

**The impact of indefinite detention:
the case to change Australia's
mandatory detention regime**



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Introduction

The impact of indefinite detention: the case to change Australia's mandatory detention regime

"We came to a country we heard has human rights and freedom. We can't believe what's happening to us ... We haven't any human rights. We are just like animals. We do not have a normal life like a human. Our feeling is dead. Our thinking is dead. We are very sad about everything. We can't smile." Ibrahim Ishreti¹

Ibrahim Ishreti fled persecution in search of safety in Australia. His hope for freedom turned into more than four years of detention, bridging visas, bureaucracy and despair. He is among thousands of men, women and children who have been held for anywhere from six days to six years under Australia's immigration detention regime.

In this report, *The impact of indefinite detention: the case to change Australia's mandatory detention regime*, Amnesty International focuses on Australia's mandatory detention policy, and in particular how it has allowed for prolonged and indefinite detention². The policy is considered to be inconsistent with Australia's international human rights obligations. In particular it violates the right to liberty and security of persons due to its lack of a case by case examination of the necessity and appropriateness of detention, consideration of a reasonable alternative to detention or access to independent review or an effective remedy. The report provides an overview of the international human rights and refugee law obligations that apply to Australia's detention of asylum-seekers and refugees and makes clear that Australia's policy does not accord with international law and standards.

The report provides recommendations the implementation of which would put an end to the indefinite detention of rejected asylum-seekers³ and would bring Australia's treatment of refugees and asylum-seekers into line with its international obligations.

Summary

Human rights concerns

Under Australia's mandatory detention legislation,⁴ asylum-seekers who arrive without adequate documentation are held in immigration detention pending the outcome of their asylum claim. The only way their detention can come to an end under Australian law is for the person to be granted a visa enabling them to remain lawfully in Australia, or to be removed or deported to another country.

Recent decisions of the Australian High Court have found that, under the *Migration Act*, those whose detention cannot be ended in any of these ways must continue to be detained. As a consequence, a rejected asylum-seeker may be subject to indefinite detention pending removal. This may result in a lifetime of detention without charge, trial or access to an effective remedy.

Mandatory detention

By seeking asylum in Australia asylum-seekers are exercising an internationally recognised right to seek asylum⁵. In doing so, they hope to escape the persecution that forced them to leave their home countries and to find a country where their fundamental rights and human dignity will be respected.

However, asylum-seekers arriving without adequate documentation are subject to the provisions of the *Migration Act*, which imposes mandatory detention until a decision is made in their case.

They may be detained for a prolonged period, until they are recognised as refugees and released, or following a negative decision, removed or deported.

As at 29 May 2005, Amnesty International estimates that at least 150 people have been detained for more than three years in immigration detention by the Australian Government. This figure includes those detained in Australia's immigration facilities on Nauru, of which there are 54 including 48 adults and six children. The total number of persons detained by Australia rises to at least 200 when those detained for more than 18 months but less than three years are included. Australia's longest serving immigration detainee, a rejected Kashmiri asylum-seeker, Peter Qasim, has been in detention since September 1998. In the case of children, Australia's Human Rights and Equal Opportunity Commission reports that the average detention period for a child in immigration detention is one year, eight months and 11 days.⁶

No judicial review of detention

The lack of independent review of the lawfulness of detention and the absence of any maximum statutory time limit for detention means that detention can not only be prolonged, it can also be indefinite. Amnesty International considers it unacceptable that exercising the right to seek asylum in Australia from human rights abuses in other countries should be met with a system that further violates human rights, including administrative detention of a prolonged or indefinite period of time.

Breach of international law

Australia's policy of mandatory non-reviewable detention places it in breach of several international human rights instruments. Article 9 of the 1966 International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, prohibits arbitrary detention and provides that a detained person must be able to take proceedings before a court that can determine the lawfulness of detention and order release where detention is unlawful. The rights to liberty and freedom from arbitrary detention are also protected in Articles 3 (right to liberty) and 9 (prohibition on arbitrary detention) of the Universal Declaration of Human Rights.

Amnesty International is of the view that detention under Australia's mandatory detention policy is arbitrary and thus in breach of the ICCPR. As confirmed by recent High Court decisions, in some circumstances immigration detention in Australia can be of indefinite duration and with no reasonably foreseeable prospect for release. This report outlines the basis on which Amnesty International considers that Australia is also in breach of key provisions of other international instruments, including the 1951 Convention relating to the Status of Refugees and the 1989 Convention on the Rights of the Child

Impact of detention on mental health

The psychological impact of indefinite detention is irrefutable. Amnesty International continues to receive allegations of ill-treatment of detainees held in immigration detention centres. If substantiated, such treatment would breach international principles of humane treatment of persons in detention and the prohibition of cruel, inhuman or degrading treatment. This would be consistent with findings by other bodies of cruel, inhuman or degrading treatment or punishment regarding similar allegations⁷. Reports of hunger strikes, suicide attempts, riots and protests within immigration detention centres are symptomatic of the complete disempowerment and desperation of human beings who are arbitrarily detained with no access to an effective remedy.

Amnesty International's challenge to the Australian Government

This report complements Amnesty International's 1998 report, *A Continuing Shame*⁸, which condemned Australia's mandatory detention policy and called upon the Australian Government

to bring its policy into line with its international human rights obligations. *The impact of indefinite detention: the case to change Australia's mandatory detention regime* reiterates the challenge to the Australian Government to review its detention policy, in particular its prolonged or indefinite character, now that the High Court has found indefinite detention to be permissible under the *Migration Act*.

Amnesty International calls on the Australian Parliament, as a matter of urgency, to make comprehensive amendments to the policy and legislation to ensure that no person is detained in violation of their human rights.

A model for change

Amnesty International is witness to the detrimental impact that prolonged or indefinite detention has had on the lives of individuals held in Australia's immigration detention centres. Each person so detained is an individual whose right to dignity has been systemically eroded by a scheme that deprives them of their right to liberty, does not provide for a case by case examination of the necessity or proportionality of detention and offers no effective opportunity to challenge the decision to detain them.

Amnesty International acknowledges recent developments in Australia that include an increased use of bridging visas⁹ (including Bridging Visa E), residential housing projects and alternative places of detention. These developments appear to indicate the Australian Government's growing recognition that its mandatory detention regime is unnecessarily harsh. However, these developments fail to address adequately the question of arbitrary detention, much less the particular problem of prolonged or indefinite detention. Further, Amnesty International is not satisfied that recent moves by the Australian Government to introduce a visa providing for release, pending removal of an individual from Australia, adequately addresses this serious human rights issue.

By implementing the model for change proposed in this report, the government would meet its international legal obligations, protect the human rights of asylum-seekers including those whose applications for asylum have been dismissed, and go some way towards introducing a humane immigration policy. The model proposed in the recommendations of this report¹⁰ does not constitute a threat to Australia's sovereignty or to the integrity of its borders.

Overview of Amnesty International recommendations

The Australian Government should:

Establish a formal independent review process to assess on a case-by-case basis the necessity and proportionality of detention of all asylum-seekers and rejected asylum-seekers who are currently detained in Australia, including Christmas Island, and on Nauru.

This process should take into account whether it is reasonable to continue detention and whether it is proportionate to the objectives to be achieved¹¹. The individual circumstances of asylum-seekers, such as whether they are children or are stateless persons, must be considered by decision-makers in determining the necessity of detention. It must also take into account the length of time a person has been in detention.

Detention should only take place in exceptional circumstances consistent with international human rights standards¹². Persons whose detention does not meet such standards should be immediately released from detention. Persons who are detained beyond a maximum period of detention which should be reasonable in its length and as specified in national law should be automatically released.

Those released should be granted a bridging visa enabling them to live in the community. Basic rights and entitlements should be attached to the bridging visa including the right to work and access to health care. Children and their families should be released into the community as a matter of priority. This formal review process would require that:

- Persons whose asylum claims are yet to be finally determined should be provided immediately with bridging visas with basic rights and entitlements unless the review process establishes that it is necessary and proportionate to the objective to be achieved to detain them.
- Rejected asylum-seekers who are stateless and cannot be returned to any other country should be provided with a solution that leads to the grant of a legal status. Where a stateless person's nationality or citizenship status cannot be resolved or determined in a timely manner, *complementary protection*¹³ in Australia should be granted to them.
- Persons whose applications for protection have been finally rejected on the basis of fair and satisfactory procedures should be granted a bridging visa with basic rights and entitlements pending their removal unless the review process establishes that it is necessary and proportionate to detain them. Such a visa should automatically translate into a residency permit if there is no real likelihood or prospect of removal from Australia within a reasonable period of time.
- Persons whose claims do not fall within a full and inclusive interpretation of the Refugee Convention¹⁴ but who are considered to be at risk of human rights abuses if returned to their country of origin should be offered *complementary protection* and released from detention.

Ensure that in future, asylum-seekers who arrive in Australia without adequate documentation are detained only when their detention is consistent with international human rights standards. Such legislation should be based on a general presumption against detention.

Specify in national law a statutory maximum duration for detention which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.

Ensure that detained asylum-seekers have regular and automatic access to courts empowered to review the necessity of detention and to order release if continued detention is found to be unreasonable or disproportionate to the objectives to be achieved.

Establish a new class of bridging visa for any future arrivals that allows for asylum-seekers to remain in the community with rights and entitlements as outlined above.

Implement a *complementary protection* model to provide for future asylum-seekers who do not meet the full and inclusive interpretation of the definition of refugee under the Refugee Convention but nonetheless are in need of international protection.

Ensure that any actions taken by the government to negotiate the forcible return of a rejected asylum-seeker are in full compliance with Australia's international human rights obligations.

The complete set of recommendations can be found in Chapter 4 of this report.

Chapter 1: Indefinite detention – the problem

"When you do not know about your future it's very crazy. I feel I am dying. They cannot deport us [because] we haven't a country to go back [to]. They don't want to give us a visa. That means that we have to stay in detention forever. It's like a death punishment."
Ahmed Al-Kateb¹⁵

Amnesty International considers that Australia's mandatory detention regime frequently results in arbitrary detention. The focus of this report is on a particular element of the detention regime, whereby asylum-seekers can be detained for prolonged periods of time, and persons whose asylum claims have been dismissed can be detained indefinitely. As some members of Australia's High Court have recognised, this means that certain rejected asylum-seekers could be deprived of their liberty for the rest of their lives.

Amnesty International's 1998 report, *A Continuing Shame*, examined how Australia's mandatory detention policy contravened refugees' and asylum-seekers' human rights and found that the policy was contrary to Australia's international human rights obligations. Since that time, various United Nations (UN) bodies have revisited the detention of refugees and asylum-seekers in Australia in a number of contexts¹⁶ and have found that Australia's detention legislation is inconsistent with its international human rights commitments. Domestic reports and findings have consistently recommended amendments to Australia's mandatory detention regime and detention facilities¹⁷.

The outlook is bleak with the High Court's finding that Australia's mandatory detention policy, including its indefinite nature, is lawful under Australian law.

The national context

What is Australia's policy regarding the treatment of asylum-seekers?

Since 1992, Australia has had a policy of mandatory detention for asylum-seekers who arrive in Australia without valid visas. That is, everyone who arrives in Australia without a valid visa must be detained irrespective of any rights that they might have under international law.

The *Migration Act* sets out Australia's mandatory detention policy. Since 1992, all 'unlawful non-citizens' in Australia must be detained¹⁸ until they are either:

- Removed from Australia
- Deported
- Granted a visa¹⁹.

Non-nationals who are in Australia without holding any valid visa are referred to as 'unlawful non-citizens'²⁰. Courts cannot release an 'unlawful non-citizen' from detention other than in one of the three situations above.

By contrast, people who enter Australia on a valid visa and then claim protection as refugees are not detained. The only difference between these two groups of people is the way in which they arrived and what documentation they had when they arrived, yet they are treated in markedly different ways. 'Unlawful non-citizens' claiming asylum are detained solely because they did not have proper papers when they arrived in Australia, rather than because they are not refugees or are a threat to national security or the public interest. They are detained before any consideration is given as to whether they are refugees, or any investigation is conducted regarding their character or the threat, if any, they might pose to the security of the country.

There is no mechanism to decide whether detention is reasonable, proportionate or to consider an individual's particular circumstances. Australian law prohibits the release of detained asylum-seekers while their status is being determined. It is only on rare occasions, due to reasons such as serious health concerns or age, that the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) grants an asylum-seeker a visa to enable them to be released from detention.

It can take more than five years for a final determination to be made on an asylum-seeker's claim. Meanwhile the asylum-seeker remains in detention until he or she is recognised as a refugee under the 1951 Convention relating to the Status of Refugees (the Refugee Convention) and granted a visa, or is removed or deported. This delay can be due to a number of factors including the nature of the claim itself and the difficulty in obtaining relevant information. However, in some cases it is also due to the shortcomings of Australia's asylum determination system, which lacks adequate safeguards to prevent errors in decision making at first instance or in relation to subsequent applications, and provides asylum applicants with inadequate advice and representation beyond appeal to the Refugee Review Tribunal (RRT).

Taza Orva* - detained for four years before being recognised as a refugee

Taza Orva was born in Iran in 1983 to an Iranian father and an Iraqi mother. The family left Iran at the end of 1999 because of persecution by the authorities due to the fact that Taza's mother is an Iraqi. Taza, his four-year-old brother, 13-year-old sister and his parents arrived off Christmas Island aboard a 12 metre Indonesian fishing boat with 277 other asylum-seekers in January 2000. The group remained on Christmas Island for five days before being transferred to Woomera. Taza recalls that probably the worst thing about Woomera was the depression caused by the lack of activity and things to do:

"People would just hang around, there were no games, no TV, no radio, no newspapers, no telephone for the first six months we were there. People would just wander from room to room complaining to each other and getting depressed. People then started to harm themselves. My brother, who was three or four-years-old at the time, found it really hard to accept."

Taza attempted suicide on four occasions whilst being detained at Woomera, and took part in a hunger strike for 12 days. On 21 January 2001 Taza and his family were moved to Port Hedland. Taza remembers thinking on arrival at Port Hedland that "this is a different, a better kind of hell than Woomera."

Taza recalls that one day at Port Hedland his father was taken away by six guards in full riot gear. They told Taza that they were taking his father to jail but would not say why. A scuffle broke out and Taza was beaten to the ground, handcuffed and taken off to the "management block" which consisted of a room 2m x 2m, lined with black mattresses, a surveillance camera and light which was on 24 hours a day. Taza was not given a blanket and he recalls that the air conditioning made the room freezing. He was left in the "management block" handcuffed for 24 hours. Approximately one week later, his father was released from jail and the family was told by a guard that "we have made a mistake, we are looking for somebody else – sorry."

Shortly after this incident the family was sent to Villawood. In May 2002 Taza's parents decided to take his younger brother and sister back to Iran they had had enough. The younger children were suffering from recurring nightmares and other mental problems for which they were receiving medication. Whilst in Villawood, Taza converted to Christianity and decided not to return to Iran with the rest of his family. He also met and fell in love with a Burmese asylum-seeker.

On 22 November 2003 Taza was recognised as a refugee and released into the community on a temporary protection visa after spending almost four years in detention. Since his release, Taza has married the Burmese woman he met in Villawood and they have a four-month-old son. He is currently studying with the hope of one day becoming an engineer. Taza and his new family still face an uncertain future as they do not yet know whether they will be given permanent status or be sent back to Iran or Myanmar.

* The name has been changed to protect the person's identity. He was interviewed by Amnesty International on 31 May 2005.

Since 2001, legislation has been introduced ostensibly aimed at improving the efficiency of the system. However this legislation restricts access to judicial review by asylum-seekers; limits review of decisions by the introduction of restrictive time limits to appeal; increases costs for bringing applications and decreases availability of fee waiver provisions; reduces the levels of appeal that are available to asylum-seekers; and penalises lawyers and migration agents who act on behalf of asylum-seekers by awarding costs against them in instances where the case is considered unmeritorious.

Amnesty International remains concerned that the limitations to Australia's asylum determination system continue to place people at risk of prolonged detention or of refoulement²¹.

Under a policy introduced by the Australian Government in October 1999 a person recognised as a refugee who entered Australia without documentation is only granted the limited right to stay in Australia for three years on a Temporary Protection Visa (TPV)²². A TPV holder has limited access to social services such as education and resettlement assistance and does not have the right to depart and return to Australia, or to reunite with their family. Often this visa is granted to people who have spent prolonged periods in immigration detention. Under the policy, if that person spent seven days en route to Australia in a country where they could have sought and obtained effective protection and then applied for further protection from Australia after September 2001, they may never be eligible for permanent protection. The result is that persons who are ultimately determined to be a refugee after years of prolonged detention, may never be eligible for permanent protection from Australia²³.

Asylum-seekers are currently held in five immigration detention centres around Australia (Villawood, Maribyrnong, Perth, Baxter and Christmas Island) and in Australia's detention facilities on Nauru. Other detainees are held in the Baxter residential housing project (RHP)²⁴, with another RHP expected to be operational in Villawood²⁵.

The rate of recognition of detained asylum-seekers determined to be refugees is startling. Nine out of 10 unauthorised arrivals that sought asylum in the period from July 2002 to June 2003 were determined to be refugees. The Human Rights and Equal Opportunity Commission (HREOC) recently found in its report on detention of children²⁶ that of 2,184 children who were detained during the period of its inquiry (1999–2003) more than 92% were ultimately recognised as refugees.

It is a matter of concern that many asylum-seekers who have ultimately been recognised as refugees have been subject to prolonged detention, in some instances as a result of error made at various stages of the determination process.

In April 2005, 20 asylum-seekers, most of whom had been detained for four years, were finally deemed to be in need of protection and released from detention. Amnesty International maintains that there must be a timely, fair and accurate asylum determination procedure, in which the applicant is not detained in immigration detention pending a final and correct determination of their status. In 2003–04 the RRT took as long as 22 weeks to process the applications lodged by detainees. In this same time frame only 65% of detainee applications were processed within the RRT's own recommended time frame of 70 calendar days²⁷.

Recently, the Australian Government has made greater use of the Bridging Visa E, a temporary visa allowing a 'non-citizen' to remain in Australia while their asylum claim is being determined. Amnesty International has expressed concern with respect to this category of visa as it is only available to a limited number of people, because a person must meet highly restrictive criteria in order to be eligible and because of the limited rights and entitlement associated with the visa class²⁸.

In May 2005 the government announced the regulations establishing the Removal Pending Bridging Visa (Bridging R (Class WR) visa). The visa allows a 'non-citizen' in immigration detention to remain in the Australian community where their removal from Australia is not reasonably practicable²⁹. To be eligible a person must have had their application for asylum finally determined and have no current proceedings in a court or tribunal. While this visa may be considered to be a positive development, Amnesty International continues to have concerns regarding its scope and associated limitations, such as the potential loss of the right to appeal a

decision on their claim for asylum and thereby the decision to deport them, even if the circumstances in a person's country of origin changes³⁰.

In 2005, the government has received widespread condemnation for the wrongful detention of Australian permanent resident Cornelia Rau and the wrongful deportation of Australian citizen Vivian Alvarez Solon. In response, the government established the Palmer Inquiry to investigate, examine and report on matters relating to the cases. The inquiry itself has also come under criticism for its lack of transparency and its limited powers to compel witnesses and evidence³¹.

Meanwhile as part of Australia's 'Pacific Solution', 54 detainees remain on the Pacific island of Nauru. Following the 'Tampa incident' in August 2001, where more than 1,000 asylum-seekers were held in Australia's immigration facilities on Nauru, the numbers of detainees on the island have significantly reduced, with the claims of those remaining having been rejected by the Australian Government. Without a change in policy, there is little prospect for those remaining on Nauru to be released³².

