people miss out on this opportunity simply because no agency has a formal responsibility to refer them on. A system that relies on chance to ensure that asylum seekers can access their legal rights can hardly be described as fair. This contravenes the principle that people in immigration detention must be treated fairly.

Example 4: Detention used as a measure of first resort

Australian law provides for mandatory detention of "unlawful non-citizens" and does not currently allow for judicial consideration of the need for detention in individual cases. Asylum seekers who arrive in Australia without a visa are detained as a matter of course before other options have been exhausted. This contravenes the principle that detention is only to be used as a last resort.

Example 5: Treatment of pregnant asylum seekers

RCOA has been advised of a number of instances of pregnant asylum seekers being treated in a manner which contravenes the principle that the inherent dignity of a person in immigration detention must be upheld.

Mrs A is in immigration detention. She is pregnant and in need of appropriate clothing, including bras. Mrs A has to put this request in writing to Serco and is told by them it is a matter for DIAC. When Mrs A writes to DIAC with the same request, she is told to contact Serco. Mrs A does not receive a bra and wears her husband's tracksuit pants because she has no clothing that will fit her as she and her baby grow. She does not leave her room in case these tracksuit pants fall down. The situation is exacerbated by the remote location of Christmas Island. In other centres, this undignified bureaucratic process would be bypassed not with a better system but with visitors providing the bra and clothing.

Mrs B is pregnant. She is airlifted from Christmas Island to Perth for medical treatment. There, she miscarries and is taken back to detention. Her medical files are provided to IHMS who do not pass on the information to DIAC. Mrs B is transferred to detention in Villawood, but no DIAC officer is advised of what she has been through until she tells an officer in person.

Example 6: Substandard provision of health care to detainees

It is not uncommon for detainees to experience difficulty in accessing their own medical records. Often records are not transferred when a detainee moves from one detention facility to another, or from detention into the community. This can have a range of negative consequences. For example, detainees may be administered with the same immunisations twice; detainees may have to reiterate their medical history many times to different personnel, often being asked to repeat distressing information (in relation to sexual violence, for example); and detainees may have a limited understanding and information about the state of their health, potentially leading to an escalation of health problems.

Mrs C was detained on Christmas Island and taken for blood tests because of repeated fainting. Neither Mrs C nor DIAC were provided with the results by IHMS. Mrs C was simply told that she was "stressed". Months later, when Mrs C was granted a Protection Visa and released, she visited a doctor and learned that she was severely deficient in iron.

Mr D arrived at his Independent Merits Review (IMR) interview and advised his lawyer that he didn't feel well. He revealed what appeared to be an infection on his nipple. When the lawyer asked if he had reported this to IHMS staff, Mr D responded that he had and he was told to "have a Panadol and a drink of water". Two weeks later Mr D was hospitalised with an infected boil.

On paper, there are procedures which enable a detained person to obtain their medical information. In reality, however, this is difficult to achieve for many. With no real access to their own health information, no way to make decisions regarding their own health and no opportunity to challenge the information they are provided about their own wellbeing, people in immigration detention are denied basic dignity. The mental health impacts of this can be immense as people question what is wrong with them, doubt themselves, worry, are left in physical pain and do not have a sense that their health is being cared for. This contravenes the principle that the inherent dignity of a person in immigration detention must be upheld.

Lack of time limits to prevent indefinite and/or prolonged detention

Example 7: Long-term detention

Australian law does not currently impose time limits on detention and the Government may (and does) detain people in immigration detention indefinitely. As of 30 June 2011, there were 6,403 people in immigration detention. In May 2011 (the last time statistics were made available on this subject), more than 4,500 of those people had been detained for longer than six months, and more than 1,800 people had been detained for longer than 12 months. It is difficult to see how these long periods of detention can be necessary for the purposes of conducting health, security and identity checks. This contravenes the principle that detention is only to be used for the shortest practicable time.

Financial costs of immigration detention

17. The financial costs of the current immigration detention regime have clearly become unsustainable. Detention facilities are expensive to operate, particularly when detention is prolonged or when people are detained in remote areas. Prolonged detention of persons who have skills or are otherwise able to contribute positively to Australia also results in significant loss of social and economic capital for the Australian community. The more intensive settlement support often required by former detainees who experience ongoing mental health issues also increases the costs associated with prolonged detention. In remote areas, where the goods and services available locally are inadequate to meet the needs of detainees, the regular transportation of goods over long distances and lengthy travel required to access services further adds to detention costs.

18. In his 2008 speech outlining the *New Directions* policy, the then Minister for Immigration, Senator Chris Evans, made a compelling case for reform of the detention system as a cost-effective policy shift, stating "the cost of long-term detention and the case against the current system are compelling…The cost to the taxpayer of detention is massive and the debt recovery virtually non-existent."[3]

19. The latest figures on the totals operational expenses across the detention network are compelling, with the operational costs of immigration detention skyrocketing, increasing from just over $147 million in 2008-09 to over $772 million in 2010-11 – a quintupling of costs in just two years.[4] The current policy of indefinite mandatory detention is also insufficiently flexible to respond to changes in the asylum seeker caseload. The recent increase in onshore asylum applications has resulted in record numbers of people being detained for longer periods and serious overcrowding in some facilities. During the same period, however, while the number of immigration detainees has increased significantly, the actual number of people detained in real terms has been relatively small, with no more than 7,000 detained at any one time. Irregular maritime arrivals (who comprise the bulk of the detainee population) to Australia during 2009-10 and 2010-11 totalled 10,549,[5] while detention costs (operational and administrative) during this same period exceeded $800 million. At such an absurdly high cost per detainee, the current system can hardly be described as economically efficient.

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[3] http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm

[4] Answers to Questions on Notice – Question 13: http://www.aph.gov.au/Senate/committee/immigration_detention_ctte/immigration_detention/submissions.htm

[5] Figures include crew. Figures taken from the Australian Parliamentary Library publication, "Boat Arrivals in Australia since 1976", available at www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm

20. The current approach of seeking out additional detention sites or even building new facilities to address overcrowding is simplistic and impractically expensive. It is clearly unsustainable to simply build new a new facility when an existing facility becomes overcrowded, while doing little to address the issues which lead to overcrowding in the first place.

21. The expense of the current immigration detention regime is particularly difficult to justify given that the vast majority of asylum seekers would be found to pose no identifiable health, security or public order risk if these checks were conducted promptly after their arrival in Australia. If people are to be detained for the purposes of managing risk, the risk assessment should be conducted and completed promptly. If no potential risk can be identified, there is no justification for their ongoing detention. For asylum seekers who have passed identity, health and security checks, community-based alternatives provide a far more cost-effective option. Community-based alternatives are more economically efficient than immigration detention, as they do not require round-the-clock staffing or the same high level of maintenance as purpose-built detention facilities. Community-based alternatives can also promote self-reliance through facilitating access to education, training and employment opportunities, in turn reducing dependence on financial support from Government and non-government agencies.

