



Refugee Council  
of Australia

## **SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COUNCIL TOWARDS THE UNIVERSAL PERIODIC REVIEW OF AUSTRALIA**

The Refugee Council of Australia (RCOA) is the national umbrella body for organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 370 organisations and individuals. RCOA promotes the adoption of flexible, humane and constructive policies by government and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee community leaders and this submission is informed by their views.

RCOA welcomes the opportunity to contribute information to the Universal Periodic Review (UPR) process of Australia, scheduled for February 2011. RCOA believes that the UPR is an important process for recognising Australia's achievements in protecting and promoting human rights, as well as highlighting human rights issues needing to be addressed.

RCOA wishes to acknowledge the many positive reforms to Australia's refugee and asylum seeker policies which have taken place in recent years. These reforms, which include the closing of the Nauru offshore processing facility, the abolition of Temporary Protection Visas, the development of community alternatives to immigration detention and the abolition of detention debt, have greatly enhanced the enjoyment of human rights amongst refugees and asylum seekers in Australia. However, RCOA has serious and ongoing concerns about Australia's policies towards refugees and asylum seekers and wishes to bring these to the attention of the Human Rights Council.

### **1. Immigration detention**

RCOA welcomes the Australian Government's commitment to restricting indefinite and non-reviewable immigration detention. However, the maintenance of the mandatory immigration detention policy continues to result in violations of human rights. The *Migration Act 1958* (hereafter the *Migration Act*) still requires all unlawful non-citizens (other than those in excised offshore zones) to be detained, regardless of circumstances, until they are granted a visa. Australian law also fails to protect unlawful non-citizens against indefinite detention, as time limitations for immigration detention are not codified in law.<sup>1</sup>

Conditions in immigration detention facilities have serious implications for the human rights of asylum seekers. Detention, particularly when indefinite or prolonged, has been shown to have a detrimental impact on the mental health of persons who have suffered torture and trauma. This impact is magnified by the limited access to legal counsel, interpreting services, communication facilities, physical and mental health services and social, cultural and religious support networks available to asylum seekers in detention. This is particularly the case for asylum seekers detained offshore or in remote facilities, whose isolated location renders the delivery of appropriate services very difficult. In light of this, the reopening of Curtin detention facility in Derby, Western Australia – one of the remotest locations in Australia – is of great concern.<sup>2</sup>

RCOA supports the principles on immigration detention articulated in the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, which affirm that, as a general principle, asylum seekers should not be detained.<sup>3</sup> We believe that asylum seekers should be detained only as a last resort and for as short a time as possible, for the purposes of establishing identity and conducting health checks or in instances where an individual poses an identifiable security or public order risk. RCOA promotes and encourages the implementation of community-based alternatives to immigration detention for asylum seekers wherever possible, particularly for families, children and other vulnerable groups.

### **Recommendation 1:**

RCOA recommends that:

- a) *The provisions of the Migration Act relating to mandatory detention should be repealed.*
- b) *Asylum seekers should be detained only as a last resort, for the purposes of establishing identity and conducting health checks or when it has been determined that they pose an identifiable security or public order risk.*
- c) *Time limitations for the detention of asylum seekers should be codified in law to ensure that no asylum seeker, including those who are in the process of being removed from Australia, is detained beyond six months.*
- d) *Where alternatives to detention are considered appropriate for asylum seekers, these arrangements should be made available.*
- e) *The Curtin detention facility, in light of its remote location and the consequent difficulty of delivering appropriate services, should not be used for housing asylum seekers.*
- f) *Community-based alternatives to detention should be implemented wherever possible, particularly for families, children and other vulnerable groups.*

## **2. Excised offshore places and offshore processing**

The retention of excised offshore places also continues to result in breaches of Australia's obligations under the Refugee Convention and of rights to judicial review, access to legal counsel and non-discrimination. Under the *Migration Act*, a non-citizen who first enters Australia at an excised offshore place (including Christmas Island, Ashmore and Cartier Islands and the Cocos [Keeling] Islands) without legal authorisation is unable to submit a valid visa application unless the Minister for Immigration makes a personal intervention into the case.<sup>4</sup> This process of ministerial intervention is non-compellable and non-reviewable. In addition, asylum seekers in excised offshore places are barred from the refugee status determination system that applies on the Australian mainland, instead undergoing a 'non-statutory' process governed by guidelines which are not legally binding. They have no access to the Refugee Review Tribunal (a non-transparent review process is available) and very limited access to the Australian courts.<sup>5</sup>

The Australian Government recently announced its consideration of offshore processing of asylum seekers in Timor Leste. Without further detail and clarification of this policy, RCOA is unable to determine if this policy will enhance protection capabilities in the region or be merely a deflection of Australia's protection obligations. It is essential that the Australian Government clarify how asylum seekers affected by this arrangement will be provided fair access to refugee status determination and review, how they will be protected from indefinite detention and how those in need of protection will be offered resettlement.