Peter Qasim – an example of indefinite detention

Peter Qasim is Australia's longest serving immigration detainee. A rejected Kashmiri asylum-seeker, he has been in detention since September 1998. He is considered to be stateless because no country will accept him as their national. Additionally, no country will allow him to reside within their borders³³. In August 2004, the High Court of Australia, by a narrow majority, ruled that under Australia's mandatory detention legislation it is permissible to detain such a person for the rest of his or her life.

Qasim's original application for refugee status was rejected on the basis that he did not have a well-founded fear of persecution. He did not proceed to merits review of the RRT decision³⁴, although he later applied unsuccessfully to the Federal Court for release from detention on the basis that there was no real prospect of his being removed³⁵. He has made one application to the Minister requesting that he be granted a visa pursuant to Ministerial discretion under section 417 of the Migration Act.

In August 2003, Qasim applied to the Indian High Commission for a passport but his application was rejected. It is therefore not possible for him to be removed to India and to date no other country has been willing to accept him. The details of Qasim's identity are not clear, including a lack of detail as to names, place of birth and residence³⁶. There have also been suggestions made by the Australian Government that he has not cooperated with DIMIA or followed correct protocols to enable his return to India. Qasim continues to deny these suggestions.

Abbas Al Khafaji's case

Abbas Mohammad Hasan Al Khafaji was born in Iraq in 1973. In around 1980, he fled to Syria before leaving for Australia in 1999. He arrived in Australia in 2000 without proper travel documents, was placed in detention and applied for protection as a refugee.

DIMIA found that Al Khafaji would have a well-founded fear of persecution if he returned to Iraq, but he was denied a protection visa because he was deemed to have effective protection in Syria. Under Australian law, the government has no obligation to protect non-citizens who have not taken all possible steps to enter and reside in another country other than Australia³⁷.

After being rejected by the RRT, Al Khafaji did not appeal. On 1 January 2001, his application was finally determined and DIMIA was obliged under the Migration Act to remove him as soon as reasonably practicable.

On 9 February 2001, Al Khafaji asked to go to Syria and suggested other countries if Syria refused to receive him. However, none of the countries to which applications were made, including Syria, agreed to his request. He therefore could not be removed and so contested the lawfulness of his ongoing detention in the Federal Court. He was ordered released from detention by Mansfield J of the Federal Court who stated that:

I find that the removal of [the respondent] from Australia is not "reasonably practicable" because there is not any real prospect of [the respondent]³⁸ being removed from Australia in the reasonably foreseeable future.

The Minister for Immigration then appealed this decision to the High Court which, by a small majority, found in the Minister's favour. The majority relied upon the reasoning that detention remains lawful if it is for the statutory and constitutionally-valid purpose of removal. In a separate application to the Minister, Al Khafaji applied again for refugee status. After almost five years of claiming protection from Australia, he was finally granted refugees status by the RRT in May 2005 following an application under section 48b³⁹ of the Migration Act.

The international legal framework and Australia's compliance

The nature of Australia's obligations under international law

"I believed Australia is a peaceful and democratic country and I believed I would receive justice here. Instead I am imprisoned forever without having any contact with the outside world, especially my family. It was only your kind letter that lightens my black dark world and gives me rays of hope to live." Letter to Amnesty International from a detainee, after spending three years in immigration detention.

Using irregular means to enter a country when seeking international protection may be some asylum-seekers' only option. To use arguments of sovereignty to justify denial of a person's right to seek asylum is contrary to the object and intention of the international human rights and refugee law framework.

The ratification of an international treaty is a voluntary act by which a state accepts to fulfil in good faith its obligations under that treaty. Article 26 of the Vienna Convention on the Law of Treaties provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Under Article 27, a state 'may not invoke the provisions of its internal law as a justification for its failure to perform a treaty'.

As the UN High Commissioner for Human Rights has observed:

Law, as any other institution, is subject to abuse. Apartheid South Africa was governed by laws that regulated oppression and led to horrific denial of dignity. The law that must guide us is that law which is capable of delivering justice and providing remedies for grievances. It is a dynamic and reliable institution that is capable of preserving the rights of all while adapting itself to the needs of a changing world. This is the role of human rights law⁴⁰.

Thus, while Australia has the sovereign power to protect its borders, it also has the obligation to comply with those treaties to which it is a party and with customary international law, including those provisions relating to the protection of human rights of refugees, asylum-seekers migrants and others in its territory or subject to its effective control.

Is detention in Australia arbitrary?

The UN Human Rights Committee recognised that the prohibition against arbitrary detention refers not only to detention that is against the law, but also to detention that is not just, appropriate, predictable and necessary in all the circumstances of the case⁴¹. This was also confirmed in *A v. Australia*⁴².

The UN Working Group on Arbitrary Detention (UNWGAD) has outlined a number of guarantees relevant to determining whether a situation of administrative detention is to be considered of an arbitrary nature⁴³. Such guarantees include ensuring that any asylum-seekers or immigrants who are placed in custody must be brought promptly before a judicial or other authority⁴⁴. They also require that a maximum period of detention should be set by law and that the custody may 'in no case be unlimited or of excessive length'⁴⁵. The asylum-seekers must be able to apply for a remedy to a judicial authority, 'which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned'⁴⁶. As such detention of an asylum-seeker may be considered arbitrary when it is not subject to judicial review or other appropriate review mechanism, or is for an excessive or unlimited period of time.

Numerous bodies have found that Australia's mandatory detention regime is arbitrary and in breach of international human rights law. These include the UN Human Rights Committee⁴⁷, the UN Working Group on Arbitrary Detention⁴⁸, the UN High Commissioner for Human Rights Special Envoy Justice Bhagwati⁴⁹, and the Australian Human Rights and Equal Opportunity Commission⁵⁰.

It is therefore relevant to look at what constitutes arbitrary detention, the principles safeguarding against arbitrary detention and some of the key findings with respect to Australia.

International Covenant on Civil and Political Rights

Article 9 of the International Covenant on Civil and Political Rights (ICCPR)⁵¹ recognises the right to liberty and security of a person and prohibits arbitrary detention. Article 9(4) guarantees the right to challenge the lawfulness of detention:

... anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Principle 11(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles) guarantees the right to be brought promptly before a judge or other judicial officer⁵². The purposes of the review before a judge or other judicial authority include: to assess whether sufficient legal reason exists for the arrest; to assess whether detention is necessary; to safeguard the wellbeing of the detainee; and to prevent

violations of the detainee's rights. This procedure may provide the detained person with their first opportunity to challenge the lawfulness of their detention.

The provisions of Article 9(4) of the ICCPR and of Principle 11(1) of the UN Body of Principles apply to all forms of detention, including immigration detention and to all human beings without discrimination, including refugees, asylum-seekers and rejected asylum-seekers.

The requirements that an individual be brought promptly before a judge or other judicial officer and be able to seek judicial review of his or her continuing detention are fundamental guarantees of a fair procedure and provide protection against arbitrary detention and other human rights violations. The UN Human Rights Committee charged with the task of providing interpretative guidance for and supervising implementation of the ICCPR, observed that effective judicial review of detention should be made mandatory⁵³ and that detention must be protected by due process of law⁵⁴.

General Comment No.8 of the UN Human Rights Committee also provides guidance on how to safeguard rights protected under Articles 9 of the ICCPR⁵⁵.

Australia's mandatory detention policy has been found on a number of occasions, both systemically and in individual cases, to violate the ICCPR, in particular Article 9(1) and (4). For example, in *A v. Australia* the UN Human Rights Committee upheld A's submission that there was a breach of Article 9(4) of the ICCPR as there was no effective judicial review of the grounds for detention. Importantly, the Committee held that the test of 'lawfulness' under Article 9(4) means lawfulness under the ICCPR, not under domestic law. It found that Article 9(4) requires judicial review of the lawfulness of detention that is not merely formal, with the power to order release if the detention is incompatible with the requirements of Article 9(1), or in other provisions of the ICCPR.

United Nations Working Group on Arbitrary Detention

In October 2002, following a visit to Australia, the UN Working Group on Arbitrary Detention released its report⁵⁶. The report raised several concerns about Australia's detention policies including the mandatory detention of unauthorised arrivals in Australia. It criticised the mandatory, automatic and indiscriminate character of detention under these policies, its potentially indefinite duration and the absence of judicial review. The report also raised concerns regarding the psychological impact of detention on asylum-seekers, the denial of family unity, the detention of children and the amendments to the *Migration Act* that restrict judicial review.

The Working Group made four recommendations and concluded that Australia should bring its policy in line with Articles 2, 9 and 10(1) of the ICCPR, to which it is a state party.

1951 Convention relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees⁵⁷ (the Refugee Convention) protects people who are outside their country of origin and who face a genuine risk of serious harm because of who they are or what they believe⁵⁸. Refugees lawfully in the territory of a state party enjoy full rights to freedom of movement (Article 26). Article 31(2) limits the way in which restrictions on their freedom of movement may be imposed on refugees⁵⁹ in the territory of the country of refuge.

The power of the state to impose a restriction on movement under Article 31(2) must be related to a recognised object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully or arbitrarily⁶⁰.

Amnesty International believes that Australia's mandatory detention regime is in violation of Article 31(2) of the Refugee Convention. This is because the necessity of detention in Australia is not determined on an individual case by case basis and is disproportionate to the objectives to be achieved given the range of viable alternatives that would achieve the same ends and the fact that detention is the most severe form restrictions on freedom of movement can take. Amnesty International considers that the particular problem of indefinite detention is indisputably contrary to the requirements of proportionality and necessity inherent in Article 31(2).

Australia's detention policy also compromises the ability of refugees to seek and enjoy asylum and is in breach of Article 31(1) of the Refugee Convention, which prohibits the imposition of penalties on refugees on account of their illegal entry or presence in the territory of a state party⁶¹. It is also of note that any actions, including arbitrary or prolonged detention, that would compel an asylum-seeker to abandon his or her claim and return to his or her country of origin or a place where he or she would be at risk of serious human rights violations, would amount to *constructive refoulement* and place Australia in breach of its obligations under customary international law and the Refugee Convention.

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

The Office of the United Nations High Commissioner for Refugees (UNHCR), in its Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (UNHCR Revised Guidelines on Detention), describes the detention of asylum-seekers as 'inherently undesirable'⁶². The general principle underlying the UNHCR Revised Guidelines on Detention is that asylum-seekers should not be detained⁶³. The UNHCR advises that the position of asylum-seekers is fundamentally different from that of other immigrants⁶⁴. It is not always possible for asylum-seekers to comply with Australia's immigration requirements as many are likely to have left with the barest necessities and very frequently even without personal documents⁶⁵.

The UNHCR has identified certain reasons detention might be exceptionally resorted to as long as it is clearly prescribed by the national law and is in conformity with general norms and principles of international human rights law⁶⁶. However, Australia's mandatory detention regime cannot be seen as consistent with the UNHCR's exceptional grounds, which stress that there should be a 'presumption against detention' and emphasises that alternatives to detention should generally be applied first⁶⁷:

...[i]n assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportionate to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period⁶⁸.

The requirement that detention should be subjected to administrative or judicial review is considered an essential safeguard against arbitrary detention⁶⁹.

In Australia, there is no capacity to challenge a detention order before such an independent body. In the worst case a rejected asylum-seeker can remain in detention without any prospect of release, should it not be possible to effect their removal from Australia.

UNHCR Executive Committee Conclusions on Detention

The issue of detention, and in particular the problem of prolonged detention, has been addressed in a substantial number of EXCOM Conclusions adopted by members of the UNHCR's Executive Committee at its annual EXCOM meeting. EXCOM Conclusion No.44⁷⁰ addresses the issue of detention most comprehensively, stating that detention should normally be avoided in

view of the hardship that it involves, and that refugees and asylum-seekers should be protected from unjustified or unduly prolonged detention.

Amnesty International is not satisfied that the Australian Government has adequately examined alternatives *to* detention (restrictions on movement that do not constitute detention) as opposed to other forms *of* detention (less oppressive forms of detention than formal closed detention centres). Moreover, the Australian Government should be required to demonstrate that monitoring arrangements or movement restrictions less severe than detention would not suffice.

1954 Convention relating to the Status of Stateless Persons

Australia is a party to the 1954 Convention relating to the Status of Stateless Persons (CSSP). In its Preamble, the Convention affirms the principle that human beings, ‘shall enjoy fundamental human rights and freedoms without discrimination’⁷¹ and considers the efforts made by the United Nations to ‘assure stateless persons the widest possible exercise of these fundamental rights and freedoms’.

The UNHCR Revised Guidelines on Detention clearly contemplate the risk of prolonged and indefinite detention, and identify the particular problem of indefinite detention of stateless persons. Guideline 9 provides that:

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release.

The UNHCR EXCOM Conclusions have dealt with the issue of statelessness on a number of occasions. EXCOM Conclusion No.78 deals with the prevention and reduction of statelessness and EXCOM Conclusion No.96 urges states to take steps to avoid cases of statelessness as well as to adopt measures leading to the grant of a legal status to stateless persons⁷². Rights accorded should include the right to freedom of movement (Article 26 CSSP), identity papers (Article 27 CSSP), travel documents (Article 28 CSSP), gainful employment (Articles 17–19 CSSP) and welfare (Articles 20–24 CSSP).

1989 Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC)⁷³ contains specific provisions that entitle children seeking refugee status or who are considered to be refugees to appropriate protection and assistance (Article 22). The CRC also outlines the rights of all children to be detained only as a measure of last resort and for the shortest appropriate period of time (Article 37).

The UN Committee on the Rights of the Child has expressed concern about the detention of children in Australian detention centres,⁷⁴ and the findings of the UN Human Rights Committee in relation to complaints made against Australia may also be understood to apply to children. In particular, the Committee’s findings in *Bakhtiyari v. Australia* related to the detention of children.⁷⁵

There is growing evidence of a range of clear breaches by Australia of the Convention on the Rights of the Child. Most recently, HREOC’s report *A Last Resort? National Inquiry into Children in Immigration Detention* found that Australia’s immigration detention system is fundamentally inconsistent with the CRC.⁷⁶ This is because Australia’s detention system fails to ensure that detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (Article 37(b) and (d)). In addition, the detention system fails to ensure that the best interests of the child are a primary consideration in all actions

considering children (Article 3(1)) and that children are treated with humanity and respect for their inherent dignity (Article 37).

As noted by HREOC, the average length of detention of children was one year, eight months and 11 days.⁷⁷

Australia's detention regime: an arbitrary practice

Australia's mandatory detention regime under the *Migration Act* is considered to be arbitrary on the basis that:

- There is no requirement that detention be justified in the individual case, taking into account considerations of reasonableness and proportionality.
- There is no requirement that detention be periodically subject to judicial review. The courts have no power to review the continued detention of an individual and to order his or her release. This has been confirmed by recent decisions of the Australian High Court.
- There is no viable mechanism, judicial or otherwise, to prevent detention being for a prolonged or indefinite period of time. The few exceptions that allow for the release from detention are, in practice, too narrow in scope and too rarely applied to be considered as viable alternatives to detention.

The practice of indefinite detention in Australia

The prolonged or indefinite nature of detention under Australia's mandatory detention regime is particularly concerning. Prolonged and indefinite detention are elements of arbitrary detention.

The most egregious examples of indefinite detention in the context of immigration detention in Australia are those where a person has been finally determined not to have a claim to protection under the Refugee Convention, is not awaiting a decision from the Minister for Immigration in exercise of her discretionary powers under s. 417 *Migration Act*, and has no prospect of removal or deportation in the reasonably foreseeable future. As this report outlines, many such individuals in Australia are stateless.

Ahmed Al-Kateb's case

In December 2000, Ahmed Ali Al-Kateb arrived in Australia by boat without a passport or visa. He was born in Kuwait in 1976 and is a Palestinian. He had lived for most of his life in Kuwait, except for a short period when he lived illegally in Jordan. He is considered to be stateless and therefore is not considered as a national by any state under the operation of its law.⁷⁸

In January 2001, Al-Kateb applied for protection as a refugee in Australia. His application for asylum was rejected by DIMIA, the RRT and the Federal Court. In June 2002, Al-Kateb told DIMIA and, two months later, the Minister for Immigration, that he wanted to go to Gaza or Kuwait. The Migration Act required that he was returned 'as soon as reasonably practicable'. Approaches made to several states, including to Israel (for Gaza), Kuwait, Egypt and Jordan, were unsuccessful.

Al-Kateb sought a declaration from the Federal Court that he was unlawfully detained and an order in the nature of habeas corpus directing his release from detention.⁷⁹

In April 2003, His Honour Justice von Doussa of the Federal Court dismissed Al-Kateb's application and held that:

the possibility of removal in the future remained and the officers of [the Department] and the Minister were continuing to make enquiries. In this case ... I am not satisfied that [Department] officers are not taking all reasonable steps to secure the removal from Australia of the [appellant]. However, I consider the evidence does establish that removal from Australia is not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future.⁸⁰

He was, however, released by consent order of the Federal Court pending the hearing of his appeal and following an earlier similar decision of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri (Al Masri)*, which had ordered the release of the stateless detainee Al Masri because removal could not be realised.⁸¹ Al-Kateb gave notice of appeal of his earlier Federal Court decision to the Full Court of the Federal Court and the appeal was removed to the High Court.⁸²

On the basis of a wide interpretation of the scope of the Australian Parliament's constitutional power to make laws with respect to aliens ('the aliens power') the High Court found in Al-Kateb's case that Australia's detention regime is constitutional and that rejected asylum-seekers can be kept in immigration detention indefinitely without legal recourse until such time when their removal can be effected. This was because the High Court considered that the power of the *Migration Act*, which requires mandatory detention of 'unlawful non-citizens', to be provided for under the Constitution, if it is for the purposes of effecting removal.

Further, the High Court did not consider the detention of 'unlawful non-citizens' to be of a punitive nature. Detention as a punitive measure can only be authorised by the judiciary under the Constitution. As the *Migration Act* is unambiguous in its intention to deny detainees the right to liberty, the court also found that the judiciary has no room to interpret the *Migration Act* in a way that honours Australia's international human rights obligations (such as those under the Convention on the Rights of the Child, the ICCPR and the Refugee Convention).

In two decisions by the High Court regarding children, the court found that detention provisions in the *Migration Act* are constitutionally valid and are comprehensive in that they lawfully provide the detention of child asylum-seekers who arrive undocumented in Australia.⁸³ The courts similarly found that it was not open to them to take into account Australia's international legal obligations when interpreting lawfully enacted and unambiguous statutory law. Mandatory detention of children has thus been confirmed as lawful under Australian domestic law, even

though it is in breach of international human rights law, including among other things, the principle of the best interest of the child.

The conclusions of these recent High Court decisions can be summarised as follows:

- Indefinite detention is permissible under the Constitution even where it is not possible to deport a person in the reasonably foreseeable future, as long as the government retains the intention to deport.⁸⁴
- International human rights obligations do not constrain the executive's power to detain 'aliens.'⁸⁵
- The power to detain 'aliens' is not constrained by considerations of 'reasonableness' or 'proportionality' in order to avoid being characterised as 'punitive' because such considerations are not directly relevant to a system of mandatory detention.⁸⁶
- No court, including the Family Court, has the power to order the release of a child from detention, even if it is in the child's best interests to do so.⁸⁷

Under the *Migration Act* the executive arm of government has been empowered by the legislature to detain 'unlawful non-citizens' without individual consideration or independent and periodic review. This power, and the interpretation by a majority of the High Court of Australia that it is constitutional, has effectively rendered the judiciary powerless to remedy the injustice of indefinite detention of failed asylum-seekers.⁸⁸

Despite the dismissal of the *Al-Kateb* appeal, the High Court decision provides little support for the government's position that the mandatory detention regime is in compliance with international human rights standards. The majority opinion does not attempt to make the argument that its findings are human rights compliant. On the contrary, it maintains that international law is not relevant to the constitutionality of the power to detain non-citizens, considering there to be no basis for implying a requirement to interpret the legislation in accordance with international human rights standards.

