Australian Government
Department of Immigration and Citizenship

Response to the Australian Human Rights Commission report on the use of community arrangements for asylum seekers, refugees and stateless persons who have arrived to Australia by boat.

Introduction

The Department of Immigration and Citizenship welcomes the opportunity to respond to the Australian Human Rights Commission (AHRC) *report on the use of community arrangements for asylum seekers, refugees and stateless persons who have arrived to Australia by boat.*

The AHRC has outlined a number of observations arising from their visits to Villawood Immigration Detention Centre, Sydney Immigration Residential Housing, Maribyrnong Immigration Detention Centre and Melbourne Immigration Transit Accommodation and from their interviews of clients who have been placed in community detention or released from detention on a Bridging Visa E. The department's comments in response to these recommendations are outlined below.

Recommendation 1: The Australian Government should end the system of mandatory and indefinite immigration detention.

The Australian Government is committed to treating asylum seekers and refugees humanely and fairly while maintaining its commitment to strong border control.

Australia has a universal visa system which means that almost all persons who are not Australian citizens need a visa to enter and reman in Australia. In most cases a visa must be obtained prior to travel to Australia. The object of *Migration Act 1958* is to regulate the entry and stay in Australia of non-citizens and the visa process allows the Government to know who is travelling to Australia, how long they are lawfully entitled to remain, and when they are required to depart.

People who arrive in Australia without the appropriate authority do not provide the Australian Government with an opportunity to assess any risks they might pose to the Australian community prior to presenting at the border. Irregular maritime arrivals are detained for the purposes of managing health, identity and security risks. Once those checks are completed, however, they may be considered for community placement while their processing is ongoing, except where they present unacceptable risks to the community.

In contrast, people who arrive lawfully have been assessed through Australia's visa process which provides the Australian Government with an opportunity to undertake appropriate health, identity, security and bona fides checks. People who arrive lawfully in Australia and later become unlawful non-citizens, or later claim asylum, generally remain in the community while their claims are assessed, except where they present unacceptable risks to the community.

6 Chan Street Belconnen ACT 2617
PO Box 25 BELCONNEN ACT 2616 • Telephone: 02 6264 1111 • Fax: 02 6225 6970 • www.immi.gov.au

Recommendation 2: The need to detain should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter. A person should only be held in a closed immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be managed in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved – if necessary, with appropriate conditions imposed to mitigate any identified risks. If a risk to the community cannot be effectively mitigated, consideration should be given to whether the person can be placed in a less restrictive form of detention.

The decision to detain is based on an assessment of risk. In the case of a person who arrived in Australia lawfully and subsequently became unlawful, the decision to detain is based on an assessment of the risk that person may present to the Australian community, or to the integrity of the migration program through repeated refusal to comply with their visa conditions. In the case of irregular maritime arrivals who have not given the Government an opportunity to assess any health, identity or security risks to the community they may present, the Government has made the judgement that they will be detained for the purposes of assessing and managing those risks.

Mandatory detention, along with strong border security measures, ensures the orderly processing of migration to our country.

It remains the Government's position that indefinite or otherwise arbitrary immigration detention is not acceptable and the length and the conditions of the detention are subject to regular review. The reviews consider the lawfulness and appropriateness of the person's immigration detention, their detention arrangements and other matters relevant to their ongoing detention and case resolution. Continuing immigration detention is dependent upon factors such as the management of health, identity and security risks and ongoing assessments of risks to the community or the integrity of Australia's migration programs.

We note the AHRC's previous position that a legitimate purpose of immigration detention can be for the purposes of conducting security checks. The screening mechanisms in place ensure that Australia is protected from people who may pose a risk to our national security. Detention of unauthorised arrivals for the purpose of managing health, identity and security risks to the community is a reasonable and proportionate approach which also enables Australia to meet its obligations to those who are found to be in need of protection.

Following an announcement on 18 October 2010, the Government has expanded its existing community-based arrangement program, moving significant numbers of people out of immigration detention facilities into community-based accommodation. The department is managing the implementation of the expanded community-based arrangements. As at 19 July 2012, 4234 people had been approved for community detention, including 2008 children.

In November 2011, the Government announced the community placement of irregular maritime arrivals on Bridging visas. The Government is applying the Bridging visa framework to facilitate the release of individuals from held immigration detention who do not pose a risk to the community. As at 19 July 2012, around 3200 people had been granted bridging visas under these arrangements.

The Minister's Council on Asylum Seekers and Detention is working closely with the department to support this process.

Recommendation 3: Australian Government policy should be reformed so that individuals in immigration detention who have received an adverse security assessment can be considered for release from detention, or for placement in a less restrictive form of detention.