Mental health impacts of prolonged detention

22. RCOA acknowledges that many experts and possibly many submissions to this Inquiry will argue for improved mental health services and facilities within Australia's immigration detention network. We acknowledge these needs and share in this pragmatic request. However, it must be noted that detention itself is, for many detainees, the single most significant cause of their deterioration in mental health. Research evaluating the consequences of prolonged immigration detention found that participants were struggling to rebuild their lives in the years following release from immigration detention, and for the majority the difficulties experienced were pervasive. People detained for long periods of time suffered an ongoing sense of insecurity and injustice, difficulties with relationships, profound changes to view of self and poor mental health. Depression and demoralisation, concentration and memory disturbances, and persistent anxiety were very commonly reported.[6]

23. The Government has consistently ignored the advice of its appointed advisory bodies – the Detention Health Advisory Group and the Council for Immigration Services and Status Resolution – and other organisations with mental health expertise which, for at least two years, have warned[7] that unrest, self-harm and suicides would increase exponentially if detention policies were not changed.

24. RCOA has received advice from counsellors from member agencies of the Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) about some of the

[6] Coffey, Kaplan, Sampson and Tucci (2010). "The meaning and mental health consequences of long-term immigration detention for people seeking asylum" in *Social Science & Medicine*, 70.

[7] See just a few of the public warnings at:
http://www.abc.net.au/news/2011-07-29/asylum-self-harm-statistics-even-higher/2816324/?site=sydney
http://www.news.com.au/national/cane-awaits-refugees-in-malaysian-detention/story-e6frfkvr-1226063014316
http://www.theaustralian.com.au/national-affairs/long-term-christmas-island-detainee-sleeping-in-mock-grave/story-fn59niix-1226112682718
http://www.abc.net.au/am/content/2010/s3018366.htm
http://www.abc.net.au/news/2010-09-17/isolation-solution-no-help-to-asylum-seekers/2264996

elements and effects of prolonged detention on traumatised people, as well as some real-life examples that demonstrate the deleterious effects of detention.

25. The traumatic events which characterise the refugee experience are often experienced again while in immigration detention in Australia. The threat to future safety, uncertainty about a visa outcome (and potential return to an unsafe place) and the witnessing of self-harm all contribute to anxiety, feelings of helplessness and a loss of control.

Example 8: Re-traumatisation caused by prolonged indefinite detention

Mr E was initially philosophical about his asylum application but, after nine months without any news, his anxiety is increasing. There is an emotional decline as he begins to ruminate on his visa application. Mr E describes himself as 'rotten fruit'; he feels that he pollutes the other detainees because, when they ask how long he's been [in the detention centre] and he tells them the truth, he depresses them. He tries to keep his spirits up so as to not depress the others but it is clear his sense of identity is affected by the waiting. As with other detainees who wait for a long time for any news, it's hard for him to believe that it is not personal. He feels for some reason the government is making him wait, while others go out. This is a logical thought when you consider that Mr E's government did very personally persecute him. He has experience of this before so it feels like it is happening all over again.

26. Re-traumatisation is not the only psychological impact of prolonged indefinite detention. Detainees may experience a range of mental health issues, including cognitive problems, difficulties regulating their emotions, consistently behaving in a way that is not characteristic or normal and resorting to acts previously not considered (such as self-harm and destroying property).

27. It is worth noting that many trauma survivors never expect to live very long, so time is particularly important to them. The two most harmful characteristics of detention on sufferers of pre-arrival trauma are boredom and uncertainty. The first step in treating all trauma is to re-establish safety, and this is not possible with clients that have no control or sense of expectation from their future. It is also not possible for people to monitor and manage symptoms in an environment where they have nothing else to do but think about their past or obsess on their current predicament.

Example 9: Indefinite detention hampers recovery from trauma

Mr F has a very limited view of the future. His experience of simply having to survive has meant he had no picture of his future and almost has not dared to think about it. He reports often feeling hopeless and despairing. This limited view later also turns out to include almost no idea about Australia. When the counsellor showed a map of Australia to Mr F, it was the first time he realised (geographically) where he was. He had no idea he was in the West and he was stunned to discover the location of Christmas Island. The helpful intervention for Mr F's trauma is distraction; when he can tell that all the memories of the past are building up, it helps to get up and do something else, to change his thinking. Unfortunately, detention compounds this, as there is little to occupy his time.

28. The perception of "illegality" bestowed upon asylum seekers arriving by boat and persons in detention has a direct impact on detainees' sense of justice (or injustice, as is the case) and contributes to a loss of trust. FASSTT agencies have advised RCOA that counsellors treating asylum seekers who have faced prolonged detention struggle

to establish trust, as the client sees the counsellor as part of the Australian Government regime that detains them.

29. The ongoing mental health issues experienced by many former detainees hamper their successful settlement and increase their need for post-arrival support and rehabilitation. Through working with former detainees, migrant and refugee settlement agencies have observed a drastic difference between the settlement experiences of persons who have spent shorter periods of time in detention and persons who have spent extended periods in detention. Those detained for shorter periods of time moved quickly into employment, accommodation and many even joined recreational and social clubs.

30. In the case of those who have spent extended periods in detention, however, there are reports of clients experiencing a sleep-wake cycle reversal (suffering insomnia and an inability to sleep at night), which impacts on their ability to settle successfully, including finding work. While former detainees may have a strong desire to work, they may be unable to because they are suffering from a range of depressive and anxiety problems. People have developed a distrust of government agencies and other services because they feel that their detention and how they were treated through the refugee determination process was arbitrary. There can be a greater level of distrust in former detainees seeking service support, including mental health and torture and trauma services.

Example 10: Settlement experiences of long-term detainees

"Another impact of long-term detention is how restless people are when they come out. They have a dream that things will be better somewhere else, so they move someplace, it does not work out, and they move somewhere else. They are moving all over Australia searching for this 'good settlement' that they have spent lengthy time in detention dreaming about. You can't take a person that fights for survival and then hold them down."

Comment from settlement service provider at Refugee Council forum, 2011

31. In a recent paper published on the issue, it was noted that the structure and divisions of detention management among DIAC, Serco and International Health and Medical Services (IHMS) leave "no organisation [taking] full responsibility for the mental health of detainees."[8] When questioned about the high rates of mental health issues in detention centres, Prime Minister Gillard replied, "We are guided by a set of detention values as to how people in detention are treated…"[9] As stated previously, the evidence demonstrates that detention is not used as "a last resort or for the shortest practicable time". The consequence of this approach is devastating to the people the Government purports to protect.

Lack of oversight and review mechanisms

32. Deficiencies in the oversight and review to prevent indefinite and arbitrary detention require additional funding for independent bodies to monitor. While detainees have their detention reviewed by the Commonwealth Ombudsman every six months, the review process has proven to be ineffective in securing the release of persons for

8 Children in immigration detention: a case of reckless mistreatment Jon Jureidini, Julian Burnside. Article first published online, 2 August 2011. http://onlinelibrary.wiley.com/doi/10.1111/j.1753-6405.2011.00711.x/full

7 Transcript of doorstop interview with Prime Minister Gillard, 1 August 2011. http://www.pm.gov.au/press-office/transcript-door-stop-interview-geelong

whom there is no demonstrable need for continued detention. At present, the only formal review mechanism available to people in long term detention is Ombudsman oversight. Over a number of years, the Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of individuals detained. Many such reports have recommended the individual be released from immigration detention. However, most have not been acted upon until the person is granted a substantive visa. There is nothing to compel DIAC or the Minister to act on the recommendations of the Ombudsman. In addition, the Ombudsman has no authority to interview and report on a person's detention until they have been detained for a period of more than six months. In light of these factors, it is questionable whether this review process effectively upholds the principle that the length and conditions of detention be subject to regular review.