Justice McHugh noted that:

... [T]he justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights.⁸⁹

In response to the *Al-Kateb* decision the Minister for Immigration announced that she would review the detention of 24 rejected asylum-seekers directly affected by the High Court's finding.⁹⁰ While Amnesty International welcomed the Minister for Immigration's announcement, the organisation is concerned that their releases were decided on the basis of a non-compellable, non-enforceable and non-reviewable discretion of the Minister for Immigration. In the present instance, the consequence was that the Minister for Immigration:

- Granted bridging visas in nine cases. Seven of those given visas were already living in the community, having been released following earlier decisions in the cases of *Al Masri* and *Al Khafaji*.
- Did not grant bridging visas in 13 cases. Of those, 10 rejected asylum-seekers were already in detention and the Minister for Immigration decided the other three should be re-detained.
- Requested further information in two cases.

The Minister for Immigration said that visas were granted where the asylum-seeker was cooperative with removal arrangements, his identity was firmly established and removal was likely to be protracted. The Minister's conclusions about questions of cooperation, establishment of identity and the likelihood that removal will be protracted are a matter of opinion of the executive arm of government and are beyond the reach of the courts.

In the event of release on a Bridging Visa E (BVE)⁹¹, conditions of release of which Amnesty International considers to be unnecessarily restrictive are also beyond the reach of the courts. BVEs do not include the right to work, Medicare,⁹² or any other supportive benefits from the government, including the Pharmaceutical Benefits Scheme.⁹³ The result is a severe restriction on the abilities of asylum-seekers to provide for themselves and their families and to access adequate health care.

At the time of the Minister for Immigration announcement, Amnesty International asked the government to legislate immediately to ensure that immigration detention in Australia complies with its international human rights obligations. Amnesty International called on the government not to return anyone who was affected by the High Court decision to immigration detention.

In March 2005, the Minister for Immigration announced the introduction of the Removal Pending Bridging Visa, which Amnesty International maintains is an inadequate response to the problem of indefinite detention.⁹⁴ As at June 2005, only 17 people had been invited by the Minister for Immigration to apply for the visa.

While the capacity to detain indefinitely remains under Australian law, Australia's policies continue to breach its international human rights obligations.

Is detention in Australia punitive?

The Australian Government has stated that its mandatory detention policy is intended to act as a deterrent against illegal migration⁹⁵ but denies that it is punitive. However, in order to achieve its stated aim of deterring future asylum-seekers, the government penalises those who have already arrived in Australia claiming asylum, to underline the consequences of irregular arrival.

Existing national case law does not provide a conclusive resolution of the question of whether the detention policy is punitive. The majority of the High Court in *Al-Kateb* found that detention is not punitive if the purpose is to achieve some legitimate non-punitive object.⁹⁶ In *Re Woolley* Justice McHugh said, that if the purpose of detention was to exclude a person from the community while their visa application was being processed, this must be done within a 'reasonable time' otherwise 'the proper inference will ordinarily be' that such detention is punitive.

In Amnesty International's view, it is not possible to separate the object of the legislation from its effect. Consequently, even though it might not be the government's intention, in its effect the mandatory detention policy is punitive. This becomes apparent when considering the effect of the policy on individual detainees' ability to enjoy human rights, the violations of which have led to Australia receiving international condemnation.

The principle that detention of refugees and asylum-seekers must be reasonable, proportional and necessary implies that detention for the purpose of deterrence is impermissible.⁹⁷ The UNHCR Revised Guidelines on Detention make clear that detention for the purpose of deterring would-be asylum-seekers is contrary to the norms of international law: 'For detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law but with Article 31 of the [Refugee] Convention and international law'. Guideline 3 provides that:

Detention of asylum-seekers ... as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the

norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country.

Amnesty International considers that Australia's detention policy compromises the ability of refugees to seek and enjoy asylum in Australia and is in breach of Article 31(1) of the Refugee Convention, which prohibits the imposition of penalties on refugees on account of their illegal entry or presence in the territory of a state party.

While having a direct and often shattering impact on the mental health of individual detainees, detention in Australia and on Nauru can also result in the obstruction of access to legal advice and information essential to asylum-seekers for pursuing their asylum claims effectively. Faced with the prospect of prolonged detention while their claims are assessed, with inadequate legal representation beyond an appeal to the RRT and limited access to other essential services and support mechanisms, some of those who have been detained for protracted periods have chosen to forgo their claims for asylum. Amnesty International has received reports of cases of asylum-seekers who have 'opted' for removal in the belief that they have no other option.⁹⁸ Amnesty International has received reports of those who have returned being subject to serious human rights abuses including kidnap, torture and even death.

Most recently Amnesty International was informed of the case of an Iraqi Temporary Protection Visa (TPV) holder who after waiting for a decision for approximately five years on his application for permanent residency, returned to Iraq in April 2004 when his application was denied. He was then kidnapped and killed by his captors who accused him of spying for Australian Intelligence.⁹⁹

In the case of returnees to Iraq, DIMIA's report *Westernisation (Situation of Western Returnees in Iraq)* describes the situation which may face returnees deemed by local authorities as 'western'. The document details the fear of many asylum-seekers and refugees who feel that by merely returning to Iraq, "insurgents would assume that they have been sent back to spy on the insurgency...that by living in Australia, they are imputed as being westernised and that they will be treated suspiciously".¹⁰⁰ The document goes on to discuss the case of a permanent resident of Australia who returned to Iraq and was killed in the southern region, near the town of Samawa.¹⁰¹ Also, two brothers who returned to Iraq from Australia in March 2004 were tracked down, threatened and interrogated by masked gunmen within three days of their arrival. The brothers were questioned in Najaf about their Australian connection. The two have since fled to Iran along with their families.¹⁰²

A report published in September 2004¹⁰³ drew upon interviews with 40 individuals who were refused protection in Australia and returned to their home countries. In conducting interviews overseas the report found that some returnees were removed from immigration detention in Australia and were immediately detained upon arrival in their home country, others faced physical and psychological abuses and many were forced to again flee their home countries. The report highlighted instances of the Australian government supplying returnees with inadequate documentation which led to administrative problems, bribery, torture and detention in the home countries. Following deportation of a person who has spent a prolonged period in immigration detention in Australia, the Australian Government has stated that "Australia is not responsible for the future well-being of that person (a rejected asylum-seeker) in their homeland".¹⁰⁴

The impact of detention on mental health

Amnesty International is concerned that asylum-seekers in detention are experiencing significant levels of mental illnesses. There is mounting evidence that detainees, particularly those who are kept in prolonged or indefinite detention, are at high risk of experiencing chronic depression, incidents of self-harm or attempted suicide. Studies published in the *Australian and New Zealand*

Journal of Public Health (December 2004) confirm earlier clinical consensus that high levels of psychopathology of detainees is attributable to the experience of detention.¹⁰⁵ Amnesty International notes the Australian Human Rights and Equal Opportunity Commissioner Dr Sev Ozdowski's position that detention itself is a primary cause of mental illness, and as such a sufferer cannot be treated whilst that person remains in detention.

This position has been confirmed by the Royal Australian and New Zealand College of Psychiatrists, in their response to an announcement by the Minister for Immigration¹⁰⁶ that extra medical staff would be provided within the Baxter detention centre. The College stated that the changes were: 'grossly inadequate in terms of the needs of this [detainee] population',¹⁰⁷ and that immigration detention 'is not suitable for the treatment of the mentally ill, that there should be immediate release of those with mental illness and mental disorder into appropriate psychiatric facilities. Detention centres don't operate as hospitals and in no way can be said to be therapeutic'.¹⁰⁸

The Federal Court on 5 May 2005 effectively found that the Commonwealth had breached its duty to take reasonable care of two detainees (referred to as 'M' and 'S') held in mandatory detention at Baxter.¹⁰⁹ Amnesty International has questioned the appropriateness of placing mentally ill detainees who are experiencing psychological distress in isolation in the Baxter Management Support Unit.

Amnesty International continues to receive reports of abuse in detention centres from detainees and their advocates. These include allegations that people are being placed in isolation in the Management Support Unit (MSU) as 'punishment' for alleged inappropriate behaviour, as opposed to the stated purpose of monitoring those who are at risk of self-harm or of harming others. There have been reports of detainees being held in the MSU or medium-security Red 1 compounds for weeks, even months, at a time for anything from spitting at an employee, refusing to obey an instruction, or inflicting self-harm.

Amnesty International is particularly concerned about the mental health of children held in immigration detention and the high incidence of self-harm and attempted suicide. For example, between January 2001 and April 2002 there were 21 reported cases of children aged between 10 and 18 years attempting suicide, amongst a population of approximately 700 children then in detention.¹¹⁰ The Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention received a wide range of evidence that indicated detention has a significantly detrimental impact on the mental health of some detained children. Evidence received by the HREOC Inquiry showed that the longer children were held in detention, the more their mental health deteriorated.¹¹¹

Mental health in detention: the Commonwealth breaches its duty of care

In a landmark decision, the Federal Court held on 5 May 2005 that the Commonwealth had breached its duty to take reasonable care of two Iranian detainees held in Baxter immigration detention centre. The applicants known as 'M' and 'S' had been detained in Australia for approximately five years. Both have been diagnosed as suffering from 'major depression'.¹¹²

The court found that health care in Baxter is provided through a complex outsourcing arrangement involving several different companies and service providers.¹¹³ This includes one contracted psychiatrist, Dr Andrew Frukacz, who gave evidence that he visits Baxter once every six to eight weeks.¹¹⁴ The Management Support Unit and Red 1 are two compounds in Baxter used by the centre to manage detainees with mental health problems.

The Management Support Unit is used for 24-hour surveillance¹¹⁵ and supervision of detainees who may be threatening the safety of themselves or others or the good order of the centre.¹¹⁶ An accommodation room is approximately three metres square; it has a window with no view and no furnishing but for a mattress.¹¹⁷ Detainees are allowed outside their rooms for only four hours each day.¹¹⁸ The Management Support Unit is the only area equipped to provide the two highest levels of suicide and self-harm watch.¹¹⁹ Detainees are usually sent to Red 1 from the Management Support Unit for 'behavioural modification purposes',¹²⁰ in the process of returning them to their normal compound.¹²¹ In Red 1, detainees are limited to four hours outside their rooms per day.¹²²

Since December 2003, 'S' had been taking anti-depressant medication prescribed by a Baxter GP. Despite multiple acts of self-harm and demonstrated behavioural issues he did not see psychiatrist Dr Frukacz until 12 February 2005.¹²³ This followed a referral by a Baxter GP on 10 November 2004. 'S's medication was altered numerous times by various GPs and he was placed in the Management Support Unit on two occasions for an estimated total of two weeks. He was also detained in Red 1 for a single period of two months. 'M' had been in Baxter since early 2003 and was prescribed anti-depressant medication in May 2003. Although he had a history of property damage and depression, he did not see psychiatrist Dr Frukacz until 12 February 2005.¹²⁴

Independent psychiatric assessments provided for the court on behalf of the applicants advised that Baxter was not an appropriate place of treatment for detainees suffering mental illness of this magnitude. Dr Dudley wrote of 'S' on 30 December 2004:

I believe that prolonged detention has contributed substantially to inducing his depression, and is making his condition worse. I believe he should not be living in detention, but rather should be supported in the community. Because of the severity of his condition, he needs further psychiatric¹²⁵ treatment, preferably in an inpatient facility.

By comparison, Baxter's own psychiatrist Dr Frukacz found that the only reason that 'S' or 'M' should be transferred to Glenside Mental Health Facility was for treatment of electro compulsive therapy, which he deemed the only psychiatric treatment not already available in Baxter.¹²⁶ He also felt that the applicant's depression was related to existential issues and that the place of detention, whether at Baxter or Glenside, would not affect the applicant's mood.¹²⁷

The court noted a continuous passing on of health reports between DIMIA, the detention services provider GSL and other contracted providers. No action was taken on the part of any party to assess or alter the treatment plan being followed for 'S' and 'M' as prescribed by Dr Frukacz.¹²⁸ The court held that once the independent and opinions of Drs Dudley, Richards and Jureidini¹²⁹ were received which conflicted with Baxter psychiatrist, it became unreasonable for the Commonwealth to continue to rely on the advice of Dr Frukacz without obtaining a second

medical opinion.¹³⁰ Such psychiatric assessments found that Baxter was not an appropriate place of treatment for detainees suffering mental illness of this magnitude.

The court found that a duty of care existed between the Commonwealth and the applicants, which was breached when an inadequate level of psychiatric care was provided to the applicants.¹³¹ This was largely the result of an uncoordinated and outsourced health care program, the nature of which called for regular auditing. The key reason for the breach was the failure of the Commonwealth to conduct formal audits and monitoring of health services.¹³²

Of the 326 detainees in Baxter at the time of the hearing, it was estimated that about one-third of these were long-term detainees. The DIMIA manager of Baxter gave evidence that it is likely most of the detainees receiving psychiatric treatment and medication for depression are from that group of long-term detainees.¹³³

The applicants were transferred to the Glenside Mental Health Facility prior to the conclusion of the case. The court would have made the order for the transfer of the detainees from Baxter to Glenside had that not already occurred.¹³⁴

It is unacceptable that prolonged or indefinite detention that can affect the mental health of detainees should be beyond the reach and scrutiny of the courts. The negative human rights consequences of the current detention regime in Australia should not be allowed to continue with the existing inadequate levels of oversight.

The wrongful detention of Cornelia Rau

Australian permanent resident, Cornelia Rau, was mistakenly detained as an 'unlawful non-citizen' for 10 months, including four months in Baxter. Although suffering from a serious mental illness, she was held in Baxter's isolation unit, where she was not provided with the mental health assistance that she needed. Rau's wrongful detention received wide press coverage and the government announced a closed inquiry, the Palmer Inquiry, into the incident. Rau reported that whilst in Baxter she was "locked up like a caged animal".

Amnesty International expressed concern at the unlawful detention of Rau and considers that it highlights the serious flaws in and injustice of the mandatory detention regime. Her detention underscores the need for an immediate amendment to the Migration Act to end the automatic, mandatory and unreviewable detention of unlawful non-nationals. Amnesty International maintains that implementation of the recommendations in this report would ensure that wrongful detentions such as this would be avoided and, at the very least, independent judicial scrutiny of detention would identify and remedy errors at an early stage.

The wrongful deportation of Vivian Alvarez Solon

In 2001, an Australian citizen, Vivian Alvarez Solon, was wrongfully deported to the Philippines. Solon was picked up by police in Lismore, Australia, after a traffic accident and was subsequently sent to the Philippines Consulate in Brisbane. At the consulate she claimed to have no family members in either Australia or the Philippines and could not provide papers or identification. Several months later she presented herself at a NSW hospital with injuries. Staff could not confirm her identity and when she informed them that she was waiting on a citizenship application, hospital staff contacted DIMIA.

Although she was listed by the police as a missing person, DIMIA failed to recognise her as an Australian citizen and deported her several months later to the Philippines, her country of birth.

After it was publicly revealed that she had been wrongfully deported in April 2005, she was finally located on 11 May 2005, living in a hospice under the care of the Missionaries of Charity Convent east of Manila in the Philippines. She had been in their care for the previous four years since being deported from Australia. Solon left two children behind in Australia including a son who was five at the time of her deportation. He has spent the past four years in foster care

Amnesty International Australia's campaign to End Indefinite Detention

The aim of Amnesty International Australia's (AIA) campaign to End Indefinite Detention is to ensure that unauthorised arrivals who seek asylum in Australia are not detained other than in strictly limited circumstances in accordance with international human rights and for a finite period of time. This requires an end to mandatory detention and the enactment of legislation to introduce a statutory maximum duration for detention and automatic and regular review of immigration detention decisions.

AIA is campaigning for the release of those who are arbitrarily detained due to prolonged or indefinite immigration detention in Australia and on Nauru. AIA is also calling on the government to adopt alternatives to detention that allow the reception of asylum-seekers into the community, including the introduction of a model of *complementary protection* for those who require Australia's protection but do not meet a full and inclusive definition of 'refugee'.

To bring an end to prolonged and indefinite detention, AIA believes it is incumbent on the government to ensure that the *Migration Act* is consistent with Australia's international human rights obligations. It must ensure that no individual is indefinitely and arbitrarily detained, and must take account of the particular vulnerability of children and stateless people.

For more information visit www.amnesty.org.au/refugees.

Chapter 2: Indefinite detention – particularly vulnerable asylum-seekers

A consequence of Australia's mandatory detention policy is that even the most vulnerable asylum-seekers or persons whose claims have been dismissed can be detained for a prolonged or indefinite period, regardless of their individual circumstances.

It is beyond question that the deprivation of liberty is likely to have a detrimental impact on the psychological and physical well-being of an individual.

Most asylum-seekers detained in Australia have already witnessed or experienced grave human rights abuses such as torture, trauma or serious forms of discrimination. They are more vulnerable to human rights violations simply because of their status as asylum-seekers. This is because, among other things, they are without protection of their country of nationality, disconnected from their support structures and with limited knowledge or understanding of their rights in Australia

The following section considers the situation of groups of particularly vulnerable detainees. Whilst members of each group identified below are vulnerable for different reasons, the special needs of persons who fall within these categories should be considered in determining whether it is reasonable to detain them and if it is necessary and proportionate in the circumstances of the individual case. These groups include:

- Stateless persons
- Children
- Family groups
- 'Pacific Solution' detainees.

Stateless persons

Stateless persons are those people who are 'not considered as a national by any state under the operation of its law'.¹³⁵ Amnesty International maintains that such persons have been rendered particularly vulnerable under Australia's mandatory detention regime.

Where a stateless person has been unable to establish a claim to refugee status, is unable to be returned to their country of former habitual residence, and has not been granted any form of *complementary protection*, prolonged or indefinite detention, possibly for life, is the consequence.

Examples of stateless persons in the world include, among others, Palestinian refugees, some Roma people in Europe, Bedouins and their descendents resident in the United Arab Emirates who cannot prove that they were born in the country, and ethnic Nepali Bhutanese refugees who were stripped of their nationality and expelled from Bhutan.

The High Court decision in *Al-Kateb v. Goodwin* means that stateless asylum-seekers cannot be released from detention on the basis that their detention may be indefinite, even where there is no possibility of deporting that person in the reasonably foreseeable future. In effect, therefore, a stateless person who is subject to mandatory detention in Australia has no power to seek, much less obtain, a remedy for their arbitrary and indefinite detention. Review of indefinite detention of stateless asylum-seekers is therefore entirely a matter for the Minister for Immigration, on the basis of a non-enforceable, non-compellable, non-reviewable discretion. This has been confirmed by the introduction of the Removal Pending Bridging Visa (RPBV), which is only offered to those people whom the Minister for Immigration considers eligible.¹³⁶

The indefinite detention of Mohammed Hassanat*

Mohammed Hassanat is a Bedouin who arrived in Australia from Kuwait in July 2004. He was permitted entry to Australia using a Spanish passport that contained a valid visa.

Hassanat advised that he is not a Spanish national and in his time in Australia has never claimed to be so. As a Bedouin, Hassanat obtained a false Spanish passport in Kuwait in order to gain work rights and avoid persecution by Kuwait authorities. Hassanat has consistently advised Australian immigration of his identity and that he is from Kuwait, although Amnesty International notes that staff at Villawood immigration detention centre refer to Hassanat as "Spanish, but he speaks a Kuwait language".