RCOA notes that the Australian Human Rights Commission's 2009 report on Christmas Island<sup>6</sup> contains detailed commentary and recommendations regarding conditions on the Island and wishes to endorse the recommendations made in this report.

**Recommendation 2:**

RCOA recommends that:

- a) *The provisions of the Migration Act relating to excised offshore places should be repealed.*
- b) *All irregular migrants should have equal access to and protection under Australian law for fair and judicially reviewable determinations of their migration applications, including applications for refugee status determination and protection.*
- c) *The Australian Government clarify its policy on offshore processing in Timor Leste, including setting out a framework for processing protection applications, the options for appeal which will be provided to ensure that every asylum seeker receives a fair hearing, the accommodation arrangements and the resettlement options available for people found to be in need of protection.*
- d) *The outstanding recommendations from the Australian Human Rights Commission's 2009 report on Christmas Island be adopted in full.*

**3. Children and Unaccompanied Humanitarian Minors**

RCOA is concerned by the ongoing detention of asylum seeker children and unaccompanied humanitarian minors. While the *Migration Act* has been amended to affirm the principle that children should only be detained as a measure of last resort, and children are no longer detained in immigration detention centres, they nonetheless continue to be held in detention-like conditions in other immigration detention facilities, in breach of Australia's obligations under the Convention on the Rights of the Child.

RCOA notes that the human rights issues relating to the detention of humanitarian minors have been thoroughly examined in the Australian Human Rights Commission report *A Last Resort? National Inquiry into Children in Immigration Detention* and wishes to endorse the recommendations outlined in this report.<sup>7</sup>

**Recommendation 3:**

*RCOA recommends that the outstanding recommendations from the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention be implemented.*

**4. Health requirements for humanitarian entrants**

Migrants to Australia must meet health requirements in order to be considered eligible for a visa. Some groups, including applicants for onshore protection visas, are exempt from these health requirements. However, all offshore refugee and humanitarian applicants remain subject to the health requirements and, while consideration of a waiver is available, RCOA believes that this discretionary procedure is not a fair or effective mechanism for safeguarding the protection of human rights. RCOA sees no justifiable grounds for the current differential treatment and believes it is entirely inappropriate and unfair to apply different standards and procedures as regards the health requirements to onshore and offshore applicants.

RCOA also advocates the extension of the waiver to applications made by refugee and humanitarian entrants under the general Migration Program. Given that demand for family reunion under the Special Humanitarian Program greatly exceeds available places, many refugee and humanitarian entrants feel compelled to apply for family reunion under the family stream of the general migration program, which may in turn result in their exclusion from the health requirement waiver.<sup>8</sup>

RCOA notes that Australia's processes for assessing visa applications against health requirements are currently under review and commends the Australian Government on instigating this review.

**Recommendation 4:**

RCOA recommends that:

- a) *Applications under the offshore component of Australia's Refugee and Humanitarian Program should be made exempt from the operation of the health requirement.*
- b) *All applications for family reunion made by refugees and humanitarian entrants under the general Migration Program be eligible for a health requirement waiver, with an automatic presumption in favour of a waiver grant.*

## **5. Anti-people smuggling legislation**

RCOA has raised a number of concerns about the *Anti-People Smuggling and Other Measures Act 2010* (hereafter the Act) which was recently passed by the Australian Parliament. RCOA believes that the Act lacks sensitivity to the circumstances of people escaping persecution and dangerous situations, particularly those who have experienced torture and trauma, with the result that it will expose already vulnerable groups to an even greater risk of harm.

Additionally, due to a lack of clarity in some sections of the Act, its scope and reach is unacceptably broad. For example, the provisions of the Act are sufficiently broad to criminalise the actions of people in Australia who provide financial support to relatives facing hardship and persecutory situations overseas, should this support – unbeknown to the sender – be used to contribute to a people smuggling operation. RCOA acknowledges that such applications are not the intended purpose of the legislation, but is concerned that in the Act does not contain adequate safeguards to effectively mitigate the risk of its misuse.<sup>9</sup> RCOA has conveyed its concerns about the legislation to the Australian Government on numerous occasions but our recommended amendments have consistently been disregarded.

**Recommendation 5:**

*RCOA recommends that the Anti-People Smuggling and Other Measures Act 2010 should be reviewed and the recommendations put forward in RCOA's submission to the Inquiry into the Act should be adopted.*

## **6. New income management scheme**

The Australian Government has recently announced the introduction of a new system of income management of welfare payments. The system, originally introduced as part of the Northern Territory Emergency Response, will be expanded beyond indigenous communities into a broader scheme targeting "vulnerable regions" and "individuals at risk" in the Northern Territory. Targeted recipients will have a significant proportion of their social security payments quarantined for spending on essentials such as food, clothing and rent.