Impact of ASIO assessment process

33. One of the key factors leading to long-term detention is the time taken by ASIO to complete security assessments. Delays in completing these assessments have led to recognised refugees spending prolonged and indefinite periods in detention, often with serious consequences for their health and wellbeing. In March 2011 DIAC officials told a Senate Estimates hearing that there were over 900 recognised refugees in detention awaiting their ASIO clearances. The ASIO process has no independent oversight and no information is provided to the individual to indicate how long the checks may take. Practice can immediately be altered so that asylum seekers and indeed refugees are released from detention pending ASIO checks.

Example 11: The reality of waiting for ASIO clearance

Mr G, a Rohingya asylum seeker, was detained on Christmas Island for 15 months. He had been advised that his claim for protection had been upheld, but he had not received security clearance from ASIO. As his detention became increasingly prolonged, Mr G he asked to be sent to Malaysia, where his three children aged two, five and seven were living in the care of two other refugee families. The Australian Government would not bring his children to Australia, nor would it release Mr G from detention. In desperation, he attempted suicide by wrapping himself in a burning bed sheet. After brief treatment in hospital, Mr G was returned to detention.

34. There is no provision in either the *Migration Act* or the *Australian Security Intelligence Organisation Act 1979* that requires that a person be detained while awaiting security clearance from the Australian Security Intelligence Organisation (ASIO). Indeed, few of the 4.1 million temporary visitors to Australia each year are subject to a full security assessment before being issued with a visa to enter the country. People who seek asylum after entering Australia on a short-term visa are not subject to detention pending a full security assessment. There is no efficiency or national interest rationale for the detention of asylum seekers for the entire period it takes to determine their refugee claims.

Impact of excision on detention and preventing bridging visa grants

35. As 'Part r' of the terms of reference of this Inquiry seeks to understand processes for assessment of protection claims made by irregular maritime arrivals, RCOA would be remiss not to highlight the inequity of maintaining a separate system of processing for asylum seekers arriving without visa. Since the November 2010 High Court decision which extended access to judicial review to all asylum seekers, the key difference

between the offshore and mainland determination processes has been a lack of transparency in the offshore process. The excision policy arbitrarily denies access to a reviewable, legally-bound system of refugee status determination for some asylum seekers, which in turn impedes access to protection and undermines the integrity of Australia's asylum processes.

Example 12: Questions about quality of offshore assessment process

Statistics recently published by DIAC reveal a remarkably high overturn rate for decisions made under the offshore determination process as compared to the mainland process. During the first six months of 2010-11, on average 78.6 per cent of decisions made under the offshore process were overturned on review, compared to just 23 per cent over the same period for the mainland process. This trend raises serious questions about the quality of decisions made under the offshore process and clearly highlights the need for greater oversight of this process.

36. RCOA rejects the assertion by the Australian Government that the excision policy is necessary to maintain border security, reduce "unauthorised arrivals" to Australia and deter people smuggling.[10] There is indeed an urgent need to address the conditions which compel asylum seekers to engage in irregular movement. However, it is completely unacceptable to deliberately impede access to protection and disqualify some asylum seekers from fair and reasonable treatment as a means of achieving this goal. There is also no evidence that the excision policy works as a deterrent for "unauthorised arrivals".

37. RCOA wishes to note an additional, and particularly worrying, consequence of the excision policy. In line with Government policy regarding excision, the priority of the Australian Customs and Border Protection Service is to prevent unauthorised vessels from arriving on the Australian mainland. As such, surveillance around excised territories, such as Christmas Island, is considered to be a lower priority. This can have potentially dire consequences for "irregular maritime arrivals (IMAs)" who first arrive in these territories, as was tragically demonstrated when the SIEV 221 foundered off Christmas Island in December 2010 with many lives lost.

Example 13: Suspected Illegal Entry Vessel (SIEV) 221

The internal review of the SIEV 221 tragedy conducted by the Australian Customs and Border Protection Service[11] indicates that the vessel was not detected until it had come within 500 or 600 metres of the Island. As noted in the following excerpt from the internal review, there was limited surveillance at Christmas Island at the time of the tragedy due to the priority of preventing IMAs from reaching the Australian mainland:

"The general concept of operations is to intercept all known IMAs within Australia's contiguous zone and, in accordance with government policy, to transfer the potential irregular immigrants to Christmas Island for processing of their claims. The priority is to prevent a mainland arrival over one which would occur on an excised offshore island…

"Being an excised offshore island, there was no planned aerial surveillance of Christmas Island during the period of the incident."

[10] www.immi.gov.au/media/fact-sheets/81excised-offshore.htm

[11] http://www.customs.gov.au/webdata/resources/files/110124CustomsInternalReview.pdf

38. RCOA notes that the present policy of excision means that asylum seekers who arrive by boat are not entitled to Bridging Visas while awaiting the their refugee status determination process. The barring of a visa application or grant hampers the implementation of more cost-effective and human community-based alternatives, as those people arriving at an offshore, excised territory are unable to be granted a Bridging Visa. The two-tiered system is yet another form of penalty to asylum seekers and is out of step with Article 31 (1) of the Refugee Convention.

Impact on public discourse in Australia

39. Another issue to be considered is the negative impact that current detention policies have on public perceptions of refugees and asylum seekers. RCOA acknowledges that immigration detention is intended to be administrative, not punitive. However, the manner in which the current immigration detention regime is managed contributes to misconceptions about the purpose of immigration detention and the level of risk posed by asylum seekers who are subject to it.

40. A number of issues – the prison-like nature and remote location of many detention facilities; the fact that the majority of those detained are asylum seekers who arrived by boat; the often prolonged nature of immigration detention; that most detained asylum seekers remain in detention for the entire status determination process, regardless of whether they present a demonstrable security or public order risk; the limited use of community alternatives – contribute to the perception that immigration detention is a deterrent or penalty for "illegal" entry and that asylum seekers, particularly those who arrive by boat, present a threat to the community.

41. The reality of the situation – that the majority asylum seekers who arrive by boat are found to be refugees and present no security or public order risk whatsoever – is not reflected in current practice or public discourse. The risk-based approach outlined below, by contrast, would ensure that the use of detention is proportional to the level of risk posed by the individual. The implementation of a risk-based approach could thus be a key factor in addressing the abovementioned misconceptions.

Broader impact of detention policies on the region

42. It is worth noting, in light of the pressing need for greater regional cooperation on refugee issues, the broader impact of Australia's asylum policies on standards of refugee protection across the region. In many Asia-Pacific states, including those which are signatories to the Refugee Convention, undocumented asylum seekers and refugees are routinely detained. In some countries, even persons who hold UNHCR documentation are at risk of detention. Detention practices in most Asia-Pacific states differ from Australia's in that detention of undocumented asylum seekers and refugees is typically punitive rather than administrative in nature. However, feedback from NGOs in South-East Asia has indicated that the widespread use of detention in the region, particularly its use as a measure of first rather than last resort, has been influenced by Australia's own policy of indefinite mandatory detention.

43. Conditions of detention for asylum seekers and refugees in many Asia-Pacific states are deplorable. Detainees often experience violence and ill-treatment (including, in some cases, torture) and deterioration of physical and mental health. Access to justice and avenues for release are often very limited – corruption among law enforcement officials is widespread, monitoring of detention is inadequate and there is often little or no access to legal counsel and judicial review. Once detained, refugees and asylum

seekers are at serious risk of refoulement. The fear of being detained under these conditions is one of the key factors which compels refugees and asylum seekers to engage in secondary movement in the hope of finding genuine safety and protection.