Shortly after arriving in Australia, Hassanat lodged an application for a protection visa. While this application was being assessed Hassanat held a bridging visa allowing him to remain lawfully in Australia but not able to work or to have access to Medicare. By 14 February 2005 DIMIA still had not reached a decision regarding Hassanat's application for refugee status. At this stage Hassanat had no finances and it was no longer possible for him to remain in the refuge where he was living. Hassanat told Amnesty International: "I was not given any indication when my case would be decided and I could not continue living in such circumstances, with no money, no job and nowhere to live". This led him to withdraw his protection visa application.

General procedure in such a situation is that the individual would be required to depart Australia within 28 days of the withdrawal. In the case of Hassanat who did not possess a valid travel document, this was not possible and he was placed in a variety of institutions including a state police station, jail and in a psychiatric hospital. Within 14 days of withdrawing his application, Hassanat was placed in immigration detention at Villawood in March 2005.

Since being in immigration detention Hassanat has not made any further applications to remain in Australia and has advised Amnesty International that he will voluntarily depart Australia as soon as possible. Hassanat informed Amnesty International that while in Villawood, "I have attempted suicide on seven occasions and took part in a hunger strike, and I did not receive any attention for this".

Hassanat recognises that Kuwait authorities are unlikely to grant him a travel document or passport to return considering he is of Bedouin minority and that he left the state as a Spanish national. This leaves Hassanat in a position where he may be held indefinitely at Villawood. Hassanat told Amnesty International: "I just want to leave Villawood. I don't care where I go. I want to go to a country where human rights are respected. I just want this to end". When asked what he wanted from Australian authorities Hassanat simply responded that he "wants to be able to leave".

DIMIA has requested that Kuwait authorities issue a travel document to permit Hassanat's return to the state. To date no document has been issued.

* The name has been changed to protect the person's identity. He was interviewed by Amnesty International on 26 May 2005.

Children

In its Revised Guidelines on Detention, the UNHCR provides that minors who are asylum-seekers should not be detained. In the case of children accompanying their parents, all

alternatives to detention should be considered. The Australian Government has not put any time limits on the immigration detention of children.

In the absence of judicial review of the necessity of detention, a child can be born and potentially spend a considerable part of his or her early years in detention. So far, the longest a child has been in detention is five years, five months and 20 days. The child and his mother were ultimately assessed as refugees.

As confirmed in HREOC's report, *A Last Resort?*, the immigration detention of children in Australia breaches Article 37 of the CRC, which provides that children should only be detained as a matter of last resort and for the shortest appropriate period of time.

The government should amend the *Migration Act* to ensure full compliance with the CRC. As at June 2005, this had not taken place.

A stateless child in need of a home

Virginia Leong, a Malaysian national, was placed in detention in 2001 after she was caught trying to leave Australia on a false passport. At the time she was two months pregnant with her daughter Naomi who was subsequently born in detention. Naomi spent the first three years of her life in Villawood Detention Centre. Naomi has neither Australian nor Malaysian citizenship, and as no country will accept her as a national is considered to be stateless.

In May of 2005, Virginia and Naomi were released from detention on a bridging visa. No explicit reason was given as to why they were released other than that the decision had followed long discussions between Leong, her lawyer and DIMIA. Leong's visa allows her to work and obtain Medicare benefits. Naomi remains on a visa without access to Medicare.

The mother and daughter's plight came to public attention when psychiatrist Dr Michael Dudley revealed that Naomi had been 'banging her head against a wall' and was often mute and unresponsive when her mother was distressed. The state of Naomi's mental health is consistent with research reported by the Australia and New Zealand College of Psychiatrists, which shows that children in long-term detention experience mental health disorders.

Naomi will remain a stateless child unless the Australian or Malaysian government grants her citizenship. She does not automatically qualify for either. Her father is a Hong Kong national and not an Australian or Malaysian citizen. Although Malaysian authorities have urged that Naomi apply for citizenship based on humanitarian grounds, it is an offer her mother Virginia has refused. Virginia has a seven-year-old Australian son in Sydney whom she has not seen since being detained in Villawood in 2001 and whom she refuses to leave behind.

Legal challenges to the detention of children

Several avenues to release children from immigration detention through Australia's courts have been pursued without success. The two most significant cases in the High Court of Australia are *B and B*¹³⁷ and *Re Woolley*.¹³⁸

B and B case

The B and B case relates to the immigration detention of a family of five children. The mother and her five children had been detained since their arrival in Australia in January 2001, while they pursued all available avenues for seeking asylum in Australia.

The father had arrived in Australia separately from his family in October 1999. He was initially released in August 2000 on a protection visa. In April 2002, as a result of new information received by the government, his visa was revoked. He was sent back to detention in December 2002.

The Family Court, in accordance with the CRC, held that children's welfare is the primary consideration in all decisions affecting them and they should be released from detention if that's in their best interests¹³⁹ The Family Court released the Band B children, subject to an appeal to the High Court.

On appeal, the High Court found that the Family Court could not release children from detention, as it could only hear matters relating to marriage, divorce and access and custody of children. Any Family Court orders to release children from immigration detention were overturned.

In March 2002, the family had also made a complaint to the UN Human Rights Committee. They claimed they had been arbitrarily detained in Australia and would be subject to torture or cruel, inhuman or degrading treatment or punishment if returned to Afghanistan (in breach of Article 7 of the ICCPR).

The HRC found that:

- The first period of the father's detention from October 1999 to August 2000 was undesirable, but not arbitrary or in breach of the ICCPR.¹⁴⁰
- The detention of the mother for two years and ten months and her children for two year and eight months was arbitrary and therefore breached Article 9(1) of the ICCPR.
- The absence of a discretion for a domestic court to review in substantive terms the justification of the mother's detention (which was, or had become, arbitrary) constitutes a violation of Article 9 paragraph 4.¹⁴¹
- The proceedings before the Family Court seeking an order for the children's release (which was granted on an interim basis) satisfied the requirement for judicial review of their detention. That is, the Family Court's order resolved the breach of Article 9(4) of the ICCPR in the case of the children.¹⁴²
- Article 7 claim was not substantiated because they failed to establish they would directly or indirectly suffer torture or cruel, inhuman or degrading or punishment.¹⁴³

Re Woolley case

Re Woolley was an application for habeas corpus¹⁴⁴ and sought an injunction to end the continuing detention of four child asylum-seekers from Afghanistan. The application was made on the basis that the provisions of the *Migration Act* that provide for detention of children. The high Court found that:

- The Constitution allowed parliament to legislate for the immigration detention of children and adults.
- The *Migration Act* did not distinguish between child and adult ‘unlawful non-citizens’ and contemplate that children would be detained.
- While children may not have the capacity to request their own removal from Australia, parents in their capacity as guardian do have the capacity to exercise immigration decisions on a child’s behalf and could therefore request removal on their behalf.

A last resort

In April 2004, HREOC released its report, *A Last Resort? National Inquiry into Children in Immigration Detention*, on the effects of detention on children. The HREOC report provides a comprehensive analysis of the situation of children in immigration detention in Australia during 1999–2003. The report was the first of its kind to find that the immigration detention of children was contrary to the CRC and was damning of Australian policy that had seen the detention of thousands of children for prolonged periods. In addition to the fact that there can be little justification for detaining children, the rate of recognition of child asylum-seekers should suggest that detaining them is unnecessary.

The HREOC report found that Australia’s immigration detention laws as applied to unauthorised arrival children create a detention system that is fundamentally inconsistent with the CRC.

The HREOC report further found that:

- Children held in immigration detention for prolonged periods are at high risk of mental harm. DIMIA repeatedly failed to implement mental health professionals’ recommendations to remove particularly ill children and their parents from the detention environment. This amounted to cruel, inhuman or degrading treatment, which breaches Article 37(a) of the CRC. 3
- Children were not protected from all forms of violence, in contravention of Article 19 (1) of the CRC.
- Children did not enjoy the right to the highest attainable standard of physical and mental health, in contravention of Article 24(1) of the CRC.
- Children with disabilities did not enjoy the right to a full and decent life, in contravention of Article 23(1) of the CRC.
- Children did not enjoy the right to appropriate education on the basis of equal opportunity, in contravention of Article 28(1) of the CRC.

The HREOC report exposes the harsh impact of detention on children and their families, and highlights the government’s repeated failure to protect children from the harm caused by their detention. It details numerous case studies including the case of a 13-year-old boy who, in a seven month period during his detention, tried to hang himself twice and engaged in acts of self-

harm on eight occasions. The HREOC report also records various health reports, including the 2003 Steel report, which reports on the situation of 20 children in a remote detention centre. It found that ‘all but one child received a diagnosis of major depressive disorder and half were diagnosed with Post Traumatic Stress Disorder (PTSD)’.¹⁴⁵

Numerous reports have found that detention causes extreme psychological distress, particularly for children who are unable to understand why they are being detained.¹⁴⁶ Amnesty International has expressed concern about the impact of detention on the development of children, both in the short and long term. This includes their emotional wellbeing, their ability to form relationships with peers, and the capacity to practice their religion, culture and language.

The HREOC report recommended that all children held in immigration detention centres or RHPs should be released with their parents and that Australia’s immigration laws should be amended in line with the CRC.

Impact of indefinite detention on children

Ahmed* is a 13-year-old boy who arrived in Australia by boat with his parents in April 2001. They were automatically detained because they did not have proper travel documents.

Ahmed spent approximately two years in Woomera, including eight months in the Woomera RHP. As a result of his father's separation from the rest of the family, Ahmed showed serious signs of depression and became suicidal. Despite recommendations by health professionals to give the family a bridging visa and release them into the community, DIMIA reunited them back in the Woomera immigration detention centre. Between May and November 2002, Ahmed attempted to hang himself twice and self-harmed by cutting himself on at least eight occasions.

In January 2003, his family was transferred to the Baxter immigration detention centre. With both parents severely depressed and his father having attempted suicide several times, Ahmed's mental health and behaviour deteriorated significantly. He was the subject of 20 child protection notifications by the South Australian Family and Youth Services (FAYS) and other health professionals, which repeatedly recommended his release from detention.

Ahmed's situation was documented in HREOC's report, *A Last Resort?* According to psychiatric and psychological assessments, Ahmed exhibited clear signs of 'severe stress' and 'deep-seated trauma'.¹⁴⁷ It was widely recognised by the health professionals with whom the family had contact that the family's mental health conditions could not be treated effectively in the detention environment.

A psychiatrist at the Women and Children's Hospital in Adelaide reported to the HREOC inquiry: "When I asked if there was anything I could do to help him, he told me that I could bring a razor or a knife so that he could cut himself more effectively than with the plastic knives that are available".

After three years in detention, the family was granted refugee status by the Refugee Review Tribunal in May 2004 and Ahmed was released from Baxter. It took three years from the start of the deterioration of his mental state for the family to be released into the community.

The Australian Government justifies the detention of children like Ahmed on the basis that their detention deters people smugglers from bringing people to Australia. Amnesty International believes that the detention of child asylum-seekers would therefore amount to the punishment of innocent children for the actions of people smugglers.

* The name has been changed to protect the child's identity.

The government rejected the findings and recommendations of the HREOC report and dismissed claims that the mandatory detention of children in Australia was inconsistent with the CRC.¹⁴⁸

Amnesty International welcomes the noticeable increase of the number of children released since 2002, which was achieved through the granting of permanent and temporary protection visas and bridging visas. In 2002, when the UN Working Group on Arbitrary Detention visited Australia, 170 children were in detention and this was reduced to 68 by June 2005. Even so, the Australian Government has not conducted any review of the detention of children under the *Migration Act* and children are still being held in immigration detention in Australia for prolonged or indefinite periods of time.

Unaccompanied children

Unaccompanied minors are child asylum-seekers who arrive in Australia without a parent or guardian. They are subject to the same mandatory detention policy as other unauthorised arrivals and can be detained indefinitely.

The HREOC report, *A Last Resort?*, found that unaccompanied children did not receive special protection and assistance in the detention environment, in contravention of Article 20(1) of the CRC.

The UN Working Group on Arbitrary Detention (UNWGAD) report, following its visit to Australia in 2002, expressed particular concern about the treatment of unaccompanied children. Since the UNWGAD report, alternatives to the detention of unaccompanied children have increasingly been used.

According to the HREOC report, it has become DIMIA policy to accommodate unaccompanied children in an alternative place of detention or to grant them a bridging visa. Amnesty International welcomed this policy change, which suggested that the special needs of unaccompanied children are being taken into account. It does not, however, detract from the fact that concerns remain about the use of bridging visas and an alternative place of detention for children as outlined in Chapter 3 of this report.

Family groups

Amnesty International is particularly concerned about the number of asylum-seeker families that are separated as a result of Australia's detention policy. The protection of the family unit is established in international law. The right to family unity is inherent in the universal recognition of the family as the natural and fundamental group unit of society. Its significance is emphasised in Article 16(3) of the Universal Declaration of Human Rights (UDHR), which provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'.

Articles 17 and 23 of the ICCPR and Articles 9, 10 and 22 of the CRC provide for the protection of the family unit. Article 20 of the CRC further provides that 'a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state'. The UNHCR EXCOM Conclusions Nos.1, 9, 24, 84, 85 and 88 reaffirm states' obligations to take measures that respect family unity and family reunion.

Authorities should take appropriate measures to maintain the unity of the family, and process asylum requests expeditiously in order to ensure that separated families are reunited as quickly as possible once they are recognised as refugees.¹⁴⁹

This requires that states not only refrain from action that would result in family separations, but also to take proactive measures to maintain unity and reunite families where they have been separated.¹⁵⁰

The prolonged or indefinite detention of families means that Australia's mandatory detention policy can result in their ongoing and unnecessary separation. In some cases, the immediate family members of detainees in need of international protection are vulnerable as they wait in their countries of origin or third countries to be reunited with husbands and fathers, should the detainees be recognised as refugees in Australia.

While a family member already lives in the community under a bridging visa, the rest of the family will not be granted bridging visas simply on the basis of their relationship with the visa holder. This means that families can be separated while awaiting the final decision on their asylum claim.

The use of Residential Housing Projects (RHPs) also separates families by preventing males over the age of 18 from being housed with the other members of the family. Although RHPs do provide women and children with an improved standard of living, this comes at the cost of

having husbands and fathers separated from the family. As the account of Leila¹⁵¹ shows, mothers can be forced to choose between family unity and the health of a child.

It is an urgent imperative that the Australian Government implement systemic changes to safeguard the integrity of the family unit and have due regard to the child's 'best interests'.

Separation of families

Benjamin* was six-years-old when he was put into foster care after refusing food as a result of being traumatised in immigration detention. His parents did not consent to his being separated from them and several psychologists warned against separating him from his parents. His mother and father were still held in the Baxter immigration detention centre. His mother was later released on a bridging visa so that she could care for Benjamin in a non-detention environment, but his father was not released with her.

The treatment of Benjamin by the authorities was the subject of an HREOC inquiry¹⁵², which found that DIMIA's treatment of Benjamin breached the Convention on the Rights of the Child. HREOC recommended that DIMIA pay compensation and give an apology to Benjamin.

The family members were later recognised as refugees and reunited in the community.

* The name has been changed to protect the child's identity.

Indefinite detention and the 'Pacific Solution'

"During two years we are living in a prison without committing any crime ... support us and give our message to all the world that we want freedom ... it is needed for every human being." Nauru detainee

In August 2001, the Norwegian vessel MV *Tampa* rescued 433 asylum-seekers, mostly Afghans and Iraqis, from an Indonesian boat in international waters and entered Australian waters in an attempt to disembark the asylum-seekers on Christmas Island. The Australian Government, controversially and in the opinion of many commentators unlawfully, refused to allow them to disembark.

Instead, the Australian Government negotiated a deal with the tiny Pacific nation of Nauru, the world's smallest republic, to accept the *Tampa* asylum-seekers while their refugee claims were processed. The Australian Government made it clear that it wanted those granted refugee status to be sent to countries other than Australia. This agreement became known as part of the widely condemned 'Pacific Solution'. Several more boats were subsequently intercepted and redirected by Australia to Nauru as well as Manus Island, Papua New Guinea.

In addition, in 2001 in the wake of the *Tampa* incident the government passed the Migration Amendment (Excision from Migration Zone) Bill 2001 designed to restrict asylum-seekers' rights to claim asylum by reducing the number of border points considered to fall within Australia's 'migration zone'. The legislation 'excised' Australian territory, including Christmas Island and Ashmore and Cartier Islands, thus invalidating any visa applications made by persons who had entered at an excised offshore place.

At its height, in February 2002, 1,158 people were held in Australia's immigration facilities on Nauru. More than 700 of the Nauru detainees were recognised as refugees and have since been resettled to countries including New Zealand, Sweden and Norway. Approximately 400 have returned to their country of origin under assisted voluntary returns programs. By June 2005, the number of detainees had reduced to 54 people following the Minister for Immigration's 2004

announcement that she would reassess the cases of the Iraqis and Afghans who had remained on Nauru.¹⁵³ The remaining caseload includes 29 Afghans, 20 Iraqis, two Iranians, two Bangladeshis and one Pakistani – including six (Afghan) children.¹⁵⁴

"We are feeling terrible mental strain. We don't know about our future. What is our sin?"
Nauru detainee

Amnesty International has published a report condemning the so-called 'Pacific Solution' and raising serious concerns about, among other things, arbitrary and unlawful detention and conditions of detention.¹⁵⁵ Amnesty International remains concerned about the continuing human rights violations suffered by detainees on Nauru as a direct consequence of Australia's 'Pacific Solution' policy. It continues to receive complaints about the length of detention in Nauru as well as conditions of detention. For example, during 2002–2004, Amnesty International received reports from Nauru detainees that:

- At times fresh water was available for only two hours a day
- Access to primary health care was limited
- Children were denied access to educational facilities.

"All children in the camps are in worse circumstances. We are suffering and worried. Also our food and water supply is really bad." Two children detained in Nauru, aged 13 and 15.

Amnesty International is concerned that through the 'Pacific Solution' Australia has exported its practice of arbitrary detention to another state. Australia denies responsibility for those on Nauru, as does the government of Nauru.

The detainees currently held on Nauru have been found not to be refugees. However, it may not be safe or possible for the majority of them to be returned to their home countries of Afghanistan and Iraq given the security situation of both countries. Amnesty International understands however that the government is taking steps to return at least some of these people to their countries of origin, evidenced most recently by the Memorandum of Understanding signed on 17 May 2005 by the Australian and Afghanistan governments to return rejected asylum-seekers. Given that they cannot be returned as a result of the security situation, and that it is unlikely they will be granted a visa for Australia or another country, they will continue to be detained on Nauru, perhaps indefinitely.

Australia is bound to fulfil its obligations under international human rights and refugee law in good faith. However, Amnesty International considers that Australia's policy regarding the transfer to and detention of asylum seekers in Pacific Island countries, such as Nauru, has been designed to circumvent these obligations.

Australia's obligations under the ICCPR in respect of the individuals detained in Nauru persist. The Human Rights Committee in its General Comment 31, *The nature of the general legal obligation imposed on states parties*, indicates that states "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".

Detention on Nauru has been beyond the reach and scrutiny of Australian courts and independent observers such as HREOC, the Commonwealth Ombudsman and, until very recently, the media. However, Australia's obligations under the ICCPR in respect of the individuals detained in Nauru persist. In its General Comment No. 31, the Human Rights Committee indicates that states must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State Party".¹⁵⁶ Amnesty International considers that the detainees on Nauru remains under the effective control of the

Australian government. On this basis, Australia is under the obligation to respect, protect and promote the human rights of detainees on Nauru and responsible for violations of this obligation.

The International Organisation for Migration (IOM) effectively acts on behalf of the Australian government administering the immigration detention centre, through an arrangement funded by the Australian Government. DIMIA has processed the majority of asylum claims after the UNHCR declined to continue refugee status determinations under its own mandate. Most recently, those 182 Iraqi and Afghan detainees who were found to be refugees as part of a review processes of the Nauru detainee population which took place in 2004 and 2005 were ultimately allowed to live in Australia on protection visas. These arrangements are indicative of the fact that the Australian Government retains effective control over the detainee population in Nauru.