The reforms will apply not only to those who have been assessed to require income management due to vulnerability to financial crisis, domestic violence or economic abuse, but also to people who have been in receipt of social security benefits for a specified length of time. As such, it is likely that the scheme will affect many newly-arrived refugees who are receiving income support while enrolled in English language training and while seeking employment. While RCOA accepts that there may be situations where income management may benefit some individuals at great risk, we are concerned that the broad sweep of this policy will result in arbitrary interference in the financial affairs of many people for whom income management is unwarranted and inappropriate.

**Recommendation 6:**

*RCOA recommends that the proposed scheme of income management be reviewed to protect recipients of social security benefits (including newly-arrived refugees) from unwarranted and arbitrary interference in their financial affairs.*

**7. Discrimination**

RCOA's regular consultations with refugee communities in Australia have frequently uncovered reports of discrimination in professional and personal interactions. Former refugees have reported experiencing discrimination in the workplace, the private rental market, the legal and justice system and in daily interaction with the wider community. While opportunities exist to file complaints of discrimination through the Australian Human Rights Commission, the Commonwealth Ombudsman and other anti-discrimination bodies, refugee communities have reported a lack of access to these services and general lack of awareness about the associated rights and responsibilities.<sup>10</sup>

**Recommendation 7:**

*RCOA recommends:*

- a) That the Australian Human Rights Commission, state and territory anti-discrimination bodies and Ombudsman services participate in post-arrival settlement education processes, including in regional and rural areas where access to advice on discrimination matters may be limited.*
- b) The development of local initiatives and programs to increase the opportunities for former refugees and the wider community to have meaningful and regular interaction.*

**8. Human rights legislation**

RCOA welcomes the introduction to the Federal Parliament of the *Human Rights (Parliamentary Scrutiny) Bill* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill*, which will increase scrutiny and consideration of human rights in the development of legislation. However, RCOA believes that these measures alone are insufficient to ensure protection of the rights of refugees and asylum seekers under Australian law.

Refugees and asylum seekers who experience human rights violations in Australia face barriers when seeking formal recognition of and recompense for their experiences. The barriers stem not only from their restricted access to review mechanisms, but also from the absence of an overarching human rights framework in Australia. Australia has yet to introduce comprehensive human rights legislation which specifically encodes minimum human rights standards in domestic law and, as such, lacks the formal legal foundation required to launch a successful claim for rights recognition.

**Recommendation 8:**

*RCOA recommends that the Australian Government adopt a comprehensive legal framework for the protection of human rights in Australia, including the provision of remedies for their breach.*

July 12, 2010

## References

---

<sup>1</sup> *Migration Act 1958* (Cth), ss 189(1), 189(2) & 196(1).

<sup>2</sup> For further information on immigration detention in Australia, see Refugee Council of Australia (2008), *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, at <http://www.refugeecouncil.org.au/resources/submissions.html>; Australian Human Rights Commission (2009), *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities*, at [http://www.humanrights.gov.au/human\\_rights/immigration/idc2008.html](http://www.humanrights.gov.au/human_rights/immigration/idc2008.html)

<sup>3</sup> United Nations High Commissioner for Refugees (UNHCR) (1999), *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*. UNHCR, Geneva, Guideline 2.

<sup>4</sup> *Migration Act 1958* (Cth), s 46A.

<sup>5</sup> For further information on offshore processing of asylum claims, see Australian Human Rights Commission (2009), *Immigration detention and offshore processing on Christmas Island*, at [http://www.humanrights.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island.html](http://www.humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html)

<sup>6</sup> *Ibid.*

<sup>7</sup> See Australian Human Rights Commission (2004), *A last resort?: National Inquiry into Children in Immigration Detention*, at [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.humanrights.gov.au/human_rights/children_detention_report/index.html)

<sup>8</sup> These comments are drawn from RCOA's recent submission to the Australian Government inquiry into the Migration Treatment of Disability. For further information, see Refugee Council of Australia (2010). *Submission to the Joint Standing Committee on Migration Inquiry into the Migration Treatment of Disability*, at [http://www.refugeecouncil.org.au/docs/resources/submissions/1003\\_JSCM\\_disability\\_submission.pdf](http://www.refugeecouncil.org.au/docs/resources/submissions/1003_JSCM_disability_submission.pdf)

<sup>9</sup> For further information, see Refugee Council of Australia (2010), *Submission to the Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, at [http://www.refugeecouncil.org.au/docs/resources/submissions/1004\\_Anti-People\\_Smuggling\\_Bill.pdf](http://www.refugeecouncil.org.au/docs/resources/submissions/1004_Anti-People_Smuggling_Bill.pdf)

<sup>10</sup> For further information, see Refugee Council of Australia (2010), *Australia's Refugee and Humanitarian Program 2010-11: Community views on current challenges and future directions*, at <http://www.refugeecouncil.org.au/docs/resources/Intake%20Sub%202010-11.pdf>, Section 5.11, pp. 90-91.