44. Australia's detention policies can thus be seen to play a role in driving irregular movement in the region, thereby fuelling the very phenomenon which has precipitated the current state of crisis within the detention network. When considering reforms of Australia's immigration detention practices, it is essential to take into account the broader impact of Australian policy to ensure that our practices do not undermine the potential for greater regional cooperation. A crucial first step towards enhancing cooperation would be for Australia to model the protection-centred practices it would like to see replicated in the region. Reform of the current immigration detention system, therefore, is not simply a domestic concern. In the long term, such reform could play a significant role in encouraging other countries in the region to improve their standards of refugee protection, thus helping to address the conditions which compel refugees and asylum seekers to engage in irregular movement.

THE ALTERNATIVE: A RISK-BASED APPROACH

45. The Australian Government's failure to implement a detention policy based on risk management has resulted in thousands of men, women and children being detained needlessly, often to the serious detriment of their health and wellbeing and at an enormous and avoidable cost. A risk-based approach, highlighted in the introduction of this submission and detailed below, would subject asylum seekers who enter Australia without visas to the same risk management processes applied to people who seek to enter the country on a temporary basis. This risk management approach would also mean that when those checking processes reveal no reason to continue detention of those people, that they be released into the community while awaiting the determination of their protection claim.

Research findings on detention and its alternatives

46. It is worth noting that the issue of Alternatives to Detention (ATD) was explored at the Expert Roundtable on Alternatives to Detention convened by UNHCR and the International Detention Coalition and held in Canberra in June 2011. The group of expert policy makers drew a number of conclusions based on international research and best practice and worthy of consideration by the Committee:

    a. There is no empirical evidence that detention deters irregular immigration, and deterrence is not a permissible consideration.

    b. It is possible to establish policy and practices that include alternatives to detention that are compatible with the concern of States to manage their sovereign borders and national security responsibilities.

    c. Treating persons with respect and dignity throughout the asylum or immigration processes contributes to constructive engagement in that process, and improves voluntary return outcomes.

    d. There are many useful examples of approaches in other States, from which Australia can learn from good practice. Australia already has some of the better alternatives; however, these alternatives have not been fully implemented.

e. Australian policy needs to be grounded in risk management rather than deterrence, and should ensure the availability of the person to have their status assessed and reviewed according to law.

f. Detention should be assessed on a case-by-case basis and only be used if there is a demonstrable risk to the community.

g. The signing of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) may provide the opportunity for additional and important opportunities for monitoring.

47. Within the present context of mandatory detention in Australia, if the Government of Australia is unwilling to shift from these legal and policy settings, there is great scope to introduce change in terms of limiting the length of detention and increasing the use of community-based options.

48. A new handbook detailing the Community Assessment and Placement (CAP) model has been developed by the International Detention Coalition to provide a practical tool for governments. Although no one model of ATD is perfect, there are a number of mechanisms to prevent detention being used in other parts of the world with much larger numbers of asylum seekers each year (but not in Australia). The International Detention Coalition's ATD Handbook includes research from 24 countries. The headline figures include:

- The compliance rates for asylum seekers allowed to live in the community (rather than in detention) are over 90 per cent.
- It is 80 per cent cheaper to have asylum seekers living in the community while their claims are processed than to keep them in detention.
- Voluntary return rates from the community are 60 to 65 per cent.
- The most successful programs incorporate initial screening but have good case management and provision for early legal advice.
- Alternatives that involved NGOs often have better outcomes.
- Alternatives can mean lower costs, increased compliance and better health and well-being for individuals.

49. The CAP model integrates international best practice by identifying five steps governments take to prevent and reduce unnecessary detention. These steps are to presume detention is not necessary; screen and assess the individual case; assess the community setting; apply conditions in the community if necessary; and detain only as a last resort in exceptional cases.

50. This model provides the Australian Government with the evidence towards implementing an early internal risk assessment process, linked to provisional and conditional release mechanisms for vulnerable groups and those who meet identity, health and public safety checks, and an expansion of the existing triaging process to enable early security screening within the detention framework.

51. Provisional release for low-risk cases could build on existing bridging visas, or be based on a new temporary visa model with transitional work and stay rights (as excision policy bars bridging visas). Conditional release could draw on international models and apply to medium-risk arrivals, whereas an expanded version of the existing

community detention system could apply for higher-risk individuals. However, the type of alternative which is most appropriate in any particular case depends on the individual circumstances and requires effective monitoring and oversight.

Response to criticisms of community-based alternatives

52. Compared to the risks posed by indefinite detention, the potential risks associated with community-based alternatives are very low. An oft-cited risk of such alternatives is that asylum seekers may abscond while awaiting the outcome of their visa application or, if their applications are unsuccessful, deportation. Experience has shown, however, that in reality this risk is minimal. Research on alternatives to detention recently conducted by UNHCR revealed that, in general, less than 10 per cent of asylum applicants abscond when released to proper supervision and facilities.[12] In Australia, the rate of absconding from community alternatives has been even lower than the international average. Of the 244 people placed in community detention under the Community Care Pilot between July 2005 and September 2008, only two (less than one percent) absconded; and only one person out of a total population of 370 absconded from Immigration Residential Housing over the same period.[13]

53. UNHCR's research also indicated that persons awaiting deportation do not appear to have a higher rate of absconding.[14] In fact, the use of alternatives to detention actually encourages compliance with immigration authorities and systems, including voluntary return if applications are unsuccessful. UNHCR's research found that failed asylum seekers appear to be more likely to opt for voluntary return if they are residing under alternative arrangements than if they are in detention. Treating asylum seekers with dignity, humanity and respect encourages compliance, whereas individuals who are disgruntled with the system or feel they have been treated unfairly are less likely to cooperate. The researchers concluded that "treatment within asylum and other legal procedures seems to be one of the biggest factors contributing to positive engagement with the system".[15] Again, this trend is borne out in Australia. Under the Community Care Pilot, 67 per cent of those who were not granted a visa departed voluntarily – a rate described as "very satisfactory" by UNHCR.[16]

54. An additional concern raised in regard to community-based alternatives relates to the potential security risks posed by persons who have not undergone a full security assessment. Again, however, the risks are minimal in reality. As noted earlier, the vast majority of temporary visitors to Australia are not subject to a full security assessment before being issued visas and allowed to reside freely in the community, but instead need only complete a MAL check. A full assessment is conducted in certain circumstances only if and when the person is seeking permanent residency. If such processes are considered sufficient to manage risk in relation to the millions of temporary visitors who enter Australia each year, RCOA cannot see why the same processes cannot be applied to asylum seekers who are now subject to indefinite detention. The present movement of people into community detention shows us that a

[12] Edwards, A. (2011). *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and other Migrants.* Published as part of UNHCR's Legal and Protection Policy Research Series, available at www.unhcr.org/refworld/docid/4dc935fd2.html; see p. iii.

[13] Department of Immigration and Citizenship (2008). *Submission 129h to the Joint Standing Committee on Migration inquiry into immigration detention in Australia*. Available at www.aph.gov.au/House/committee/mig/detention/subs/sub129h.pdf

[14] Edwards 2011, p. 84

[15] Edwards 2011, p. 84

[16] Edwards 2011, p. 86.