The Australian Government announced on 17 May 2005 that it had signed a Memorandum of Understanding (MOU) with the Afghanistan Government for the return of rejected asylum-seekers in Australia.

Amnesty International believes that security has deteriorated across Afghanistan, and that Afghans face increased vulnerability and risk of violence in the run up to the parliamentary elections, scheduled for September 2005. The Afghan state is unable to provide adequate and effective protection to its citizens. Amnesty International has consistently documented serious and ongoing human rights violations in Afghanistan.

In view of the prevailing instability in that country, Amnesty International reaffirms its view that there should be no forcible return of people to Afghanistan at the present time, nor active promotion of people returning to Afghanistan. This includes the return of rejected asylum-seekers.

Amnesty International reiterates its call to the Australian Government to take all necessary steps to protect the human rights of the remaining detainees.¹⁵⁷ These people should be provided with effective remedies including the right to an independent review of the decision to detain them and release into the Australian community on appropriate visas unless the court determines that their ongoing detention is proportionate and reasonable.

Boutros Chamoun* - detention and the 'Pacific Solution'

Boutros Chamoun is a Christian Iraqi who fled due to the violence perpetrated against Christians. He sought asylum from Australia 2001. He was detained at Australia's immigration detention centres on Manus Island, Papua New Guinea, from October 2001 to July 2003. During his time in detention on Manus Island, he suffered ongoing depression. His capacity to cope progressively reduced.¹⁵⁸ In May 2002, he was diagnosed with posttraumatic stress disorder (PTSD) and had symptoms of:

"re-experiencing, nightmares, avoidance, hyperarousal and bouts of angry and uncomfortable behaviour. He also had a sense of being persecuted (being a Christian in a group of majority Shiites) and¹⁵⁹ generally adopted a withdrawal behaviour."

In late July 2003, Chamoun was transferred to Baxter detention centre in South Australia for further mental health review. Having been placed in Baxter, it was documented in Australasian Correctional Management's Medical Progress Notes (ACM MPN) that he was distressed and felt as though he had been placed in prison.¹⁶⁰

In August 2003, Chamoun's expressed feelings of hopelessness. He had stated he would find a method to commit suicide if he was requested to remain in detention.¹⁶¹ Additionally when Chamoun received a fax stating he had been refused application for a visa from Sweden on 31 October, ACM MPN documented that he became emotional, tearful and expressed his life was now over.¹⁶²

Chamoun also reported that it would be better for him to die in Australia rather than returning to Iraq.¹⁶³

On 11 November 2003, Chamoun attempted suicide in Baxter. The ACM Medical Incident Report (MIR)'s gave description of his attempt:

"Found in room by officers, lying on floor of bathroom in foetal position. Fluorescent light globe had been removed from ceiling, crushed and in corner of bathroom. Electric cord wrapped around light globe socket.¹⁶⁴ Refusing to say what had happened or what he was trying to do."

He had attempted to electrocute himself and had ingested glass fragments. Again on the 21 November 2003 Chamoun had to be physically restrained by officers in the management unit after apparent attempts at self-harm.¹⁶⁵

On 21 January 2004, eight days short of Chamoun being on the mainland for six months, he was forcibly removed from Baxter detention centre and sent to the Pacific island of Nauru. Had he been in Australia for six months he would have been able to appeal his asylum application through the Australian Refugee Review Tribunal.

Amnesty International has been advised that on the day of his transfer to Nauru, Chamoun was not told why he was being removed. He was handcuffed, not allowed to say goodbye to anyone or inform his legal representatives.¹⁶⁶

According to DIMIA, an offshore person who requires medical treatment is brought into Australia only if medical support and services on offshore facilities is not assisting them. The person will stay in Australia for as long as they require medical treatment and then be returned once finishing their medical treatment.¹⁶⁷

Chamoun was ultimately recognised as a refugee and was resettled in Sweden where he currently resides.

* The name has been changed to protect the person's identity.

Christmas Island: need for comprehensive solution

Christmas Island first came to world attention in August 2001 when the Norwegian vessel MV Tampa sought to disembark asylum-seekers rescued in international waters onto the island. The Australian Government refused permission. This was followed shortly thereafter by the excise of Christmas Island and the establishment of a detention centre on the island.

The detention centre currently holds Vietnamese asylum-seekers, who arrived in Australia aboard the Hao Kieton 1 July 2003. Among the 53 asylum-seekers who arrived were Tran and his wife, Pham Thi Phuong Thuy. In February 2004 Phuong Thuy gave birth, in detention, to Amy. After months of negotiations Amy and her parents were finally released from detention on Christmas Island on 30 March 2005. The latest detainee, Michael Andrew Tran, was born under guard on 23 May 2005 in Perth, to parents who have been detained on Christmas Island. The child's mother was permitted to give birth on the Australian mainland due to medical complications. Seven of the remaining 40 persons currently held on the island are children.

Amnesty International continues to receive reports that there is inadequate health care in the detention centre with a number of the detainees experiencing mental health problems. Those remaining children on Christmas Island are able to attend school, but concerns have been raised that the children's experience of detention is causing them serious harm. Concerns have also been raised over the safety of an unaccompanied woman in the centre.

Amnesty International believes their cases should be reviewed immediately to determine whether their detention is necessary and proportionate to the objective to be achieved. Persons whose detention does not meet the criteria of necessity and proportionality should be immediately granted a bridging visa enabling them to live on the Australian mainland. This would include those persons whose claims for asylum have yet to be finally determined as well as those persons whose claims for asylum have been rejected on the basis of a fair and satisfactory procedure. Should a rejected asylum-seeker not be able to be removed from Australia in a reasonable time period, their visa should translate into residency. Should the person not meet the full and inclusive interpretation of a refugee as defined in the Refugee Convention but still be in danger of human rights abuses, they should be granted complementary protection at the time of the review

"We are about three years here – it's enough, we are human, we are not animals to keep in the zoo: people of this detention centre are really under pressure, everybody are feeling mental problems, people have sleep-producing pills until can sleep at night, it's enough to keep people in this jail."

Letter to Amnesty International from a female detainee on Nauru

Indefinite detention – questions answered

Australia's mandatory detention policy has resulted in the arbitrary non-reviewable detention of thousands of asylum-seekers and refugees over the past decade. Over this period various justifications for the policy have been put forward by the government. The following section addresses some of the questions that are relevant to such justifications:

Can detention be considered indefinite if the detainee has the option to leave Australia and thereby bring it to an end?

If a person applies for asylum, Australia is prohibited from sending them back to their country of origin until a decision on their application is made. The principle of *non-refoulement* prohibits

the forcible return of a person in any manner whatsoever to a situation where they would face serious human rights abuses. It is the cornerstone of international refugee law.

Any actions, including prolonged detention, compelling an asylum-seeker to return to his or her country of origin or a place where he or she would be at risk of serious human rights violations would amount to constructive *refoulement*.

The argument that asylum-seekers are in a ‘three-walled prison’, where they can choose to be released from their detention by leaving the country, is fallacious. Between July 2002 and June 2003, more than 90% of those who arrived without a valid visa who sought refugee status were ultimately recognised as refugees and therefore entitled to international protection and protection against *refoulement*. Of the 2,184 children detained in Australia during 1999-2003, 92% were recognised as refugees. These figures suggest that those in detention in Australia are likely to be determined to be refugees and as such are unable to leave Australia and thereby bring their detention to an end.

That a person may bring their detention to an end by leaving the country in which he or she is detained does not absolve Australia from its international obligation to ensure freedom from arbitrary detention.

Can the detainee be considered to be responsible for prolonging their detention?¹⁶⁸

Because detention is linked to the outcome of an application for a visa to enter the country, the Australian Government has argued that the individual effectively becomes responsible for prolonging his or her own detention by lodging appeals. Given the seriousness of the claim that an individual asylum-seeker is making – of persecution in the event of return to their country of origin – it is not unreasonable or unexpected that individuals will pursue avenues of appeal available to them.

Amnesty International considers that there is no legal basis or any other justification for ‘blaming the victim’ and attributing responsibility for prolonged detention to the pursuit of appeals. It is important to be clear that these appeals relate either to the merits of the claim for refugee status, or challenges to the lawfulness of refugee status determination; they do not relate to appeals concerning the lawfulness or otherwise of continuing detention.

Access to fair and effective asylum procedures is an essential component of a refugee protection regime and a full and inclusive application of the Refugee Convention. They enable a state to identify those who should benefit from international protection under the Convention and those who should not.

As the current system only allows for appeals to be lodged from detention, any appeal has the consequence of prolonging detention. A detainee who seeks to appeal cannot, therefore, be deemed to have chosen to extend their period of detention voluntarily.

Should a person in indefinite detention be entitled to the grant of a visa only if they are cooperative with removal arrangements?

The Minister for Immigration has intimated that individuals who do not cooperate with removal arrangements will not be granted a bridging visa even if they face detention for life. Assessment of whether there has been a failure to cooperate should not be a matter for the detaining authority. Rather if there is an ongoing necessity to detain the asylum-seeker, it should be a question to be considered by an independent judicial body. It should remain subject to periodic and automatic review.

Should a person in indefinite detention be denied release on the basis that his or her identity has not been firmly established?

Questions of identity should be a matter for the courts. There should be a presumption that the individual is the person that they claim to be unless there is substantive evidence to suggest otherwise. The onus should be on the government to advance such evidence.

Should a person in indefinite detention be released only if their removal is likely to be protracted?

Amnesty International believes that a rejected asylum-seeker who is subject to indefinite detention should be released, subject to considerations of the necessity and proportionality of their detention. This should also be the case at the expiry of a statutory maximum duration of detention which is reasonable in its length, even where there is evidence that emerges that suggests that advances or 'breakthroughs' may be made in securing the removal of an individual.

If considered necessary, the government may also wish to apply strict reporting mechanisms to ensure a person is available for removal.

Should a person be released from indefinite detention if there is a risk that he or she will abscond?

The Australian Government claims that detention prevents asylum-seekers from absconding.¹⁶⁹ In the Australian context, there is little evidence to suggest that asylum-seekers are likely to abscond. For instance, no unauthorised asylum-seekers released into the community on a bridging visa during 1996-1998 absconded.¹⁷⁰ If the government is concerned about an individual absconding, it should establish a system of case management and undertake an independent evaluation to establish whether there is an objective risk of the person absconding.

Should a person be detained if they are a threat to national security?

There is little evidence to suggest that asylum-seekers have been found to be a threat to national security. Asylum-seekers are screened by the Australian Security Intelligence Organisation (ASIO) when they arrive in Australia to determine whether they represent a threat to national security. On 22 August 2002, the Director General of ASIO told the Joint Standing Committee on Foreign Affairs, Defence and Trade that of 5,986 arrivals from 2000 to 2002, not one was found to be a security risk.¹⁷¹

Detention on the basis that a person *might* be a threat without further evidence to substantiate the claim cannot be justified. The question of the quality and extent of the evidence is properly a matter for the courts, to be assessed on a case by case basis, with the burden of proof remaining on the government.

Chapter 3: Indefinite detention: other forms of detention versus alternatives to detention

The UNHCR Revised Guidelines on Detention call upon states to consider alternatives to the detention of asylum-seekers until their status is determined. The alternatives, as set out in Guideline 4, include monitoring requirements (e.g. reporting and residency requirements), provision of a guarantor/surety, release on bail and residency at open centres. Such alternatives provide authorities with the capacity to monitor the movements of asylum-seekers while respecting asylum-seekers' right to freedom of movement.

The Australian Government has made a number of recent policy changes that have to some extent softened the harsh nature of its detention regime. However, these changes fail to address adequately the mandatory and indefinite nature of Australia's detention policy or provide real alternatives to detention. The changes include the establishment of residential housing projects and the designation of so-called 'alternative places of detention'. Whilst the government has portrayed these as alternatives to closed detention, Amnesty International maintains that these initiatives provide other forms *of* detention rather than alternatives *to* detention. There has also been an increased use of bridging visas, which can be considered to be an alternative *to* detention but these are of limited value due to the eligibility criteria and the restriction on rights and entitlements attached to this visa class.

Most of the recent changes aim to place women and children in a less harsh form of detention such as in the Residential Housing Projects (RHPs) or in some cases, releasing women and children into the community while under strict conditions. Certain members of these groups of people are identified by DIMIA as being at risk of harm in immigration detention centres. However, Amnesty International is concerned that recent government policy changes fail to acknowledge the vulnerability of men in detention. This is particularly the case for husbands and fathers, as well as the vulnerability of families separated by the government's refusal to locate men in RHPs or to release them into the community. Amnesty International is also concerned about single men who are in prolonged or indefinite detention.

Amnesty International maintains that recent government initiatives, outlined below, should apply only to those asylum-seekers and rejected asylum-seekers for whom detention is determined as being the only reasonable and proportionate response to their unauthorised arrival. As set out in Chapter 1 of this report, the UNHCR makes it clear that detention is inherently undesirable and outlines the circumstances in which detention may exceptionally be resorted to. Recourse to RHPs and 'alternative places of detention' should only take place in those circumstances where detention may exceptionally be resorted to as specified by the UNHCR, and detention should in all cases be in compliance with international human rights law and standards.

Residential housing projects

Residential housing projects (RHPs) have been in use in Australia for immigration detention purposes since August 2001. The Australian Government refers to the RHPs as 'alternative detention'. RHPs provide housing in a community setting, which the Australian Government claims allows women and children to live more self-sufficiently.¹⁷² RHP residents can go on trips supervised by GSL staff,¹⁷³ visit each other and attend schools or kindergarten. Transport is provided for them to visit friends or family in the nearby immigration detention centres and fathers in immigration detention centres can visit their families in the RHPs at organised times.

According to the government, RHPs are a good alternative form of detention for families, unaccompanied women and unaccompanied children because they allow them to live in a more home-like setting. There is greater protection from the traumas of hunger strikes, violence and

riots that can occur in detention centres. However, while the lifestyle of families in the RHPs may be an improvement to that in immigration detention centres, Amnesty International considers RHPs to be another form *of* detention rather than an alternative *to* detention.

What's wrong with RHPs?

Although less oppressive than detention in immigration detention centres, Amnesty International considers that RHPs bear many of the problematic hallmarks of centre detention with the same or similar negative effects on the mental and physical health of detainees. RHPs constitute another form of detention as detainees are exposed to excessive surveillance and monitoring including:

- Outdoor cameras.¹⁷⁴
- Security guards patrolling the site 24 hours a day.¹⁷⁵
- The requirement that detainees never leave the grounds unless accompanied by a DIMIA officer.¹⁷⁶
- Routine headcounts by guards several times a day.¹⁷⁷
- Body searches of children on their way to and from school.¹⁷⁸

The RHPs do not fall within the parameters of 'alternatives to detention' as set out in the UNHCR Revised Guidelines on Detention. Open centres (Guideline 4 (iv)) would allow permission to asylum-seekers to leave and return to the centre during stipulated times. Nor does the RHP fall within the alternative of residency requirements (Guideline 4(i)), which allows for asylum-seekers to reside at a specific address or within a particular administrative region until their status has been determined. Instead the RHP is a fenced centre from which detainees are not permitted to leave unless part of pre-arranged supervised excursion.

As fathers are not allowed to live with their wives and children in RHPs, families are forced to separate and denied the opportunity to share a normal family life, with both parents participating equally in the upbringing and development of their children. The importance of the family unit and the right to family life are recognised under international law.¹⁷⁹

RHPs also fail to address adequately the problems associated with children in detention. As the freedom of movement of children in RHPs is still restricted, they are likely to continue to suffer distress. In its 2004 report *A Last Resort?* which examined the effect of immigration detention on children, HREOC called for the release of all children from immigration detention centres, as well as RHPs.

Although RHPs do provide women and children with improvements in their detention conditions, this comes at the cost of having husbands and fathers separated from the rest of the family. A father of children who were living in the Woomera housing project had the following to say about the impact of separation:

Children need their father and they need to be all together, like mentally and spiritually we are all sick. Also, they have separated me from the rest of my family and now I am alone in the donga here and my depression has been more and this has had a negative effect on my whole family.¹⁸⁰

Amnesty International believes that RHPs are an inadequate way of protecting the best interests of children and as such do not meet Australia's international human rights obligations. The organisation believes that the severe restrictions on the movement of and the security measures imposed on children in RHPs contravene Article 37(b) of the CRC as well as Article 31(2) of the Refugee Convention.

A choice no-one should have to make

Leila* , a detainee at the Port Augusta Residential Housing Project, described her experiences while living at the place she describes as ‘the worst immigration detention centre’ she has ever been in.¹⁸¹ Leila did not want to move to the RHP because she wanted to stay with her husband. Faced with pressure from immigration officers and an underweight baby, she decided to go.

The conditions in the RHP are far from ideal. According to Leila, she could not go into the community except on supervised weekly outings, there were cameras located everywhere in the RHP, she was locked in her house at 11pm, security guards visited her house unannounced four times a day and a loudspeaker in the kitchen broadcasted announcements.

Leila was also extremely concerned that the whole family was suffering because of their separation. When she saw her husband, who was depressed due to their situation, they fought, and her daughter became extremely timid.

Rather than resolve the issues associated with her detention, Leila’s experience shows how the RHP environment can in fact exacerbate them.

* The name has been changed to protect the person’s identity.

Alternative places of detention

Under the *Migration Act*, the Minister for Immigration has the power to declare any place in the community to be an ‘alternative place of detention’ (APD). This may include RHPs as well as hotels, mental health facilities, foster care and family homes. Home detention is an alternative form of detention, similar to ‘house arrest’, and is often used for unaccompanied children in South Australia.

In December 2002, the Migration Series Instructions on Alternative Places of Detention set out under what circumstances asylum-seekers can be held in an APD.¹⁸² However, the government does not widely utilise the APD arrangements for people to live in the community. Where it is considered on an individual basis by an ‘officer’ – a person defined by the Minister – that an alternative arrangement to detention is appropriate, a detainee may be removed to that place. People who are eligible for the APD arrangement are mainly women and children. Those removed have included unaccompanied minors and individuals who have attempted self-harm or have been diagnosed with serious mental health illnesses.

Still technically in detention, the asylum-seekers are restricted in their movement to a particular place that has been designated as the detention environment. There is little support provided to those who have been detained under such an arrangement including inadequate access to social workers and appropriate welfare arrangements.¹⁸³

What’s wrong with alternative places of detention?

Amnesty International recognises that the conditions in APDs are less intrusive than being held in an immigration detention centre. However, APDs do not allow for freedom of movement or the right to privacy and should not be seen as alternatives to detention. People in APDs are constantly monitored by guards or others appointed to monitor and control their movements. The level of surveillance and monitoring depends on the APD arrangement established for the individual or family. If the person wishes to leave the APD, they must have a designated person with them at all times. Such ‘designated person’ must be pre-approved by DIMIA.

APDs do not fall within the parameters of ‘alternatives to detention’ as set out in the UNHCR Revised Guidelines on Detention. Reporting requirements (Guideline 4(i)) under the UNHCR

Revised Guidelines on Detention specify only periodic reporting as opposed to constant monitoring as is the case with APDs. Similarly, residency requirements (Guideline 4(i)) simply require residence at a specific address or within a particular administrative region.

As an interim measure, pending comprehensive revision of the detention regime, Amnesty International believes that more use could be made of alternative places of detention given that they address at least some of the more oppressive elements associated with indefinite detention in immigration detention centres. However, any expanded use of alternative places of detention would need to include less intrusive restrictions on freedom of movement and greater respect for the privacy of refugees and asylum-seekers. It would also require the full consultation with the community sector. At present, costs associated with the APD fall disproportionately on the welfare sector, which provides care, activities and support for those under the APD arrangements. Detention in APDs, which should be much less costly than immigration detention centres, should be fully funded and resourced by the Australian Government.