The Australian Government has determined that, in view of the serious nature of an adverse security assessment, namely that an individual has been assessed by ASIO to directly or indirectly present a risk to security, individuals with adverse security assessments should not be released to live in the community. The Government has pursued, and will continue to pursue, resettlement options for these individuals in third countries until circumstances change so as to enable removal consistent with Australia's international obligations.

The Government also notes that a case directly on this point is under consideration by the High Court of Australia, with judgment currently reserved.

In respect of placement in a less restrictive form of detention, current arrangements include careful consideration of the accommodation placement of people in immigration detention, who have received an adverse security assessment. These decisions are made on a case-by-case basis, taking into account the individual's care needs and level of security risk. Placement options include, where appropriate, the least restrictive facilities within the immigration detention network, such as Immigration Residential Housing and Immigration Transit Accommodation. Irrespective of the type of facility in which a person is accommodated, every effort is made by the department and its service providers to ensure the person has access to services and support arrangements appropriate to their needs and circumstances. A person's accommodation placement can also be reviewed at the weekly Client Placement Assessment meetings following a request by the person or by case management, the health services provider or the detention services provider.

In addition, the cases of all clients are subject to monthly case manager reviews, regular senior officer reviews and mandatory reporting by the Secretary under the *Migration Act 1958* on the circumstances of a person's detention; and these reports are provided to the Commonwealth Ombudsman. On the basis of the Secretary's reports, the Commonwealth Ombudsman is required to give to the Minister an assessment – which may include recommendations – of the appropriateness of the arrangements for a person's detention. The Commonwealth Ombudsman's reports are tabled in the Parliament.

Recommendation 4: The Australian Government should comply with its international human rights obligations by providing for a decision to detain a person, or a decision to continue a person's detention, to be subject to prompt review by a court. To comply with article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR), the court must have the power to order the persons release if their detention is not lawful. The lawfulness of their detention is not limited to domestic legality – it includes whether the detention is compatible with the requirements of article 9(1) of the ICCPR, which affirms the right to liberty and prohibits arbitrary detention.

The department notes the AHRC's view that Australia is not complying with its international obligations in this regard and that as stated in previous AHRC reports, the AHRC bases this position on the views of the United Nations Human Rights Committee (UNHRC). Australia disagreed with the Committee's interpretation of Article 9(4) of the International Covenant on Civil and Political Rights and expressed to the Committee its view that, under that Article, judicial review needs to be available to consider the lawfulness of detention in the context of domestic law rather than the issues of arbitrariness. The Australian Government maintains that this position complies with Article 9(4).

As stated in the response to recommendation 2, the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, are subject to regular review. Senior officer reviews are conducted by the department and made available to the Commonwealth Ombudsman and statutory reviews are undertaken by the Commonwealth Ombudsman. The reviews consider the lawfulness and appropriateness of the person's detention, their detention arrangements and other matters relevant to their ongoing detention and case resolution.

In addition, a person in immigration detention can seek judicial review of the lawfulness of their detention in the Courts, including the High Court. This is consistent with Article 9(4) which, in Australia's view, requires courts to be empowered to assess whether the detention is lawful according to domestic law. In addition, a person in immigration detention because of the refusal of a visa or cancellation of a visa, may generally also seek merits or judicial review of the visa decision that resulted in them becoming an unlawful non-citizen and being liable for detention, or of a decision to refuse a bridging visa once they are detained.

Recommendation 5: The Australian Government should work towards a uniform model of community assessment and placement for asylum seekers, irrespective of their place or mode of arrival in Australia. An individual assessment of suitability for community placement should be conducted at the earliest opportunity post-arrival. Features of such a model should include:

- **Permission for adult asylum seekers placed in the community to seek paid employment, irrespective of their level of vulnerability.**
- **Opportunities for engagement in meaningful activities, including permission to attend English language classes and to enrol in vocational training.**
- **A level of income support sufficient to meet basic needs for those who are unable to generate an independent income.**
- **Access to essential health care and counselling.**
- **Full access to formal education for school-aged children.**

The department is currently exploring ways to provide more consistent, transparent and better integrated support services to help vulnerable clients to resolve their immigration status in the community. It is the department's intention to draw together the support services delivered currently under the Community Detention program, the Community Assistance Support program and the Asylum Seeker Assistance Scheme to create a single platform to deliver needs-based and risk-based services. Existing support services under these programs include reception and orientation, income support, access to health care, accommodation assistance, and counselling for survivors of torture and trauma. The establishment of an integrated service delivery platform will focus on assisting clients to achieve self agency.