MAL check can be done within 48 hours and is adequate to satisfy DIAC that an asylum seeker poses no threat.

55. Moreover, adverse security findings relating to visa applications are extremely rare. Of the 39,527 security assessments made in 2009-10, only 19 adverse findings were made across all visa categories – a rate of just 0.0004%.[17] While every case is assessed on its individual merits, the risks relating to security matters are clearly very low, particularly when weighed against the serious risks associated with long-term indefinite detention.

SHORT-TERM MEASURES

56. These following measures can be implemented immediately and do not require legislative change.

Implementation of a risk-based approach

57. A guiding principle of detention reform should be that immigration detention is to be used solely for the purposes of managing risk. Asylum seekers should be detained only for the period necessary for identity, health and initial security checks to be completed, unless an individual poses an identifiable health, security or public order risk. For those asylum seekers posing no risks, an appropriate bridging visa should be granted and adequate support provided to enable them to live in the community. This approach would ensure that potential risks to the community are managed appropriately without inflicting further harm to vulnerable people attempting to flee persecution. It would also allow for continued detention in cases where genuine risks exist.

58. This risk-based approach also mitigates the serious risks associated with long-term indefinite detention. The detrimental impacts of prolonged detention on the health and wellbeing of detainees has been well documented, with impacts worsening as the length of detention increases. Past and current experience has unequivocally demonstrated a strong link between long-term indefinite detention and increased incidences of serious mental health issues, self-harm, suicide and unrest. This carries an enormous cost not only to the individuals subject to long-term detention, but also to the broader community, as the ongoing mental health issues experienced by many former detainees hamper their successful settlement and increase their need for post-arrival support and rehabilitation. A risk-based approach which ensures that asylum seekers are promptly released from detention after passing initial checks would greatly reduce the risk of these eventualities.

Recommendation 1:

RCOA recommends that the Australian Government immediately implement a risk-based approach to immigration detention and subject asylum seekers who enter Australia without visas to the same risk management processes applied to people who seek to enter the country on temporary visas.

[17] See RCOA's March 2011 submission to the Parliamentary Joint Committee on Intelligence and Security Review of Administration and Expenditure in Australian Intelligence Agencies, available at www.refugeecouncil.org.au/resources/submissions/1103_ASIO_sub.pdf

Continued expansion of community detention program

59. Until the full implementation of a risk-based approach, RCOA encourages the Government and this Committee to continue the expansion of the community detention program. As outlined in DIAC's responses to questions on notice submitted to this Inquiry, the anticipated costs of the community detention program will be approximately $15 million, with over 1,600 individuals approved for the program as at 1 July 2011. The costs reflect the high initial costs of securing leases, connection fees for utilities and provision of household goods in each property, so the ongoing costs will likely be far less. These costs are significantly less than the cost of holding people in detention facilities, while also doing far less harm than holding people in any kind of closed centre or place.

60. Vulnerable groups, including children, families, unaccompanied minors and those that have been in detention long-term, should continue to be prioritised not only for community detention but also in the processing of their refugee and security assessments.

Political leadership

61. While reform of the immigration detention system is essential to addressing public perceptions, it is equally essential for such measures to be coupled with political leadership. The conflation of border security and anti-people smuggling measures with asylum and protection issues in broader policy discussions, and the lack of political leadership in correcting myths and misinformation about refugees and asylum seekers are both key factors in the proliferation of negative misconceptions among the public. RCOA therefore calls on all political leaders to cease the politicisation of refugee and asylum issues, present factual information and show leadership in correcting myths and misconceptions.

62. RCOA is not alone in its desire for politicians on all sides of politics to present facts, use correct terminology and to avoid leveraging asylum issues for political gain. Much of the public hysteria about asylum seekers, "boat arrivals", immigration and "border security" could be quelled through political leadership on the issues. Regardless of differing individual and party views, all politicians are united in having to respond to a wider public that feels some level of fear, however unfounded this fear may be. The impact of present discourse is real; "tougher" policies to address the public's fears result in people spending longer periods in overcrowded, remote detention facilities, more families separated and people living in Australia unable to fully belong in communities where they feel judged and isolated. Community leaders, politicians, the media, NGOs and individuals all have a role to play in changing this discourse for the benefit of society as a whole.

63. Australia's international reputation is also being undermined, with the United Nations Human Rights Committee making adverse findings against Australia in immigration detention cases on 14 occasions over the last decade. They found that that the detention in those cases violated the prohibition on arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights.[18] The damage to Australia's international reputation involves more than just negative perceptions. It harms our

[18] See Minister Evans's comments during the 2008launch of the immigration detention values. http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm

nation's capacity to negotiate regional cooperation arrangements to address failures in refugee protection.

Recommendation 2:

RCOA recommends that the Australian Government expedite the expansion of the community detention program to ensure that all vulnerable people, including children, families, unaccompanied minors, survivors of torture and trauma and those who have experienced long-term detention are removed from closed detention facilities.

MEDIUM TO LONG TERM MEASURES

Legislative time limit (and why this is possible)

64. To mitigate the risk of indefinite immigration detention, it is crucial for time limits on detention to be codified in law. RCOA recommends that detention of asylum seekers should be restricted to a maximum of 30 days, during which time an analysis of identity, health and security risks can be undertaken. Any attempt to detain an asylum seeker for more than 30 days should be subject to independent judicial review.

65. In the majority of cases, there should be no reason to detain a person for more than 30 days. The present movement of people into community detention has illustrated that a Movement Alert List security check (more commonly known as a MAL check) can be completed within 48 hours and is adequate to satisfy DIAC that an asylum seeker poses no serious security threat. An even more comprehensive security check is said to be possible within a 72 hour timeframe for the asylum seekers who may be returned to Malaysia under the recently signed transfer agreement. That prompt individual security assessments can and do take place currently indicates that swift identification processes are entirely possible.

66. Health checks can most certainly be conducted within a matter of days. Chest x-rays (for tuberculosis) and blood tests take only a few days to complete. Further tests would not being required in most cases.

67. RCOA acknowledges that there may be occasions where a court may determine that longer periods of detention are necessary. Even in these cases, however, no asylum seeker, including those who are in the process of being removed from Australia, should be detained beyond six months. This time limit should cover the entire time spent in detention, even if such incarceration has been interspersed with periods of time spent in the community. If longer detention is determined to be appropriate due to security or public order risks, alternatives to immigration detention should be adopted for this individual.

Recommendation 3:

RCOA recommends that time limitations on immigration detention should be codified in law so as to:

- *Restrict the detention of asylum seekers to a period of no longer than 30 days before judicial review.*
- *Ensure that no asylum seeker, including those who are in the process of being removed from Australia, is detained beyond six months.*

Judicial review beyond 30 days

68. An essential complement to the introduction of legislative time limits on detention is the establishment of a process of judicial oversight for detention which exceeds these time limits. In line with the above recommendations, all decisions to detain a person beyond 30 days should be subject to judicial review. If continued detention is determined to be appropriate, subsequent reviews should occur at regular intervals. These requirements should be codified in law.

69. Additionally, guidance criteria should be made available to both DIAC officials responsible for seeking extensions of detention beyond the 30 day limit and magistrates making determinations about continued detention of a person. This would help to reduce referrals for judicial review in cases where continued detention is clearly unnecessary and ensure consistency in decision-making.