Home detention for unaccompanied children

Under home detention, unaccompanied children are placed in the care of people authorised by the Minister for Immigration, such as teachers, Department of Human Services' staff and foster carers. The children have designated places of detention, which include their homes and schools. If they leave these places, an officer approved by DIMIA must accompany them.¹⁸⁴

Unaccompanied children can also be placed in a group home with others in the same situation, where they are supervised. Some, in particular boys over 16-years-old, are placed in independent accommodation or an unsupervised group home.¹⁸⁵ They are still strictly monitored.

Home detention has increasingly become an alternative to immigration detention centres for unaccompanied children. Even though it provides an environment in which the specific needs of unaccompanied minors can be more easily met, it nonetheless offers an alternative place of detention rather than an alternative *to* detention.

HREOC's case studies of children in home detention demonstrated that children are often distressed about their living arrangements. One 15-year-old boy said, "[W]e feel very lonely. We don't have our family. We don't have our parents or anybody. We need a sensible person to look after us here".¹⁸⁶

Although unaccompanied children in home detention live in the community and go to school, they are strictly monitored and their freedom is restricted. Home detention is a less intrusive approach to detention, but like house arrest it still constitutes deprivation of liberty and falls short of international human rights law and standards, including Article 9 of the ICCPR and Article 37 of the CRC.

Bridging visas – an alternative to detention

"We have big problems. We can't live a normal life. We can't do anything. We can't work. We have problems to help ourselves to find the money to eat and drink. The normal things makes us very depressed ... All the time I see Ibrahim and we crying for our situation. What they will do? What they will do with us? Now we are four years in this situation. We are just living in nothing."

Ahmed Al-Kateb

A bridging visa is a temporary visa that allows a non-citizen without an otherwise valid visa to legally enter and remain in Australia, often with reporting and other conditions attached.¹⁸⁷ It allows asylum-seekers with special needs to be released from detention while awaiting a decision

on their asylum application. It may be considered to be an alternative to detention within the UNHCR Revised Guidelines on Detention.

Who is eligible for a bridging visa?

Asylum-seekers can be released from detention on a bridging visa if they fall within one of the following criteria (*Migration Regulations 2.20*):

- Children with appropriate community arrangements
- People over the age of 75
- People with special health requirements
- Survivors of torture and trauma
- Spouses of Australian residents.

Most asylum-seekers in detention are not granted bridging visas as they do not meet these restrictive criteria, which themselves may be interpreted restrictively.

What's wrong with bridging visas?

As a Bridging Visa E does not provide for any government subsidised support services or the right to work, holders have little or no income or access to social welfare support. Once released they often depend on non-government welfare institutions, such as church organisations, which themselves have limited resources and are overstretched.

As Al-Kateb, who has been released into the community on restrictive reporting conditions, said:

We have a little support from the community. That's all what we can do. We can't work. And we can't study. And we can't have any benefits the government or Centrelink or Medicare. Nothing. We are just walking in a big detention. There is nothing we can do. And we are all the time worried that they will send us back to detention again. All the time scared and worried ...

Only those whom the government deem to be the most vulnerable are eligible for release. The sicker or more vulnerable a detainee becomes while in detention, the greater their chance of being released. It is unclear why it is only once a detainee has been so damaged by their experience of detention that the possibility of release on a bridging visa should arise. The case of *C v. Australia* illustrates how sparingly such visas are used.

In *C v. Australia*, the UN Human Rights Committee found that the government's failure to take steps to release the complainant for at least two years after becoming aware of the complainant's psychiatric condition (which developed as a result of the protracted period of immigration detention) constituted cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR.

Most of those stateless detainees granted temporary relief pending appeals to the High Court or in the wake of the *Al-Kateb* decision have been released on Bridging Visa E. Their freedom of movement is limited by the imposition of restrictive reporting conditions requiring them to report to police and DIMIA regularly depending on the visa and the particulars of the case.¹⁸⁸

Bridging visas for unaccompanied children

The grant of a bridging visa is a preferred option to alternative places of detention because it removes children from the detention environment and does not subject them to the possibility of prolonged or indefinite detention. Some state governments have a Memorandum of

Understanding between DIMIA and the state child welfare agencies that ensure that unaccompanied minors receive adequate health care.

In reality, under-resourced church and community organisations take on much of the responsibility, particularly where there is no arrangement with the state government. As the Minister for Immigration is the guardian of unaccompanied children, Amnesty International believes that there should be a federally-funded independent body adhering to a national set of guidelines to ensure accountability in the supervision of these unaccompanied children. It would oversee the delivery of state and federally funded services and where necessary implement procedural amendments to ensure that the best interests of the child are being met. This would take the pressure off the community sector as well as monitor any conflict of interest that the Minister for Immigration may have as both the child's 'protector' and their 'detainer'.

Removal Pending Bridging Visa

In response to the caseload of long-term detainees, the Australian Government announced a new visa class, known as the Removal Pending Bridging Visa (RPBV), in March 2005. The RPBV Regulations were gazetted in May 2005 (Bridging R (Class WR)). The new visa is extremely limited in scope. It benefits a small number of long-term detainees who become eligible for release from detention pursuant to its provisions on the condition that they waive certain legal rights and agree to return home when the government deems it appropriate. Further, to be eligible they must not have current applications for asylum still pending either through the courts or review.

Amnesty International believes this to be an inadequate and piecemeal response to indefinite detention and the mandatory detention policy more broadly.¹⁸⁹

Amnesty International considers the new visa class to be problematic because:

- It does not apply to those detainees who have been on Nauru, all of whom have been detained for more than three years.
- Applicants have no right of administrative or judicial appeal on their asylum claim even if their individual circumstances change, including for example where the situation in their country of origin deteriorates. Any such attempt to exercise their right of appeal may be interpreted as being 'uncooperative' with the government's attempt to arrange and effect their removal.
- It also requires that the visa holder agree to leave Australia when the Australian Government requires them to do so and does not provide them with an effective opportunity to elect the state of destination and seek admission.¹⁹⁰
- There is no time limit associated with the visa. This perpetuates the limbo and uncertainty for these detainees, one of the most damaging aspects of their experience. While being in the community is preferable to detention, there is nothing to suggest that a person could not remain indefinitely on such a visa.¹⁹¹
- Visa holders are prevented from being reunited with any family members who may be outside Australia while they are on the RPBV, as they are prevented from returning to Australia if they choose or need to visit them.

The visa is not a substitute for an adequate *complementary protection* scheme. Given the highly restrictive nature of the conditions attaching to the grant of an RPBV, Amnesty International is concerned that detainees who fear human rights abuses should they be removed from Australia are unlikely to sign such a document and will therefore remain in detention. The notional

‘availability’ of the visa should not be used to ‘blame the victim’ for their prolonged or indefinite detention.

Complementary protection

The Refugee Convention recognises as refugees persons who meet the specific criteria set in Article 1A(2) of the Convention. Notably, it does not address the situation of people fleeing generalised violence or civil conflict. It extends protection to stateless persons when they can establish well-founded fear of persecution for the reasons indicated in the Convention definition of a refugee.

In Australia, Amnesty International together with other non-government organisations (NGOs) and church groups, has proposed to the Australian Government a model of *complementary protection*.¹⁹² The model seeks to ensure that international protection is accorded to those who are in need of it, even if they do not meet a full and inclusive interpretation of a refugee as defined in the Refugee Convention.

This proposed NGO model establishes a single administrative procedure to consider first whether someone is a refugee in accordance with Refugee Convention criteria and, if they are not, to determine whether they should nevertheless be given *complementary protection* because there is a risk that they would suffer serious human rights abuses if returned.

Such protection would also be accorded where the individual cannot be removed from Australia because no country is prepared to accept them. The proposed NGO model would enhance the efficiency and fairness of Australia’s protection system. It would assist in addressing the problem of prolonged or indefinite detention of stateless detainees by providing the government with an alternative basis on which to grant a protection visa.

Complementary protection would resolve particular problems currently facing the government, including how to deal with Afghans, Iraqis and others who may not meet the criteria of a full and inclusive interpretation of Article 1A(2) of the Refugee Convention, but who cannot return to their home country because their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence and internal conflict.

Under the *complementary protection* model proposed by Australian NGOs, people who would be among those considered for protection include those who:

- Do not have access to a nationality or right of residence that is recognised by any country within a reasonable time frame.
- Would face torture or ill-treatment if returned to their country of origin.
- Come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict.
- Come from countries where there is significant and systemic violation of human rights or a breakdown in the rule of law.
- Would face serious human rights violations other than for a Convention-related reason if compelled to return.

Complementary protection should not be taken to signify that a person has a lesser need for international protection; rather, the reasons for international protection fall outside a full and inclusive interpretation of the refugee definition. The grant of *complementary protection* should therefore accord the recipient the same rights and entitlements as those granted refugee status.¹⁹³

Implementation of the proposed model for complementary protection would assist Australia to comply with its obligations under international instruments, including the Convention against

Torture and ICCPR, and fulfil one of the commitments Australia made when endorsing the UNHCR's Agenda for Protection.¹⁹⁴

The introduction of *complementary protection* would require amendments to the *Migration Act* and new regulations to be passed.

Chapter 4: Ending indefinite detention

This chapter provides recommendations to change Australia's mandatory detention policy thereby providing safeguards against indefinite or prolonged detention. As is clear from this report and the international standards and jurisprudence upon which it draws, Australia's current mandatory detention policy is contrary to international law and can lead to the prolonged detention of asylum-seekers and the indefinite detention of persons whose claim for asylum has been dismissed.

Recommendations for change

Amnesty International recommends that the Australian Government take all necessary steps to ensure that the *Migration Act* is consistent with its international human rights obligations. This requires amendments to the mandatory detention provisions of the *Migration Act* to ensure that detention takes place only in accordance with procedures and standards established by international human rights and refugee law.¹⁹⁵

Amnesty International believes that implementation of its recommendations would enable Australia to respect the rights and needs of individuals seeking asylum from Australia, while addressing the legitimate concerns of the Australian Government to control migration flows to Australia. These recommendations build on some of the recent government-initiated developments that have recognised the need for alternatives to immigration detention centres.

Amnesty International recommends that:

1. All refugees and asylum-seekers in Australia should be treated without discrimination and with full respect for their human rights, regardless of their immigration status. Any distinctions between those that arrive in Australia documented and those arriving undocumented, must satisfy requirements of proportionality, necessity and be prescribed by law.
2. The Australian Government should urgently establish a formal independent review process to assess on a case-by-case basis the necessity and proportionality of detention of all asylum-seekers and rejected asylum-seekers who are currently detained in Australia, including Christmas Island, and on Nauru. This process should take into account whether it is reasonable to continue their detention and whether it is proportionate to the objectives to be achieved.

Persons whose detention does not meet the criteria of necessity and proportionality should be immediately released from detention. Persons who are detained beyond a maximum period of detention, which should be reasonable in its length and as specified in national law, should be automatically released. Children and their families should be released into the community as a matter of priority. This formal review process would require that:

- Persons whose asylum claims are yet to be determined should be immediately provided with a bridging visa¹⁹⁶ unless the review process establishes that it is necessary and proportionate to the objective to be achieved to detain them. This category should include individuals who have appealed against an earlier negative decision and are awaiting the outcome of such appeal.
- Rejected asylum-seekers who are stateless and cannot be returned to any other country should be provided with a solution that leads to the grant of a legal status. The Australian authorities should make every effort to resolve statelessness cases in a timely manner through practical steps to identify and confirm an individual's

nationality in order to determine the country an individual may be returned to or through negotiations to arrange re-admission to the country of former habitual residence. Where a stateless person's nationality or citizenship status cannot be resolved or determined in a timely manner, *complementary protection*¹⁹⁷ in Australia should be granted to them.

- Persons whose applications for protection have been finally rejected on the basis of fair and satisfactory procedures, and are not awaiting a decision from the Minister in the exercise of her discretion under s. 417 of the *Migration Act*, should be granted a bridging visa allowing them to work and have access to health care pending their removal unless the review process establishes that it is necessary and proportionate to detain them. Such a visa should automatically translate into a residency permit if there is no real likelihood or prospect of removal from Australia within a reasonable period of time.
 - Persons whose claims do not fall within a full and inclusive interpretation of the Refugee Convention but who are considered to be at risk of human rights abuses if returned to their country of origin should be offered *complementary protection* and released from detention.
3. There should be a presumption against the detention of asylum-seekers arriving without authorisation. A statutory maximum duration for detention should be specified in national law which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.
 4. As soon as an asylum-seeker arrives in Australia, he or she should be referred to the body responsible for deciding on claims for asylum, be informed of his or her rights, including the right to legal counsel and interpreters, be counselled on the nature and meaning of the asylum procedure and be provided with the opportunity to submit an asylum claim. Consistent with the UNHCR Revised Guidelines on Detention, detention of an asylum-seeker should only be resorted to if necessary:
 - To verify identity.
 - To determine the elements on which the claim for refugee status or asylum is based (including *only* a preliminary interview, not the entire determination procedure).
 - Where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities.
 - To protect national security and public order.The initial assessment should include a determination of whether the asylum-seeker is a minor, in particular an unaccompanied minor, stateless or vulnerable in any other way. There should be clear guidelines for all decision makers as to the circumstances in which an asylum-seeker can be considered to be a threat to public order or national security. This judgment should be made only by a court. Asylum-seekers should have access to a process that allows them to challenge government decisions to that effect and seek remedies.
 5. On arrival in Australia, all asylum-seekers should, unless where detention is deemed to be necessary as set out above, be released into the community on bridging visas. The bridging visa should provide for the following rights:
 - Permission to work.
 - Access to the Asylum Seeker Assistance Scheme.

- Access to Medicare.
- Government-funded specialist care based on their individual needs, including torture and trauma assistance if appropriate.
- Government-funded asylum casework support, including access to free independent legal advice and representation.

Where the imposition of conditions of release are necessary, restrictions on freedom of movement including reporting conditions should not be unreasonable or disproportionate to the objective to be achieved.

6. Persons who do not meet a full and inclusive interpretation of the definition of a refugee under the Refugee Convention but nonetheless are in need of international protection should be provided with *complementary protection*.
7. If, as a consequence of the initial assessment, an asylum-seeker is detained, written reasons should be given for the initial decision to detain, in a language understood by the asylum-seeker, including information about his or her rights in detention and the right to appeal. The asylum-seekers must be able to apply to a judicial authority, which shall decide promptly on the lawfulness of the decision.
8. In all detention decisions, the onus should be on the authorities to show that detention is necessary, reasonable and proportionate in the individual case and is based on grounds that are clearly defined in applicable national law and are in accordance with international law. The authorities should be required to provide details of which alternatives to detention have been considered and the reasons, if any, why they would not suffice. The simple fact of arriving unauthorised should not be a permissible justification for detention.
9. There should be regular review by a court of the merits and lawfulness of individual detention decisions and the necessity of continuing detention. If, in accordance with international human rights standards, detention is found to be unreasonable or disproportionate to the objectives to be achieved, the asylum-seeker should be released into the community on a bridging visa.
10. Any person who is detained in immigration detention centres at any stage and for any length of time must have the possibility to communicate with the outside world and contact his or her legal representative and family or community members. For this reason, Amnesty International opposes the use of detention in remote areas. Persons in immigration detention must also be provided with appropriate access to education and health care.
11. If detention is found to be necessary, use of so-called 'alternative places of detention' and residential housing projects should be considered for all detainees on a case by case basis before resorting to confinement in closed detention centres. Steps should be taken to ensure that restrictions imposed on alternative places of detention are reasonable and proportionate while respecting the principles of human rights including the right to privacy and family life.
12. An independent body should be appointed to review conditions in detention centres, alternative places of detention and residential housing projects, including the appropriateness of surveillance mechanisms and the use of isolation as sanction in the context of detention. The oversight of the treatment of detainees in detention centres should be increased by:
 - Establishing community reference committees at all detention centres.

- Restoring the power of HREOC to initiate contact with detainees.
 - Promoting the transparency of the Immigration Detention Advisory Group, which should include regular provision of information to DIMIA and HREOC on the conditions in immigration detention.
 - Allowing adequate access to detainees by health professionals, independent observers and representatives of relevant religions.
 - Ensuring that isolation is never used for detainees who are suffering mental illness or other serious medical conditions.
 - Ensuring that the use of isolation and other conditions of detention is reviewable by a court.
 - Investigating any allegations of ill-treatment of persons while held in detention in compliance with relevant international standards and bringing to justice those responsible.
13. Any actions taken by the government to negotiate the removal of a rejected asylum-seeker should be in full compliance with Australia's international human rights obligations.
14. The Australian Government should abolish the temporary protection visa regime and grant all those persons who have been recognised as refugees, including those who have been detained and subsequently recognised as refugees, with permanent protection.
15. There should be the strongest possible presumption against the detention of children. In respect of primary caregivers who are accompanying children, all appropriate alternatives to detention should be considered. Alternative places of detention may be considered if this is the only means of maintaining family unity and it is in the best interests of the child. The Australian Government should adopt the recommendations of the HREOC report, *A Last Resort?*, so as to comply with its international obligations under the Convention on the Rights of the Child.
16. In relation to unaccompanied children, the Australian Government should:
- Release any unaccompanied children from immigration detention and pass legislation to prohibit the practice of placing unaccompanied children in immigration detention.
 - Create an independent body to ensure accountability in the supervision of unaccompanied children, which would adhere to nationally agreed upon guidelines based upon human rights law and standards.
 - As part of the Minister for Immigration's obligations to unaccompanied children, process their asylum claim promptly and within a reasonable time frame. They should be prioritised over other asylum applications.
17. Regarding the 'Pacific Solution', the Australian Government should:
- Close Australia's detention centre on Nauru and publicly commit to not sending any asylum-seekers or refugees who attempt to claim asylum in Australia to any offshore facilities.
 - Ensure that, pending the release of the detainees on Nauru:
 - an independent delegation of medical, legal and human rights experts visits Nauru to assess the camps and the treatment of detainees.

- those detainees who are considering return to their country of origin have access to translation services, independent legal advice and all relevant up-to-date country information before making any decision to return.
- Restore all excised Australian islands.

Appendices

Appendix 1: Amnesty International's work on refugees

Amnesty International aims to contribute to the worldwide observance of human rights as set out in the Universal Declaration of Human Rights and other internationally recognised standards.

Amnesty International:

- Opposes grave violations of the rights of every person.
- Supports the right of people to freely hold and express their convictions and to be free from persecution by reason of their ethnic origin, sex, colour or language.
- Defends the right of every person to physical and mental integrity.
- Opposes human rights abuses by state and non-state actors alike.

Refugee rights are a fundamental tenet of human rights. Article 1A(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) sets out the definition of a refugee. Article 33 of the Refugee Convention prescribes the fundamental principle of *non-refoulement*, an established principle of international customary law, which is binding on all states.

The Refugee Convention also addresses other obligations that are imposed on the contracting state with respect to refugees in its territory. These include:

- That the provisions of the Refugee Convention be applied without regard to race, religion or country of origin (Article 3).
- That the contracting state affords refugees free access to the courts of law of the contracting state and any other benefits accorded to the nationals of the contracting state (Article 16).
- The contracting state shall not impose penalties, on account of a refugee who enters its territory without authorisation (Article 31).

Amnesty International works to prevent the human rights violations that cause refugees to flee their homes. At the same time it opposes the forcible return of any individual to a country where he or she faces serious human rights violations. Amnesty International therefore seeks to ensure effective and durable state protection for individuals from being sent against their will to a country where they risk such violations, or to any third country where they would not be afforded effective and durable protection against such return.