Currently, the community detention and bridging visa programs for irregular maritime arrivals provide a range of specialist support and other services, including health, education, and accommodation, depending on what is appropriate for each cohort and which address individual circumstances and needs. For example, community-based detention arrangements do not give a person any lawful status in Australia because no visa is granted at this stage and the person remains administratively in immigration detention while living in the community. Nor does it give them the rights and entitlements of a person living in the community on a visa (e.g. the right to formal study or work). Of course, access to education for school age children is facilitated in accordance with state and territory laws.

Bridging visa holders, on the other hand, are lawful non-citizens and have no restriction applied to their visa that would limit their access to employment or study. They are also eligible to access Medicare and the Pharmaceutical Benefits Scheme and, depending on their vulnerability and financial need, may be eligible for assistance through the existing Community Assistance Scheme and the Asylum Seeker Assistance Scheme. Both programs are funded by the department and administered by the Australian Red Cross.

These arrangements are complemented by measures in immigration detention facilities, such as programs, activities, education for school age children and English-language training, to prepare and equip clients for life in the community prior to grant of a visa or placement in community detention.

Recommendation 6: The Australian Government should introduce reforms so that refugees who have received adverse security assessments from the Australian Security Intelligence Organisation are provided with:

- **Information sufficient for them to be reasonably informed of the basis of the adverse assessment.**
- **Access to merits review by the Security Division of the Administrative Appeals Tribunal.**
- **Procedural mechanisms to provide for effective merits and judicial review, including opportunities for a person to know the basis of their assessment and to make submissions on the content of that assessment, either directly or through an appropriate person such as a Special Advocate.**

The matters raised in Recommendation 6 pertain to adverse security assessments issued by ASIO, and as such are a matter for that agency.

Recommendation 7: The Australian Government should develop a formal statelessness determination mechanism which recognises both *de jure* and *de facto* statelessness, and establish administrative pathways for the grant of substantive visas to stateless persons who have been found not to be refugees or otherwise owed protection.

The department acknowledges that it is difficult to return a stateless person with no lawful right to remain in Australia unless their country of habitual residence or former nationality, or a third country, is willing to accept them, and sometimes this results in a protracted period during which the person's status is being resolved.

Australia is committed to upholding its obligations under the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness.* The obligations under the latter Convention, which include obligations to grant nationality to persons who would otherwise be stateless if they are born in Australia or if they have an Australian parent, are implemented through the *Australian Citizenship Act 2007.* Neither Convention prevents removal of stateless persons who are unlawfully in Australia (or who are lawfully here but where there are character or security reasons for removal) or requires the grant of a visa, and statelessness alone is not a ground for engaging Australia's international protection obligations under other international human rights instruments. Amendments to the *Migration Act 1958* are consequently not the Government's preferred option in dealing with statelessness claims where other options are available to achieve policy objectives. However, the Government has committed to identify situations of statelessness more rapidly and to provide for decision makers better tools for assessing the claims of stateless people.

In line with this, and as noted in the AHRC's report, the department has developed guidelines for assessing claims of statelessness based on existing procedural guidance, to assist protection visa decision makers to make a finding in relation to statelessness claims (that is the client *appears to be stateless* or *does not appear to be stateless)* for the purposes of a protection visa assessment. This is intended to provide more robust findings on statelessness as they relate to protection claims and to identity. The guidelines include possible lines of inquiry for interviewers to aid substantiation of statelessness claims and give guidance in relation to the establishment of identity where this is relevant to claims of statelessness. The guidelines are to be used in conjunction with country of origin information on relevant legislation and state practice in relation to citizenship and nationality.

These guidelines are broadly in accord with the UNHCR's *Guidelines on Statelessness No.2: Procedures for Determining whether an Individual is a Stateless Person*.

Cases where a person does not engage Australia's protection obligations and who cannot be removed for reasons beyond their control, including if their statelessness is a practical barrier to removal, will be managed through the Ministerial Intervention process for consideration of case resolution options, including possible temporary or permanent visa pathways.

Recommendation 8: A uniform national policy on the use of restrictive places of detention should be developed and should cover all places of detention that may be used for observation and segregation. Mental health and suicide prevention experts should be consulted in the development of this policy. The policy should specify that there is to be no co-location of people who are considered to be at risk of suicide or other forms of self-harm with people who are under observation due to aggressive or threatening behaviours.

The department is examining its arrangements in relation to the use of restrictive detention in Immigration Detention Centres and the impact of any such policy on placement decisions. A range of stakeholders including the Detention Health Advisory Group, or a future departmental health body, will be consulted in the development of a uniform national policy governing the use of restrictive detention. The department recognises that wide consultation is required to ensure that any potential policy position in relation to the use of restrictive detention by the department is guided by evidenced based principles that address all the risks potentially posed by such placements.