Recommendation 4:

RCOA recommends that:

- *All decisions to detain a person beyond 30 days should be subject to judicial review, with subsequent reviews carried out at regular intervals if continued detention is deemed appropriate.*
- *Requirements relating to judicial review of immigration detention should be codified in law.*

Mechanisms to resolve difficult cases and to review ASIO assessments

70. While the risk of indefinite detention can be largely mitigated through the introduction of legislative time limits on detention and a system of judicial review, there is also a need to develop mechanisms for preventing the indefinite detention of persons whose status cannot be easily resolved.

71. Indefinite detention is a particular risk for persons who have been found to be in need of protection but who have received an adverse security finding. As these persons cannot be granted a visa to reside permanently in Australia, their options are generally limited to voluntary repatriation, the viability of which is limited by the risk of persecution (including torture or other inhumane treatment based on presumptions about what Australian authorities may have learned); or seeking resettlement in a third country, the likelihood of which is diminished by their adverse security finding. If neither repatriation nor resettlement eventuates, these persons may face indefinite detention without any prospect of their status being resolved. There is a need for clear guidelines and mechanisms for addressing this situation in a timely fashion if and when it arises.

72. In addition to clearer guidelines, there is also a need to introduce a review mechanism for asylum seekers who receive an adverse security finding. Currently, Protection Visa applicants have no opportunity to seek an independent merits review of a negative security assessment. While the Administrative Appeals Tribunal (AAT) has the power to review negative ASIO assessments, access to the AAT is denied to people who are not citizens or permanent residents. The Inspector General of Intelligence and Security has twice raised this concern and recommended that legislation be altered to allow for

AAT review of negative security assessments of Protection Visa applicants,[19] a recommendation which RCOA strongly supports.

Recommendation 5:

RCOA recommends that:

- *Clear guidelines be developed for resolving in the status of persons who have been found to be in need of protection but who have received an adverse security finding.*
- *In line with the suggestion of the Inspector General of Intelligence and Security, legislation be altered to allow the Administrative Appeals Tribunal to hear appeals relating to negative ASIO security assessments for Protection Visa applicants.*

Legislate minimum conditions of detention

73. Consideration should be given to enshrining in law minimum standards of detention. The Government's key detention values stipulate that "conditions of detention will ensure the inherent dignity of the human person". This provision mirrors UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers[20] (hereafter, the Guidelines), which state that "conditions of detention for asylum seekers should be humane with respect shown for the inherent dignity of the person". Contrary to the Guidelines, however, conditions of detention are not prescribed by Australian law.

74. RCOA acknowledges that some of the basic conditions of detention recommended in the Guidelines may already be reflected in current practice. However, to ensure that these conditions are implemented universally throughout the detention network and provide avenues for recourse should they not be met, it is necessary for standards of detention to be enshrined in law.

75. At a minimum, legislatively-defined conditions of detention should include the following, as stipulated in the Guidelines:

    i. initial screening to identify trauma or torture victims, with a view to providing appropriate treatment;

    ii. segregation of men and women, and children from adults (unless these are relatives);

    iii. use of separate detention facilities for asylum seekers (as opposed to prisons or other correctional facilities); or, if this is not possible, separation of asylum seekers from convicted criminals or prisoners on remand;

    iv. opportunities for detainees to receive visits, in private where possible;

    v. access to medical treatment and psychological counselling;

    vi. opportunities for physical exercise through recreational activities;

    vii. opportunities to continue further education or vocational training;

    viii. opportunities to exercise their religion and receive a diet in keeping with their religion;

[19] See the Inspector General of Intelligence and Security's annual reports for 1998-99 (p. 17) and 2006-07 (p. 12), available at www.igis.gov.au/annual_report/index.cfm

[20] Available at www.unhcr.org.au/pdfs/detentionguidelines.pdf

ix. access to basic necessities, such as beds, shower facilities and basic toiletries; and

x. access to a complaints mechanism.

Recommendation 6:

RCOA recommends that minimum standards of detention should be codified in law, in line with the conditions outlined in UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.

End excision to facilitate bridging visas and avoid long-term detention

76. The maintenance of the excision policy and the separate status determination process for "irregular maritime arrivals" is likely to seriously undermine the urgently-needed reforms to the immigration detention system. As persons subject to the excision policy are unable to apply for a visa unless the Minister for Immigration and Citizenship intervenes in their case, the excision policy could severely hamper the implementation of a risk-based approach to detention. Through hindering access to Bridging Visas, the excision policy could prevent the release from detention of persons who have been assessed as posing no identifiable risk, thereby exposing them to unnecessary and potentially prolonged detention. Any reforms aimed at mitigating unnecessary detention and its myriad negative impacts would thus be undermined if the excision policy is maintained.

77. Given the impediment that excision presents to detention reform, RCOA strongly recommends the abolition of the excision policy and the extension of access to the onshore status determination system to all asylum seekers, regardless of their mode of arrival.

Recommendation 7:

RCOA recommends that provisions of the Migration Act *relating to excised offshore places be repealed.*

Closure of offshore and remote detention facilities

78. Consideration should be given to closing offshore and other remote detention facilities. As mentioned earlier in this submission, such facilities are extremely costly to operate due to the expense of providing access to goods and services over vast distances. Additionally, through hindering access to key services and support networks, remote detention can have serious repercussions for the health and wellbeing of detainees and the protection outcomes they are able to secure.

79. The limited access to legal counsel, interpreting services and communication facilities available to asylum seekers in remote detention reduces their capacity to lodge a protection claim based on sound legal advice and explore further avenues for seeking protection should their initial application be unsuccessful. Additionally, the inadequate access to social, cultural and religious support networks and health care services (including mental health services) can have serious impacts on detainees' physical and mental health, impacts which become more pronounced as detention becomes more prolonged.

80. The closure of remote and offshore detention facilities would therefore play a key role in resolving some of the most costly and destructive impacts of the current immigration

detention system. In the future, RCOA recommends that all immigration detention facilities should be located only in areas where appropriate services and support are available within a short distance.

Recommendation 8:

RCOA recommends:

- *The progressive closure of immigration detention facilities located offshore and in remote areas.*
- *That, as a general standard of practice, immigration detention facilities should be located only in areas where appropriate services and support are readily accessible.*

Training of staff

81. The reforms outlined above would introduce an entirely new approach to immigration detention. As such, it is essential to ensure that all relevant staff receive appropriate training and guidance on implementing these reforms. In particular, DIAC staff (and all subcontracted staff) should be provided with guidance and training on treating asylum seekers with dignity; recognising the particular needs of children, families and vulnerable people; ensuring that minimum standards of detention are upheld; and using detention as a last resort and for the shortest practicable time.

Recommendation 9:

RCOA recommends that all relevant staff, including both government employees and contracted staff, receive appropriate training and guidance on implementing a risk-based approach to immigration detention.

Introduce flexibility in decision to detain

82. A final issue for consideration is whether detention should be applied on a mandatory basis. RCOA notes that the implementation of the reforms outlined above would not necessitate the abolition of mandatory detention. Such reforms are rather aimed at preventing indefinite, prolonged and unnecessary detention, which are the most costly and destructive elements of the current system. However, the inflexible nature of mandatory detention creates potential for unnecessary detention to occur.

83. RCOA acknowledges that, even under a risk-based model, short periods of immigration detention will continue to be necessary in certain cases. However, consideration should be given to replacing the current blanket policy with one which would allow for a degree of flexibility in the decision to detain. This would not prevent the use of detention in cases where it is genuinely needed, but would simply allow for discretion in instances where it is patently clear that detention is unnecessary.