Appendix 2: Selected extracts of relevant legislation and international instruments

The Migration Act 1958 (Cth)

Section 189(1)

... if an officer knows or reasonably suspects that a person in the migration zone ...is an unlawful non-citizen, the officer must detain the person.

Section 196

(1) An unlawful non-citizen detained under s. 189 must be kept in immigration detention until he or she is:

- (a) removed from Australia under section 198 or 199;
- (b) deported under section 200; or
- (c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

Section 198

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

- (a) the non-citizen is a detainee; and
- (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
- (c) one of the following applies:
 - (i) the grant of the visa has been refused and the application has been finally determined; and
 - (ii) the visa cannot be granted; and
- (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

Section 417

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal* under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

* including the Refugee Review Tribunal

The Universal Declaration of Human Rights 1948

Article 3

Everyone has the right to life, liberty and security of person.

Article 9

No-one shall be subjected to arbitrary arrest, detention or exile.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 16(3)

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention)

Article 1A(2)

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

Article 3

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 16(1)

A refugee shall have free access to the courts of law on the territory of all Contracting States.

Article 21

As regards housing, the Contracting States, in so far as the matters regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 26

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 31(1)

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom were threatened ... enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article 31(2)

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country ...

Article 33(1)

No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 34

The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees.

Appendix 3: Chronology

1951 The Refugee Convention was concluded, partly as a response to the refugee crisis created by the Second World War. Australia played a leading role in drafting the Convention.

22 April 1954 The Refugee Convention came into force after the 6th state party's ratification. It was Australia's accession that brought the Convention into operation.

1954–1989 Australia received less than 500 asylum applications per year.

1989–1991 Increasing numbers of refugees claimed asylum in Australia, mainly due to students already in Australia claiming protection after the Tiananmen Square massacre in China in June 1989.

1 September 1992 Australia's mandatory detention policy took effect, under the *Migration Reform Act 1992*. The Minister for Immigration acquired the power to designate alternate places of detention.

1998 Amnesty International published its report *A Continuing Shame* (AI Index: AUS/POL/REF) and the Human Rights and Equal Opportunity Commission (HREOC) released its report *Those who've come across the seas: Detention of unauthorised arrivals*. HREOC concluded that Australia's mandatory detention policy was arbitrary and in breach of international law (Article 9, ICCPR). Amnesty International's report reached similar conclusions and emphasised that, 'fairness and respect for the human dignity of refugees risking their lives to seek protection in Australia have become dependent on a web of complex legal conditions, developed primarily to make the administration of border control more efficient.'

20 October 1999 The Temporary Protection Visa (TPV) scheme was introduced in Australia whereby unauthorised arrivals granted refugee status are only eligible for three years of temporary protection.

2001 Several new acts amended Australia's *Migration Act*, including:

- ***Migration Amendment (Excision from Migration Zone) Act 2001***, which prevented undocumented asylum-seekers arriving in Australia's excised territories from seeking asylum in Australia. If recognised as refugees, the government attempts to relocate those who arrived in the excised territory to another country.
- ***Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*** enables authorities to send an offshore entry person to a 'declared country'.
- ***Border Protection (Validation and Enforcement Power) Act 2001***, which allows the prevention of arrival to and removal from Australia's territorial waters of a vessel if it is attempting to enter Australia unlawfully. It also prevents any legal challenges to forced removal.
- ***Migration Legislation Amendment (Judicial Review) Act 2001***, which introduced a privative clause that severely restricts access to judicial review of administrative decisions made under the Migration Act.
- ***Migration Legislation Amendment Act (No 1) 2001***, which restricts access to the courts for judicial review of migration decisions.
- ***Migration Legislation Amendment Bill (No. 6) 2001***, which limited the definition of 'refugee' and allowed adverse inferences to be drawn from an asylum-seeker's lack of identity documents.

Amnesty International expressed concerns at the restriction of rights for those attempting to seek asylum in Australia, including those arriving in excised territories.

March 2001 The Commonwealth Ombudsman released a report on immigration detention centres (Commonwealth Ombudsman (2001), Report of an own motion investigation into the Department of Immigration and Multicultural Affairs' immigration detention centres). The report expressed concerns about conditions in detention and the detention of women and children.

June 2001 The Joint Standing Committee on Foreign Affairs, Defence and Trade released a report on Australian immigration detention centres (*A Report on Visits to Immigration Detention Centres*, June 2001). The report recommended improvements to the conditions in detention and some changes to the mandatory detention policy.

August 2001 The *Tampa* incident took place. Some 433 asylum-seekers were effectively refused entry into Australia's migration zone for the purposes of seeking asylum.

September 2001 Nauru and Papua New Guinea agreed to accept some of the **Tampa** asylum-seekers – the 'Pacific Solution' was formed.

October 2001 The 'children overboard' incident took place. Asylum-seekers travelling to Australia by boat were intercepted by Australian authorities and the government accused them of throwing their children overboard as the boat sank. Following widespread concern that the children had not in fact been thrown in the water, the government's allegations were the subject of a Select Committee Inquiry in 2002.

31 January 2002 The government invited the United Nations Working Group on Arbitrary Detention (the UNWGAD) to visit Australia.

24 May–6 June 2002 Justice Bhagwati, Regional Advisor for Asia and the Pacific of the UNHCR, and the UNWGAD both visited Australia to investigate human rights issues relating to immigration detention.

31 July 2002 Justice Bhagwati released the report on his visit to Australia, in which he found that 'the human rights situation of persons in immigration detention in Australia is a matter of serious concern' and said that a more humane approach to illegal immigration 'would certainly be desirable'. (The Report of Justice PN Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002, Human Rights and Immigration Detention in Australia, see: <http://www.unhchr.ch/hurricane/hurricane.nsf/newsroom>).

October 2002 The UNWGAD released its report, raising concerns about the mandatory detention of unauthorised arrivals. The report criticised the mandatory, automatic and indiscriminate nature of detention, its potentially indefinite duration and the absence of judicial review. It also addressed the psychological impact of detention on asylum-seekers, the denial of family unity and the detention of children. (See United Nations, Economic and Social Council, Commission on Human Rights Fifty-ninth session Item 11(b) of the provisional agenda, Civil And Political Rights, Including The Question Of Torture And Detention: Report Of The Working Group On Arbitrary Detention, Addendum, Visit To Australia E/CN.4/2003/8/Add.2, 24 October 2002 (the UNWGAD Report).)

12 November 2002 HREOC released its report on the transfer of detainees to prisons, following an inquiry into a complaint by six asylum-seekers concerning their transfer from immigration detention centres to state prisons and their detention in those prisons (see: http://www.hreoc.gov.au/human_rights_reports/hrc_report_21.html).

13 December 2002 In a joint media release, the Minister for Foreign Affairs and the Minister for Immigration rejected the UNWGAD Report. The release suggested that the report contained

fundamental factual errors leading to a misrepresentation of Australia's policies and confusion about the relationship between international and Australian law. It also said that the UNWGD's recommendations skated over the sovereign right of Australia to determine who enters its borders and the circumstances of that entry. It argued that immigration detention is central to Australia's migration program, the protection of its borders and the ability to respond to refugee resettlement needs.

April 2003 The immigration detention centre in Woomera in South Australia was closed. The Baxter immigration detention centre replaced it and the Port Augusta residential housing project was opened, both of which are in South Australia.

November 2003 The Attorney-General established the Migration Litigation Review to consider reforms to migration and refugee litigation. The UN Human Rights Committee handed down its decision in *Bakhtiyari v. Australia*.

December 2003 The Woomera residential housing project was closed.

25 March 2004 The Migration Amendment (Judicial Review) Bill 2004 proposed the introduction of time limits for applications for judicial review. Amnesty International made a submission on the Bill (see: http://www.amnesty.org.au/_data/page/534/AIASubmission_JudicialReview300404.pdf).

April 2004 The HREOC report *A Last Resort? National Inquiry into Children in Immigration Detention* was released.

29 April 2004 The High Court gave its decision in *Minister for Immigration and Multicultural and Indigenous Affairs v. B* [2004] HCA 20.

10 June 2004 The deadline for the release of all children from immigration detention set by the HREOC report passed without all children being released.

6 August 2004 The High Court gave its decision in *Al-Kateb v. Godwin* [2004] HCA 37.

August 2004 The Minister for Immigration announced that Temporary Protection Visa (TPV) holders who were in Australia on 27 August 2004 could apply for non-humanitarian visas in Australia without having to leave the country. Prior to this, TPV holders were only eligible for protection visas and s. 417 Ministerial Discretion. As at April 2005, a very limited number of TPV holders applied, as the new visas have limited rights and entitlements.

9 September 2004 Peter Qasim, a 30-year-old asylum-seeker from Kashmir, entered his seventh year in detention.

7 October 2004 The High Court of Australia gave its decision in *Re Woolley; Ex Parte Applicants M276/2003 by their next friend GS* [2004] HCA 49.

December 2004 Asylum-seekers in Baxter immigration detention centre undertook hunger strikes.

January 2005 A Sudanese man who had been held in immigration detention in Australia since 10 December 1997 was deported. At the time he was Australia's longest serving detainee, having been in detention for almost seven years.

February 2005 Australian permanent resident and mentally ill woman Cornelia Rau was released from Baxter into a psychiatric care facility.

The Palmer Inquiry was opened to investigate the wrongful 11 month detention of Cornelia Rau.

March 2005 The Australian Government announced a new restricted visa class, known as the Removal Pending Bridging Visa. The visa affected a handful of long-term detainees who would

be released from detention on the condition that they relinquish certain legal rights and agree to return home when the government deemed it to be appropriate. Amnesty International criticised the visa as it did not address the fundamental problems of Australia's mandatory detention regime.

May 2005 Australian woman Vivian Alvarez Solon is found in the Philippines after being wrongly deported in 2001. Two hundred further cases of wrongful detention are referred to the Palmer Inquiry.

Appendix 4: Statistics and nationalities of long term detained¹⁹⁸

Where do the detainees come from and how do they arrive?

The most common countries of citizenship for detainees in 2003–2004 were:

- People's Republic of China
- Iran

Afghanistan

Indonesia

Vietnam

Republic of Korea

The last unauthorised boat arrival in Australian waters occurred on 1 July 2003 with the arrival of 53 Vietnamese nationals aboard the *Hao Kiet*.

How many people are held in detention?

As at 18 May 2005 there were 928 persons held in detention on the Australian mainland, Christmas Island and Nauru. Of these approximately 137 are women and 68 are children. According to DIMIA, only about 25% of people in detention at any one time are pursuing issues flowing from a claim for asylum.

The remainder at any one time are not asylum-seekers, but rather visa overstayers or otherwise unlawfully in Australia.

The highest number of children in detention at any one time between 1 January 1999 and 1 January 2004 was 842 (on 1 September 2001). Of this number, 456 were at the Woomera detention centre.

How long are people held in detention?

As at 29 May 2005, Amnesty International estimates that at least 150 people have been detained by the Australian Government for more than three years in immigration detention. This figure rises to at least 200 when those detained for more than 18 months but less than three years are included. These figures can be broken down as follows:

Detained for more than three years

Australian mainland

Iran	40
Iraq	1
Afghanistan	24
Sri Lanka	17
Others	19
Sub-total	101

Nauru

Iran	2
Iraq	20 (+ 2 Iraqis in Melbourne for medical treatment)
Afghanistan	29
Bangladesh	2
Pakistan	1
Sub-total	54 + 2 = 56

Total number of detainees held for more than three years 157

Detained for more than 18 months but less than three years 53

Total number of detainees held for more than 18 months 210

How long are children held in detention?

As at 26 December 2003 the average length of detention was one year, eight months and 11 days.

The longest a child has ever been held in immigration detention is five years, five months and 20 days. This child and his mother were released from Port Hedland detention centre on 12 May 2000 after being assessed as refugees. There are currently 68 children in detention.

Endnotes

¹ Ibrahim Ishreti is now living on a bridging visa in the community while he awaits a decision of the Minister for Immigration to exercise her discretion to grant him a visa. He was interviewed by Amnesty International on 18 February 2005.

² A preliminary version of this report, entitled *The impact of indefinite detention: the case to change Australia's mandatory detention regime – preliminary report*, was released on 23 March 2005.

³ The term 'asylum-seeker' denotes a person who has sought asylum but has not yet had a final determination of their claim. Rejected asylum-seekers are asylum-seekers whose claim has been rejected in a final determination. In the context of Australia, this refers to a person who is determined not to be a refugee having exhausted all avenues of review available to them through the courts or via the exercise of Ministerial Discretion under section 417 or section 48b of the Migration Act 1958 (Cth) (Migration Act).

⁴ Established under the Migration Act 1958 (Cth).

⁵ Article 14 of the Universal Declaration of Human Rights (UDHR) provides that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. This right is also implicit in the 1951 Convention relating to the Status of Refugees (the Refugee Convention).

⁶ As at 26 December 2003.

⁷ See for example, *C v. Australia*, where the UN Human Rights Committee found that the Australian Government's failure to take the steps necessary to ameliorate the mental deterioration of a detainee constituted cruel, inhuman or degrading treatment or punishment in violation of Article 7 ICCPR (*C v. Australia* Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002). In addition, the Human Rights and Equal Opportunity Commission (HREOC) recently found in its report on detention of children, *A Last Resort? National Inquiry into Children in Immigration Detention* (April 2004), that the Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from detention with their parents amounted to cruel, inhuman and degrading treatment of those children. This amounted to a breach under article 37(a) of the Convention on the Rights of the Child.

⁸ *Australia, A Continuing Shame: The mandatory detention of asylum-seekers*, June 1998. AI Index Aus/POL/REF.

⁹ A bridging visa is granted to individuals applying for a visa in Australia whose current visa ceases before a decision is made on their application, or if the application has been rejected but the review of the refusal is pending. There are five classes of bridging visas, of which Bridging Visa E is one.

¹⁰ Amnesty International's recommendations draw on a number of proposals that have been put to the Australian Government by organisations and coalitions, including the Refugee Council of Australia, Justice for Asylum Seekers, A Just Australia and Amnesty International.

¹¹ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. Geneva: UNHCR, United Nations High Commissioner for Refugees (February 1999) (UNHCR Revised Guidelines on Detention), Guideline 3.

¹² Including the UNHCR Revised Guidelines on Detention.

¹³ Full details of complementary protection can be found at page 47.

¹⁴ 1951 Convention relating to the Status of Refugees. Australia became a party to the Refugee Convention on 22 January 1954, and to its 1967 Protocol on 13 December 1973.

¹⁵ Ahmed Al-Kateb, a Kuwaiti Palestinian, is now living on a bridging visa in the community while he awaits a decision of the Minister for Immigration to exercise her discretion to grant him a visa. See page 25 for further details. Al-Kateb was interviewed by Amnesty International on 18 February 2005.

¹⁶ For example:

United Nations, Economic and Social Council, Commission on Human Rights fifty-ninth session Item 11(b) of the provisional agenda, Civil And Political Rights, Including The Question Of Torture And Detention: Report Of The Working Group On Arbitrary Detention, Addendum, Visit To Australia E/CN.4/2003/8/Add.2, 24 October 2002 (the UNWGAD Report);

Report of Justice PN Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, mission to Australia 24 May to 2 June 2002, Human Rights and Immigration Detention in Australia;

UN Human Rights Committee in *C v. Australia* No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002; and

Bakhtiyari v. Australia Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003.

¹⁷ For example, HREOC *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, and the Joint Standing Committee on Foreign Affairs, Defence and Trade *A report on visits to immigration detention centres*, June 2001.

¹⁸ Migration Act, s.189.

¹⁹ Migration Act, s. 196.

²⁰ Migration Act, s. 14.

²¹ The international legal principle of non-refoulement bars all states from returning individuals to a country where their lives or liberty are at risk or where they are likely to face torture. This is a binding principle of customary international law which is also laid out in international treaties including the Refugee Convention (Article 33) and the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3).

²² Since 1999, Australia has granted more than 9,000 TPVs to persons who have been recognised as refugees.

²³ Amnesty International also expresses concern at the RRT set aside rate of DIMIA decisions regarding TPV holders applying for further protection. Between July 2003 and July 2004 the RRT set aside the DIMIA decision in 244 cases (of the 271 lodged) by people of one particular nationality, thereby determining that Australia owes those persons protection under the Refugee Convention and deeming DIMIA to be incorrect in 90% of these decisions made.

²⁴ Residential Housing Projects (RHPs) have been in use in Australia for immigration detention purposes since August 2001. While the RHP environment may be considered to be more appropriate for women and children, Amnesty International considers the RHP to be another form of detention as opposed to an alternative to detention.

²⁵ The Immigration Detention Advisory Group (IDAG) was formed in February 2001 to provide advice to the Minister on the appropriateness and adequacy of services, accommodation and facilities at immigration detention centres. While it has been successful in addressing certain areas of concern, questions have been raised by refugee advocates regarding IDAG's transparency and the capacity of the body to effect changes required within the centres. Community Reference Committees have been established in each detention facility around the country. Each Committee focuses on matters pertaining to the conditions and services provided at the particular centre. Amnesty International notes that at certain times CRCs have not been operating at centres including Baxter and Villawood.

²⁶ *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004.

²⁷ 2003–2004 RRT Annual Report www.rrt.gov.au/ann/reports.htm.

²⁸ See page 44 for further details.

²⁹ Migration Amendment Regulations 2005 (No.2).

³⁰ See page 46 for further details.

³¹ See page 24 for further details.

³² See page 34 for further details.

³³ It is claimed he has written to 80 countries seeking acceptance.

³⁴ Qasim claims that he did not understand that there was a strict time limit on applications for judicial review.

³⁵ See [2003] FCA 1569.

³⁶ DIMIA decision, page 7, paragraph 3.1.26.

³⁷ Border Protection Legislation Amendment Act 1999 (Cth), which amended the Migration Act by the insertion of s. 36(3): 'Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national'.

³⁸ *Al Khafaji v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369.

³⁹ Section 48b of the Migration Act allows the Minister to allow a person who has been refused a protection visa to make a further application for a protection visa.

⁴⁰ UN High Commissioner for Human Rights, Louise Arbour, International Commission of Jurists, Biennial Conference, Berlin, Germany, 27 August 2004.

⁴¹ See *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990).

⁴² In *A v Australia*, the UN Human Rights Committee determined that:

9.2 ... the Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author’s detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author’s claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.

⁴³ Report of the Working Group on Arbitrary Detention, Deliberation No. 5, Situation regarding immigrants and asylum seekers, E/CN.4/2000/4, 28 December 1999, pages 29–30.

⁴⁴ *ibid.*, Principle 3.

⁴⁵ *ibid.*, Principle 7.

⁴⁶ *ibid.*, Principle 8.

⁴⁷ *A v. Australia* No. 560/1993 CCPR/C/59/D/560/1993, 30 April 1997, *C v. Australia* No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002 and *Bakhtiyari v. Australia* Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003. See also Concluding Observations of the Human Rights Committee: *Australia*, A/55/40, 24 July 2000.

⁴⁸ Report of the Working Group on Arbitrary Detention, Addendum, Visit to Australia, /CN.4/2003/8/Add.2, 24 October 2002 (the UNWGAD Report).

⁴⁹ Report of Justice PN Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002, Human Rights and Immigration Detention in Australia accessed at [http://www.unhchr.ch/hurricane/hurricane.nsf/0/bc4c8230f96684c8c1256c070032f5f1/\\$FILE/Report.doc](http://www.unhchr.ch/hurricane/hurricane.nsf/0/bc4c8230f96684c8c1256c070032f5f1/$FILE/Report.doc) on 15 May 2005.

⁵⁰ HREOC, *Those Who’ve Come Across the Seas, Detention of unauthorised arrivals, May 1998*, HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004.

⁵¹ Australia became party to the ICCPR in 1980.

