



**Submission by the United Nations High Commissioner for Refugees
for the Office of the High Commissioner for Human Rights' Compilation Report**

- Universal Periodic Review:

AUSTRALIA

I. Background and Current Conditions

The Government of Australia acceded to the *1951 Convention relating to the Status of Refugees* on 22 January 1954 and its *1967 Protocol* on 13 December 1973 (collectively “1951 Refugee Convention”), which are implemented in domestic law by the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth). Australia has a highly developed refugee status determination system involving many avenues of review and appeal.

Australia also acceded to both the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness* on 13 December 1973. Australia is presently working with UNHCR to develop a mechanism for the determination of stateless persons.

In 2009, Australia received 6,170 protection visa applications (an increase from 4,565 in 2008).¹ There were 2,671 asylum-seekers who arrived in Australia’s ‘excised offshore places’ by boat in an irregular manner (known as Irregular Maritime Arrivals (IMAs)), or who were intercepted at sea during 2009 (an increase from 161 arrivals in 2008). As at 28 May 2010 there were 3,733 people in immigration detention (1,316 on the mainland and 2,417 on Christmas Island), including 3,486 IMAs and 691 women and children.²

Australia makes a significant contribution to refugee protection through its participation in UNHCR’s Executive Committee (ExCom), its generous financial support to UNHCR’s global programmes and its longstanding refugee resettlement programme of around 11,250 refugees and others in need of humanitarian assistance.

¹ The number of protection visa applications comprises the number of asylum-seekers who arrive onshore (and are immediately entitled to apply for a protection visa), as well as those who have already arrived at Australia’s excised offshore places, proceeded through the offshore RSD system, are recognized as refugees, and are then allowed to apply for a protection visa.

² Department of Immigration and Citizenship (DIAC), *Managing Australia’s Borders: Immigration Detention Statistics for 28 May 2010* <<http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>>

II. Achievements, Challenges and Recommendations

1. Reception Standards of Treatment

Asylum-seekers who arrive in Australia without a visa are subject to immediate deportation, or immigration detention until their entitlement to a visa can be determined. Mandatory detention of unauthorized arrivals occurs regardless of whether the asylum-seeker lands in Australia on the mainland (“onshore arrivals”), or at an excised offshore place (“offshore arrivals”).³

The UN Human Rights Committee has observed that Australia’s legal framework of mandatory detention may be considered arbitrary, in the absence of sufficient judicial review of the decision to detain, and has recommended 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.’⁴

Australia detains asylum-seekers in a number of facilities, including Immigration Detention Centres (IDCs) and alternative places of detention, including: (i) Immigration Residential Housing (to enable selected women and children to live in family-style accommodation while remaining technically in detention); (ii) Immigration Transit Accommodation (hostel style accommodation for short term, low flight risk people with no known medical or mental health issues); (iii) Community detention (to enable families with children, unaccompanied minors or people with special needs to be detained in the community and move about without being accompanied or restrained, at a specified address, with reporting conditions); and, (iv) Alternative temporary detention in the community (detention in the community with a designated person in private houses, correctional facilities, watch houses, hotels, apartments, foster care or hospitals).

Alternatives to detention include the availability of certain bridging visas which may be available for asylum-seekers with special needs that cannot be met in immigration detention facilities or for a person whose removal from Australia is not reasonably practicable at the time.

UNHCR welcomes the progressive reforms to immigration detention in Australia, which began in 2005, including: (i) the creation of a Ministerial discretionary power to specify alternative arrangements for a person’s detention and conditions to apply to that person; (ii) the creation of a Ministerial discretionary power to grant a visa to a person who is in immigration detention; and (iii) the incorporation into the Migration Act of a statement that ‘parliament affirms as a matter of principle that a minor shall only be detained as a measure of last resort’.

Legislative amendments have also created a requirement that a decision (either in the first instance, by a delegate of the Minister for Immigration, or on appeal, by the Refugee Review Tribunal, RRT) must be made on all valid protection visa applications within 90 days of the date

³ Including the Ashmore and Cartier Islands in the Timor Sea, Christmas Island in the Indian Ocean, Cocos (Keeling) Island in the Indian Ocean, offshore resource and other installations, certain islands off the coasts of Queensland, the Northern Territory and Western Australia, and the Coral Sea Islands Territory.

⁴ *A v Australia*, CCPR Communication No 560/1993, [9.4.]-[9.5.], UN Doc CCPR/C/59/D/560/1993 (1997).

upon which the application was made or remitted (from the RRT to the Minister).⁵ The Minister must periodically report on the implementation of this requirement in the Federal Parliament. The Department of Immigration and Citizenship (DIAC) has expressed its intention to abide by this processing time frame in respect of Australia's offshore processing system (outlined below), even though there is no equivalent legislative requirement. Furthermore, DIAC must report to the Commonwealth Ombudsman when a person has been detained for two years or more, and every six months thereafter, as long as the person remains in detention. In this regard, the Ombudsman may make *non-binding* recommendations to the Minister including, but not limited to, recommending continued detention, release into the community or the granting of a visa.

The Immigration Minister, on 29 July 2008, laid out Australia's *New Directions in Detention* policy. The new policy identifies seven *Key Immigration Detention Values*, and re-asserts Australia's mandatory detention regime, but emphasizes a risk-based approach to the continuation of detention and the prompt resolution of cases, based on demonstrable risk factors such as health, security and identity. This is a significant and welcome change from previous policy whereby persons could be detained solely on the basis of their method of arrival, which gave rise to concerns about the mandatory and arbitrary nature of detention. However, there are insufficient community-based alternatives forms of detention to implement this new policy and existing detention arrangements, in particular Christmas Island's immigration detention facilities, place detainees in isolated detention facilities without appropriate safeguards or adequate services, especially regarding the specific needs of vulnerable people, including women and children.