Recommendation 10:

RCOA recommends that subsections 42(4) and 189(1)(2) of the Migration Act *be amended to allow for discretion in the decision to detain.*

SUMMARY OF RECOMMENDATIONS

Recommendation 1:
RCOA recommends that the Australian Government immediately implement a risk-based approach to immigration detention and subject asylum seekers who enter Australia without visas to the same risk management processes applied to people who seek to enter the country on a temporary basis.

Recommendation 2:
RCOA recommends that the Australian Government expedite the expansion of the community detention program to ensure that all vulnerable people, including children, families, unaccompanied minors, survivors of torture and trauma and those who have experienced long-term detention are removed from closed detention facilities.

Recommendation 3:
RCOA recommends that time limitations on immigration detention should be codified in law so as to:

- *Restrict the detention of asylum seekers to a period of no longer than 30 days before judicial review.*
- *Ensure that no asylum seeker, including those who are in the process of being removed from Australia, is detained beyond six months.*

Recommendation 4:
RCOA recommends that:

- *All decisions to detain a person beyond 30 days should be subject to judicial review, with subsequent reviews carried out at regular intervals if continued detention is deemed appropriate.*
- *Requirements relating to judicial review of immigration detention should be codified in law.*

Recommendation 5:
RCOA recommends that:

- *Clear guidelines be developed for resolving in the status of persons who have been found to be in need of protection but who have received an adverse security finding.*
- *In line with the suggestion of the Inspector General of Intelligence and Security, legislation be altered to allow the Administrative Appeals Tribunal to hear appeals relating to negative ASIO security assessments for Protection Visa applicants.*

Recommendation 6:
RCOA recommends that minimum standards of detention should be codified in law, in line with the conditions outlined in UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.

Recommendation 7:
RCOA recommends that provisions of the Migration Act *relating to excised offshore places be repealed.*

Recommendation 8:
RCOA recommends:

- *The progressive closure of immigration detention facilities located offshore and in remote areas.*

- *That, as a general standard of practice, immigration detention facilities should be located only in areas where appropriate services and support are readily accessible.*

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Recommendation 10:
RCOA recommends that subsections 42(4) and 189(1)(2) of the Migration Act *be amended to allow for discretion in the decision to detain.*

APPENDIX A

RCOA Submissions related to immigration detention

- (June 2011) - Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010: http://www.refugeecouncil.org.au/resources/submissions/1106_Detention_sub.pdf
- (May 2011) - Submission to the Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011: http://www.refugeecouncil.org.au/resources/submissions/1105_Character_Test_sub.pdf
- (March 2011)- Submission to the Attorney-General's Department on recommendations made under the Universal Periodic Review of Australia: http://www.refugeecouncil.org.au/resources/submissions/1103_UPR_sub.pdf
- (July 2010) – Submission to the United Nations Human Rights Council towards the Universal Periodic Review of Australia: http://www.refugeecouncil.org.au/resources/submissions/1007_UPR_sub.pdf
- (August 2009) - Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009: http://www.refugeecouncil.org.au/resources/submissions/0908_Detention_sub.pdf
- (August 2008) - Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia: http://www.refugeecouncil.org.au/resources/submissions/0808_Detention_sub.pdf
- (April 2002) - RCOA Submission to the Human Rights and Equal Opportunity Commission's Inquiry into Children in Immigration Detention: http://www.refugeecouncil.org.au/resources/submissions/0204_Children_in_Detention_sub.pdf

Submissions and reports from other organisations

- *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum- Seekers, Stateless Persons and Other Migrants.* (2011) UNHCR Legal and Protection Policy Research Series by Alice Edwards
- Commonwealth Ombudsman (February 2011) Christmas Island Immigration Detention Facilities: *Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island: October 2008 to September 2010.* http://www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf
- Joint Standing Committee's on Migration (2008-2009) three reports of the inquiry into immigration detention in Australia. http://www.aph.gov.au/house/committee/mig/detention/index.htm
- *El Masri v Commonwealth (Department of Immigration and Citizenship)* (2009) *Report into unlawful and arbitrary detention and the right of people in detention to humane treatment* http://www.hreoc.gov.au/legal/humanrightsreports/AusHRC41.html
- Migration Amendment (Immigration Detention Reform) Bill 2009 (31 July 2009) Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs http://www.hreoc.gov.au/legal/submissions/2009/20090731_migration.html
- Commonwealth Ombudsman (2008) Department of Immigration and Citizenship: *Administration of Detention Debt and Write-Off.* Report 02/2008. Commonwealth Ombudsman, Canberra: http://www.ombudsman.gov.au/files/investigation_2008_02.pdf

- Submission of the Human Rights and Equal Opportunity Commission (HREOC) (4 August 2008) to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia http://www.hreoc.gov.au/legal/submissions/2008/20080829_immigration_detention.html
- Australian National Audit Office (2007) *Preparations for the Re-tendering of DIAC's Detention and Health Services Contracts.* ANAO, Canberra: http://anao.gov.au/~/media/Uploads/Documents/2006%2007_audit_report_35.pdf
- Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Detention Process Issues*. Report 07/2007. Commonwealth Ombudsman, Canberra: http://www.ombudsman.gov.au/files/investigation_2007_07.pdf
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Reports into Detention Centres

- (2011) Immigration detention at Villawood Summary of observations from visit to immigration detention facilities at Villawood http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html

- (2011) Immigration detention in Leonora: Summary of observations from visit to immigration detention facility in Leonora http://www.hreoc.gov.au/human_rights/immigration/idc2011_leonora.html
- (2010) Immigration detention on Christmas Island http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.html
- (2010) Immigration detention in Darwin: Summary of observations from visits to immigration detention facilities in Darwin http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.pdf
- (2009) Immigration detention and offshore processing on Christmas Island http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.pdf
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APPENDIX B

Joint Standing Committee's on Migration – three reports of the inquiry into immigration detention in Australia (2008-09)
http://www.aph.gov.au/house/committee/mig/detention/index.htm

In 2008 and 2009, the Parliamentary Joint Standing Committee made a series of recommendations which RCOA believes deserve re-examination by the Joint Select Committee.

First report

The first report Joint Standing Committee on Migration (JSCM) calls for a series of open and transparent guidelines against which detainees and the Australian public can judge the fairness and rationality of the detention system. It recommends a maximum time limit of 12 months detention for all detainees, except those considered a significant and ongoing risk to the community.

The report tackles the uncertainties of indefinite detention and recommends the prescriptive time frames for detaining individuals:

- 5 day time frames for health checks;
- up to 90 days for the completion of security and identity checks, after which consideration must be given to release on to a bridging visa; a maximum time limit of 12 months detention for all except those who are demonstrated to be a significant and ongoing risk to the community; and
- the publication of clear guidelines regarding how the criteria of unacceptable risk and visa non-compliance are to be applied.

The report also recommends additional measures to increase oversight and transparency, such as:

- greater detail and scope of the three month review to be conducted by the Department of Immigration and Citizenship (DIAC);
- ensuring the six month Ombudsman's review is tabled in Parliament and that the ministerial response to recommendations is comprehensive;
- providing increased oversight of national security assessments of people in detention; and
- enshrining the *New Directions in Detention* values in legislation as a priority.