⁵² Principle 11(1) states: ‘A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority ...’. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

⁵³ *Israel Concluding Observations, 1998 – CCPR/C/79/Add.93* paragraph 21.

⁵⁴ United Nations Human Rights Committee in its views in *Mukong v. Cameroon*(1995) 2 IHRR 131.

⁵⁵ UN Human Rights Committee, General Comment No. 8, Right to liberty and security of persons (Article 9), 30 June, 1982.

⁵⁶ United Nations, Economic and Social Council, Commission on Human Rights Fifty-ninth session, Item 11(b) of the provisional agenda, Civil And Political Rights, Including The Question Of Torture And Detention: Report Of

The Working Group On Arbitrary Detention, Addendum, Visit To AustraliaE/CN.4/2003/8/Add.2, 24 October 2002 accessed at:
<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19?Opendocument>. on 15 November 2004.

⁵⁷ Australia became a party to the Refugee Convention on 22 January 1954, and to its 1967 Protocol on 13 December 1973.

⁵⁸ See Article 1A of the Refugee Convention.

⁵⁹ A person is a refugee as soon as he or she fulfils the criteria contained in the Refugee Convention. This necessarily occurs prior to the time at which refugee status is formally determined. It is therefore a basic principle of international refugee law that asylum-seekers are to be treated as refugees unless or until they have been found not to be in need of international protection. Therefore, unless otherwise provided in the Refugee Convention, asylum-seekers are entitled to the same rights as refugees under the Refugee Convention. This includes the safeguards provided for in Article 31.

⁶⁰ Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees - Revised, Geneva Expert Round Table, 8–9 November 2001, paragraph 11(a).

⁶¹ See page 20 for further detail on the breach of Article 31(1).

⁶² Office of the United Nations High Commissioner for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999), (UNHCR Guidelines) paragraph 1.

⁶³ UNHCR Guidelines, Guideline 2.

⁶⁴ *ibid.*

⁶⁵ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, paragraph 196.

⁶⁶ UNHCR Guidelines, Guideline 3. The exceptional circumstances include:

to verify identity; to determine the elements on which the claim for refugee status or asylum is based (including only a preliminary interview, not the entire determination procedure); where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities; or to protect national security and public order.

⁶⁷ UNHCR Guidelines, Guideline 3, paragraph 2.

⁶⁸ UNHCR Guidelines, Guideline 3, paragraph 3.

⁶⁹ Executive Committee of the UNHCR, Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice, 4 June 1999, EC/49/SC/CRP.13, paragraph 16.

⁷⁰ Conclusion No. 44 (XXXVII) – 1986 – Detention of Refugees and Asylum Seekers.

⁷¹ Preamble to the 1954 Convention Relating to the Status of Stateless Persons.

⁷² Conclusion on the return of persons found not to be in need of international protection No. 96 (LIV) – 2003, paragraph (h).

⁷³ The 1989 Convention on the Rights of the Child (CRC) entered into force on 2 September 1990. Australia signed and ratified the CRC on 22 August 1990 and 14 December 1990 respectively.

⁷⁴ Concluding Observations of the Committee on the Rights of the Child, Australia, UN Doc. CRC/C/15/Add.79 (1997), paragraph 20.

⁷⁵ See page 29 for details of the Human Rights Committee findings.

⁷⁶ See page 30 for further details.

⁷⁷ HREOC, A Last Resort? page 70.

⁷⁸ In *Al-Kateb v. Godwin* [2004] HCA 37 at paragraph 79 it was held that ‘The appellant submitted, and it was not contested, that he is a ‘stateless person’. That term is defined in Art 1 of the Convention relating to the Status of

Stateless Persons ('the Stateless Persons Convention') as meaning one 'who is not considered as a national by any State under the operation of its law'. Long-term residency in Kuwait or birth there did not guarantee to Palestinians citizenship or the right to permanent residence'.

⁷⁹ Al-Kateb v. Godwin[2004] HCA 37, paragraph 24.

⁸⁰ *ibid.*, paragraph 105.

⁸¹ Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri(2003) 126 FCR 54.

⁸² Al-Kateb v. Godwin[2004] HCA 37, paragraph 196.

⁸³ Re Woolley; Ex Parte ApplicantsM276/2003 by next friend GS [2004] HCA 4, Minister for Immigration and Multicultural and Indigenous Affairs v. B[2004] HCA 20. (B and B).

⁸⁴ Al-Kateb v. Godwin[2004] HCA 37, paragraphs 44–46, 232 and 298.

⁸⁵ Al-Kateb v. Godwin[2004] HCA 37, paragraphs 62–73 and 238–9.

⁸⁶ Al-Kateb v. Godwin[2004] HCA 37, paragraphs 12, 36, 41–49 and 223–37.

⁸⁷ Minister for Immigration and Multicultural and Indigenous Affairs v. B[2004] HCA 20 at paragraph 54, and Re Woolley; Ex Parte ApplicantsM276/2003 by next friend GS [2004] HCA 4

⁸⁸ Justice Gummow of the High Court in his dissenting opinion contended that in the Al-Kateb case 'the continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government'.

⁸⁹ Al-Kateb v. Godwin[2004] HCA 37 at paragraph 75.

⁹⁰ Accessed at: http://www.minister.immi.gov.au/media_releases/media04/v04126.htm on 10 January 2005.

⁹¹ See page 44 for further details.

⁹² Medicare is a government subsidised national health care support scheme.

⁹³ The Pharmaceutical Benefits Scheme (PBS) is a national subsidy of prescription medication financed by the Australian Federal Government.

⁹⁴ See page 46 for further details.

⁹⁵ When introducing the original Migration Amendment Bill on 5 May 1992, the then Minister for Immigration, Gerry Hand, told the House of Representatives:

The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.

On 19 February 2002, the then Minister for Immigration, Multicultural and Indigenous Affairs, Philip Ruddock, told the Australian Parliament:

Late last year ... we were able to pass certain laws which strengthened our territorial integrity. This strategy has been successful in deterring potential illegal immigrants from making their way to Australia.

Most recently, the Immigration Minister, Senator Amanda Vanstone, in a joint media release with the Attorney-General Philip Ruddock on 13 May 2004 in response to the HREOC report, said that an immigration policy that did not include the detention of children:

... would in practice encourage the inclusion of children in people smuggling operations.

⁹⁶ It is also important to note the view of the minority in the High Court that a system of detention can, at the same time, have a non-punitive and a punitive purpose, Al-Kateb v. Godwin[2004] HCA 37 at paragraphs 135–138.

⁹⁷ Guy Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, a paper prepared at the request of the Department of International protection for the UNHCR Global Consultations, October 2001, paragraph 128. <http://www.unhcr.ch/cgi-bin/txis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3bcfdf164>.

⁹⁸ This may amount to constructive refolement, further details of which are at page 15.

⁹⁹ The death was also reported in Al-Furat newspaper, "Permanent Residency for one Iraqi Refugee, Death for Another," 16 December 2004.

¹⁰⁰ Westernisation (Situation of Western Returnees in Iraq), DIMIA Country Information Service, REF: IRQ050105, January 2005.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ Deported to Danger, Edmund Rice Centre for Justice and Community Education, September 2004 accessed at <http://www.erc.org.au/research/1096416029.shtml> on May 15 2005.

¹⁰⁴ Senate Hansard 8 February 2001 – Government Response to the Senate Committee 2000 in relation to Recommendation 11.1.

¹⁰⁵ Accessed at: <http://www.phaa.net.au/anzjph/anzjph/2004Edition/Vol28no6-December/ANZJPH2004-6contents.htm> on 29 April 2005.

¹⁰⁶ Ministerial Statement to Senate Estimate Committee – VPS065/2005, released 25 May 2005.

¹⁰⁷ Transcript of interview conducted on 25 May 2005, reported by Eleanor Hall, with the Royal Australian and New Zealand College of Psychiatrists.

¹⁰⁸ *ibid.*

¹⁰⁹ *S v. Secretary, Department of Immigration & Multicultural and Indigenous Affairs*[2005] FCA 549 at paragraph 2.

¹¹⁰ Submission to the HREOC National Inquiry Into Children in Immigration Detention, Dr Michael Dudley, Conjoint Senior Lecturer, School of Psychiatry UNSW and Sydney Children's Hospital, 9 January 2003.

¹¹¹ HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, page 148.

¹¹² *S v. Secretary, Department of Immigration and Multicultural and Indigenous Affairs*[2005] FCA 549 at paragraph 2.

¹¹³ *ibid.* at paragraph 42.

¹¹⁴ *ibid.* at paragraph 51.

¹¹⁵ *ibid.* at paragraph 9.

¹¹⁶ *ibid.* at paragraph 15.

¹¹⁷ *ibid.* at paragraph 12.

¹¹⁸ *ibid.* at paragraph 16.

¹¹⁹ *ibid.* at paragraph 29, paragraph 30.

¹²⁰ *ibid.* at paragraph 8.

¹²¹ *ibid.* at paragraph 20.

¹²² *ibid.* at paragraph 23.

¹²³ *ibid.* at paragraph 91.

¹²⁴ *ibid.* at paragraph 98.

¹²⁵ *ibid.* at paragraph 111.

¹²⁶ *ibid.* at paragraph 116 (paragraph 26 of Dr Frukacz's affidavit).

¹²⁷ *ibid.* at paragraph 148 (paragraph 22 of Dr Frukacz's affidavit).

¹²⁸ *ibid.* at paragraph 174.

¹²⁹ Dr Jureidini assessed 'S' for the purposes of the proceedings. Drs Dudley and Richards had visited Baxter in a voluntary capacity and Dr Richards had presented a written assessment of M's mental health to GSL staff.

¹³⁰ *ibid.* at paragraph 181.

¹³¹ *ibid.* at paragraph 264.

¹³² *ibid.* at paragraph 265.

¹³³ *ibid.* at paragraph 10.

¹³⁴ *ibid.* at paragraph 269.

¹³⁵ Article 1, 1954 Convention relating to the Status of Stateless Persons.

¹³⁶ For more information on the RPBV, See page 46.

¹³⁷ *Minister for Immigration and Multicultural and Indigenous Affairs v. B* [2004] HCA 20.

¹³⁸ *Re Woolley; Ex Parte Applicants M276/2003 by next friend GS* [2004] HCA 49.

¹³⁹ In accordance with Article 3(1), CROC as implemented by the provisions of the Family Law Act 1975 (Cth).

¹⁴⁰ *Bakhtiyari v. Australia*, Communication No. 1069/2002, CCPR/C/79/D/1069/2002, 6 November 2003, paragraph 9.2. Note that the only period of detention under consideration in this communication was the first period of detention to which Bakhtiyari was subject. His second period of detention, which the Committee considered may raise similar issues under Article 9, was not the subject of the Communication.

¹⁴¹ *Bakhtiyari v. Australia*, paragraph 9.4.

¹⁴² However, as mentioned earlier, the High Court in *B and B* overturned a decision of the Family Court and found that the Family Court did not have jurisdiction to determine the validity of the detention of a child in these circumstances. As the findings of the Human Rights Committee in this case were made on the basis that the Family Court had the power to make such orders, and the High Court has now found otherwise, the views of the Human Rights Committee need to be read in this light.

¹⁴³ *Bakhtiyari v. Australia*, paragraph 8.4.

¹⁴⁴ A declaration that a detainee is unlawfully detained and an order for his release.

¹⁴⁵ HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, page 392.

¹⁴⁶ *The Australian and New Zealand Journal of Public Health*, December 2004, details numerous studies enquiring into the health of children and families in immigration detention, accessed at: <http://www.phaa.net.au/anzjph/anzjph/2004Edition/Vol28no6-December/ANZJPH2004-6contents.htm> on 20 January 2005.

¹⁴⁷ *South Australia's Family and Youth Services, Investigation Report on Child Protection Intake from Woomera Detention Centre*, 10 May 2002, page 4.

¹⁴⁸ *Minister for Immigration and Multicultural and Indigenous Affairs, Media Centre 'HREOC Inquiry into Children in Immigration Report Tabled: Joint media release with the Attorney-General the Hon. Philip Ruddock MP'*, 13 April 2004, accessed at: http://www.minister.immi.gov.au/media_releases/meida04/v04068.htm on 20 October 2004.

¹⁴⁹ *Global Consultations in International Protection EC/CG/01/17, Recommendation f); Summary Conclusions of Family Unity UNHCR/IOM/2002, General Consideration No. 5.*

¹⁵⁰ *ibid.*

¹⁵¹ See page 43 for further details.

¹⁵² See HREOC report No. 25, *Report of an inquiry into a complaint by the child's father on behalf of his son regarding acts or practices of the Commonwealth of Australia (DIMIA)*.

¹⁵³ As part of this reassessment, eventual recognition of 27 Iraqis and 146 Afghans took place, all of whom were brought to Australia on three and five-year temporary protection visas. A further nine Afghans were released on 29 May 2005, after almost three years in detention.

¹⁵⁴ In June 2005, the Minister announced that a further group of Afghans including 4 children have been recognised as refugees and will be granted in protection in Australia.

¹⁵⁵ *Australia-Pacific: offending human dignity – the 'Pacific Solution'*, AI Index ASA 12/009/2002, 25 August 2002. See also *Amnesty International Position on Nauru*: <http://www.amnesty.com.au/refugees/report11.html> accessed on 19 October 2004. For a discussion of the legality of extra-territorial processing of asylum claims, see also *UK/EU/UNHCR: Unlawful and Unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims*, AI Index: IOR 61/004/2003, 18 June 2003.

¹⁵⁶ *Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004, par. 10.

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- ¹⁵⁷ It is noted that since 1 March 2005, detainees are allowed freedom of movement outside the camp between 8am and 7pm from Monday through to Saturday, subject to some exclusion zones such as the airport.
- ¹⁵⁸ Dr Fethi Touzri, Medical Report, 8/7/03.
- ¹⁵⁹ Dr Fethi Touzri, Medical Report, 8/7/03.
- ¹⁶⁰ ACM Baxter Immigration Detention Facility, Medical Progress Notes, July 2003.
- ¹⁶¹ ACM Baxter Immigration Detention Facility, Medical Progress Notes, 24 August 2003.
- ¹⁶² ACM Baxter Immigration Detention Facility, Medical Progress Notes, 31 October 2003
- ¹⁶³ *Ibid.*
- ¹⁶⁴ ACM Baxter Immigration Detention Facility, Medical Incident Report, 11 November 2003.
- ¹⁶⁵ ACM Baxter Immigration Detention Facility, Medical Incident Report, 21 November 2003.
- ¹⁶⁶ Hogarth, L, Letter to Hon. Senator Vanstone; Minister for Immigration, Multicultural and Indigenous Affairs, 22 January 2004.
- ¹⁶⁷ Commonwealth of Australia, Official Committee Hansard, <http://www.aph.gov.au/hansard/senate/commtee/S7314.pdf>, 17/02/04
- ¹⁶⁸ According to Senator Amanda Vanstone, "Many people in detention who have been found not to satisfy the requirements for the grant of a protection visa choose to pursue several avenues of appeal. As a consequence their period of immigration detention can be extended", accessed at: <http://www.minister.immi.gov.au/faq/asylum.htm#1> on 28 January 2005. See also Note No. 59/97, File No. 250/3/12/2, the Australian Government's response to the views of the UNHRC in *A v. Australia*, at paragraph 6.
- ¹⁶⁹ Submissions of the Minister for Immigration and Multicultural and Indigenous Affairs (MIMIA) and the Attorney-General of the Commonwealth, in *Al-Kateb v. Godwin*[2004] HCA 37 and *MIMIA v. Al Khafaji*, at paragraph 20, and Note No. 59/97, File No. 250/3/12/2, the Australian Government's response to the views of the UNHRC in *A v. Australia*, at paragraph 5.
- ¹⁷⁰ Mary O'Kane, 'Refugee and Asylum Seeker issues in Australia', June 2003.
- ¹⁷¹ Joint Standing Committee on Foreign Affairs, Defence and Trade: Human Rights Subcommittee, Aspects of HREOC's Annual Report 2000–01 Concerning Immigration Detention Centres, page 7, accessed at: <http://www.aph.gov.au/hansard/joint/commtee/j5748.pdf> on 28 January 2005.
- ¹⁷² DIMIA Residential Housing Project Fact Sheet (Number 83), accessed at: <http://www.immi.gov.au/facts/83rhps.htm> on 28 January 2005.
- ¹⁷³ The Detention Services Provider for DIMIA is Global Solutions Limited (Australia) Pty Ltd, also known as GSL.
- ¹⁷⁴ Senate Hansard, 16 June 2004, Matters of Public Interest: Immigration: Residential Housing Project, at page 23896, accessed at: <http://www.aph.gov.au/hansard/senate/dailys/ds160604.pdf> on 10 December 2004.
- ¹⁷⁵ *supra*.
- ¹⁷⁶ *supra*, at page 23897.
- ¹⁷⁷ *supra*, at page 23896.
- ¹⁷⁸ *supra*, at page 23897.
- ¹⁷⁹ See Article 16(3) UDHR, Articles 9, 10, 20 and 22 of the CRC, Article 23 ICCPR, and Article 10 ICESCR
- ¹⁸⁰ HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, page 148.
- ¹⁸¹ Russell Skelton, 'Home Sweet Home', *The Age*, 24 June 2004.
- ¹⁸² DIMIA, Migration Series Instruction 371, Alternative Places of Detention (MSI 371), 2 December 2002.
- ¹⁸³ Asylum Seeker Project Hotham Mission, 'Background information: visiting or accompanying people under Alternative Places of Detention'.
- ¹⁸⁴ HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, page 153.

¹⁸⁵ The Youth Affairs Council of South Australia, February 2003. Fact Sheet accessed at: <http://www.yacsa.com.au/onlinedocs/SouthAustralia'sYoungRefugeesandAsylumSeekers.pdf> on 10 October 2004.

¹⁸⁶ HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, page 833.

¹⁸⁷ Migration Act 1958, s. 73 and Migration Regulations 1994, Division 2.5.

¹⁸⁸ Reporting requirements are anywhere from every 24 hours to four weeks.

¹⁸⁹ The Minister announced on the 30 May 2005 that she would offer the RPBV to 17 people, including seven people who are already living in the community.

¹⁹⁰ The UN Human Rights Committee, in its General Comment No. 27, Freedom of Movement (Article 12) CCPR/C/21/Rev.1/Add.9, 2 November 1999 states that, 'an alien being legally expelled from the country is ... entitled to elect the State of destination, subject to the agreement of that State' (paragraph 8).

¹⁹¹ Amnesty International recommends that the RPBV regulations stipulate a time at which such a visa converts to permanent residency.

¹⁹² Also known as subsidiary protection.

¹⁹³ The Australian NGOs advocating for complementary protection maintain that those recognised as refugees in Australia should be granted permanent protection. Accordingly, those eligible for complementary protection should also be awarded status that would allow them to remain permanently in Australia.

¹⁹⁴ Objective 3, Goal 1 of UNHCR's Agenda for Protection, A/AC.96/965/Add.1, 26 June 2002, calls for provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention, but who nevertheless require international protection. Australia, as a member of the Executive Committee of UNHCR, endorsed the Agenda for Protection in General conclusion on international protection (No. 92 (LIII) – 2002).

¹⁹⁵ Including the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. Geneva: UNHCR, United Nations High Commissioner for Refugees (February 1999).

¹⁹⁶ Rights attached to the bridging visa are set out in recommendation 5.

¹⁹⁷ Full details of complementary protection can be found at page 47.

¹⁹⁸ Amnesty International has compiled these figures from a number of sources including DIMIA, Chilout, Human Rights and Equal Opportunity Commission and Jane Keogh who, with the help of her contacts both within and outside the detention centres, has compiled a database of detainees spanning the past three years.