In addition, the report recommended changes to ensure prolonged detention did not occur without review by recommending that merits and judicial review of the grounds for detention are available where a person has been detained for more than 12 months.

The report also recommended that people in immigration detention no longer be charged for the costs of their detention, and that all existing debts be waived immediately. (Legislation was later introduced by the Government and passed by Parliament to this effect).

Second report

The second report of the JSCM looked at community-based alternatives to detention. Built on the *New Directions in Detention* values, the report recommended a reform of the bridging visa framework to comprehensively support those released into the community, with appropriate reporting or surety requirements. The JSCM recommended that the Australian Government utilise the reformed bridging visa framework in lieu of community detention. Other recommendations included:

- Reforms to the bridging visa framework to ensure that people are provided with the following where needed:
    - basic income assistance that is means-tested

    - access to necessary health care
    - assistance in sourcing appropriate temporary accommodation and basic furnishing needs, and provision of information about tenancy rights and responsibilities and Australian household management, where applicable, and
    - community orientation information, translated into appropriate languages, providing practical and appropriate information for living in the Australian community, such as the banking system, public transport and police and emergency contact numbers.
- That the Australian Government commit to ensuring that children living in the Australian community, while their or their guardian's immigration status is being resolved, have access to:
    - safe and appropriate accommodation with their parent(s) or guardian(s)
    - the provision of basic necessities such as adequate food
    - necessary health care, and
    - primary and secondary schooling.
- That people on bridging visas have permission to work throughout the duration of the application and review process.

Third report

The third report reviewed the facilities, services and transparency of Australia's immigration detention system. Appropriate level of care was a priority, with the JSCM adamant that people detained in both onshore and offshore facilities were provided with equal levels of care and that the transparency of the system was improved. It was recommended that:

- DIAC engage an independent auditor to undertake a full review of the current immigration detention service providers and immigration detention facilities within the next three years;
- DIAC introduce a mandatory ongoing training program for all staff of the immigration detention service provider;
- DIAC publish the detention service standards;
- the Australian Government maintain appropriate physical and mental health facilities on Christmas Island;
- greater access be made available to the media to all immigration detention facilities, while maintaining the privacy of people in immigration detention;
- DIAC publish regularly updated information on all immigration detention facilities, including statistics on the detainee population, on its website; and
- a set of public media protocols be developed and applied consistently across all immigration detention facilities.

APPENDIX C

MEDIA RELEASES FROM THE REFUGEE COUNCIL RELATED TO DETENTION

2011

- Manus Island Deal is Pacific Solution 2.0 – 19 August 2011
  http://www.refugeecouncil.org.au/news/releases/110819_Manus_MOU.pdf

- Australia-Malaysia deal undermines regional push for protection -26 July 2011
  http://www.refugeecouncil.org.au/news/releases/110726_MalaysiaSigning.pdf

- A better way: A risk-based approach to immigration detention – 24 June 2011
  http://www.refugeecouncil.org.au/news/releases/110624_RW_detention.pdf

- Detention inquiry a good start but action needed – 2 June 2011
  http://www.refugeecouncil.org.au/news/releases/110602_ParlInq_det.pdf

- Urgent need for detention reform highlighted yet again – 26 May 2011
  http://www.refugeecouncil.org.au/news/releases/110526_AHRC_Vwood.pdf

- Malaysia's appalling rights record ignored in refugee transfer deal – 8 May 2011
  http://www.refugeecouncil.org.au/news/releases/110507_Malaysia_transfer.pdf

- Manus detention plan undermines international cooperation – 6 May 2011
  http://www.refugeecouncil.org.au/news/releases/110506_Manus.pdf

- Increase in long-term detention at heart of unrest – 27 April 2011
  http://www.refugeecouncil.org.au/news/releases/110427_MigAct_changes.pdf

- Scrutiny of detention welcomed – 14 April 2011
  http://www.refugeecouncil.org.au/news/releases/110414_Omb_CI.pdf

- New detention centre: Same problems, more cost – 5 April 2011
  http://www.refugeecouncil.org.au/news/releases/110405_Tas_detention.pdf

- Detention needs overhaul, not band-aid fix – 15 March 2011
  http://www.refugeecouncil.org.au/news/releases/110315_CI_protests.pdf

- Government gets it wrong with more detention centres – 4 March 2011
  http://www.refugeecouncil.org.au/news/releases/110304_Detention.pdf

2010

- Welcome moves to release children from detention – 18 October 2010
  http://www.refugeecouncil.org.au/news/releases/101018_Release_of_children.pdf

- Refugee Council urges release of children from detention – 11 October 2010
  http://www.refugeecouncil.org.au/news/releases/101011_Release_of_children.pdf

- Time to review detention policy – 17 September 2010
  http://www.refugeecouncil.org.au/news/releases/100917_Detention.pdf

- Reopening Curtin a step backwards for reform – 18 April 2010
  http://www.refugeecouncil.org.au/news/releases/100418_Curtin.pdf

- Halt in refugee processing creates detention concerns – April 9 2010
  http://www.refugeecouncil.org.au/news/releases/100409_Suspension_of_processing.pdf

- Senator Fielding all wrong on detention – January 29 2010
  http://www.refugeecouncil.org.au/news/releases/100129_Fielding.pdf

2009

- Common sense changes build fairer refugee determination process – May 13 2009
  http://www.refugeecouncil.org.au/news/releases/090513_Budget.pdf

2008

- New high security detention centre unsuitable for asylum seekers – August 16 2008
  http://www.refugeecouncil.org.au/news/releases/080816_Christmas_Island.pdf

- Detention changes help to restore Australia's human rights record – July 29 2008
  http://www.refugeecouncil.org.au/news/releases/080729_Detention_changes.pdf

- Refugee Council welcomes closure of Nauru detention centre – 8 February 2008
  http://www.refugeecouncil.org.au/news/releases/080208_Nauru_closure.pdf

2007

- Refugee Council welcomes an end to the failed 'Pacific Solution' – December 10 2007
  http://www.refugeecouncil.org.au/news/releases/071210_Pacific_Solution.pdf

- Closure of Baxter detention centre a welcome step – August 17 2007
  http://www.refugeecouncil.org.au/news/releases/070817_Baxter_closure.pdf

2006

- Refugee Council welcomes Ombudsman's reports into wrongful detention – December 6 2006 http://www.refugeecouncil.org.au/news/releases/061206_Ombudsman_dentention.pdf

2005

- Refugee Council of Australia calls for a judicial inquiry into immigration detention and removals – 15 July 2005
  http://www.refugeecouncil.org.au/news/releases/050715_Detention_removals.pdf

- Detention reforms: A missed opportunity – 20 June 2005
  http://www.refugeecouncil.org.au/news/releases/050620_Detention_reforms.pdf

- Refugee Council of Australia calls on all political parties to support detention bills – 6 June 2005 http://www.refugeecouncil.org.au/news/releases/050606_Detention_bills.pdf

- Refugee Council responds to creation of new visa class for detainees – 23 March 2005
  http://www.refugeecouncil.org.au/news/releases/050323_RPBVs.pdf

2000

- Further criticisms of Australia's mandatory detention policy – 31 July 2000
  http://www.refugeecouncil.org.au/news/releases/000731_Mandatory_detention.pdf

- Protests at Woomera detention centre – 9 June 2000
  http://www.refugeecouncil.org.au/news/releases/000609_Woomera_protests.pdf