In May 2009, Australia signed the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, reaffirming the Government's commitment to detention reform with enhanced accountability and transparency.

Recommendation: UNHCR commends the Government of Australia for its commitment to comprehensive detention reform. However, UNHCR has ongoing concerns with Australia's legislative and policy framework of mandatory detention, which may not be consistent with the general principle that asylum-seekers should only be detained on exceptional grounds and that there should be a presumption against detention, unless shown to be necessary according to prescribed criteria relating to the risks posed by an individual.

Notwithstanding the Government's reiteration of mandatory detention, which UNHCR opposes, the Office recommends that the Government's *New Directions in Detention* policy should apply throughout the Commonwealth of Australia, including any territories excised from the 'migration zone.' Furthermore, the Government's *Key Immigration Detention Values* should be explicitly incorporated into Australia's legal framework.

All decisions to detain an asylum-seeker, refugee or stateless person should be based on an individualized (case-by-case) basis and the reasons should be limited to those authorized by international law and standards. Specific criteria relating to the decision to detain, and the reasons for its ongoing necessity, in particular when a person presents an unacceptable risk to the community, should be established and prescribed in legislative form. Mechanisms established to

⁵ Sections 65A, 414A and 440A of the *Migration Act 1958*.

provide review of the decision to detain should be prescribed in legislation to ensure clarity, transparency and predictability.

All decisions to detain an asylum-seeker, refugee or stateless person should be subject to an effective judicial or ‘arms-length’ administrative review, independent of the original detaining authorities, in accordance with article 9(4) of the *1966 International Covenant on Civil and Political Rights*. In all cases, reasons should be given in writing to record the basis of the detention, and there should be periodic reviews of its ongoing necessity.

2. Determination of Refugee Status

Australia has established a dual refugee status determination (RSD) system which discriminates between the classes of entrants, solely on the basis of method and place of entry to Australia. Asylum-seekers who are interdicted attempting to enter Australia, or land at an “excised offshore place”, are termed to be ‘offshore entry persons’ and are not subject to the substantive provisions of the Migration Act.

RSD at an excised offshore place is undertaken by DIAC officials pursuant to the non-statutory Refugee Status Assessment (RSA) processing arrangements. Declined offshore entry persons are entitled to seek merit review of the first instance decision through the non-statutory Refugee Status Review (RSR) process; however, offshore entry persons do not have access to judicial review.

The Immigration Minister, on 29 July 2008, laid out Australia’s *New Directions in Detention* policy. Although the Government reaffirmed its commitment to the legal framework of excision, which UNHCR opposes, the Office welcomes improvements to the transparency and accountability of the processing system in excised territories, including: (i) access to independent and publicly funded advice and assistance to pursue their claims; (ii) access to independent review of unfavourable decisions; (iii) external scrutiny by the Commonwealth Immigration Ombudsman (with own motion powers); and, (iv) refugees will be locally integrated in Australia (mainland).

Recommendation: UNHCR commends the Government of Australia for introducing measures to reform the system of processing asylum claims on Christmas Island. However, UNHCR continues to have concerns with the dual character of the legal framework of offshore processing and is of the view that there should be a legislative basis for decisions, to ensure clarity and to ground the decisions, to the extent possible, in Australian law in a non-discriminatory manner. A legislative basis for refugee status assessments would ensure coherency and consistency between UNHCR’s international protection standards, Australian jurisprudence and statutory interpretations.

3. Suspension of RSD processing

On 9 April 2010, effective immediately, the Australian Government introduced policy changes in the processing of new asylum applications received from Sri Lankan and Afghan nationals, citing the evolving conditions in these two countries.

The announcement imposes an administrative suspension on the non-statutory RSD processing of asylum applications lodged by Sri Lankan and Afghan asylum-seekers who arrive in

Australia's "excised offshore places" or who are intercepted at sea; and accords 'the lowest processing priority' to protection visa applications lodged by Sri Lankan and Afghan asylum-seekers who arrive at the Australian mainland. Sri Lankan claims have been suspended for three months, and Afghan claims for six months, with the possibility of extension at the end of their respective periods.

UNHCR is concerned that Australia's mandatory detention regime will apply to affected Sri Lankan and Afghan asylum-seekers without clear guidelines or effective judicial oversight. UNHCR is concerned that the combination of mandatory detention and suspension of asylum claims means that more people are being detained for longer, putting pressure on both the physical capacity of the detention facilities and the welfare of detainees. This is of particular concern given the reopening of the immigration detention facilities in geographically isolated places, including the Curtin Air Force Base in remote Western Australia, which has accompanied the suspension and the increasing incidents of immigration detainees committing self-harm in Australia's immigration detention facilities. It is UNHCR's longstanding position that detention of asylum-seekers is inherently undesirable and that alternatives to detention should be explored wherever possible.

Recommendation: UNHCR recognizes that there may be circumstances where pauses in normal RSD processing are appropriate and in line with States' obligations under the 1951 Refugee Convention. Circumstances which might warrant such action could include situations of mass influx and quickly evolving post-conflict situations, where the main purpose of such measures is to increase the protection and humanitarian space for asylum-seekers and refugees. They should not be punitive or discriminatory in their application and should, ideally, be developed in cooperation with UNHCR and other countries in the region that are also affected by these issues.

In UNHCR's view, the changes in the processing of asylum claims should be accompanied with adequate protection safeguards on the treatment of asylum-seekers whose claims are suspended, including protection from *refoulement*, appropriate reception arrangements, and special attention to the needs of vulnerable people, notably children.

UNHCR is concerned that there are no transparent or objectively determined criteria, which explain the processing changes that were applied to these two nationalities, or any administrative guidelines to assess how and when the changes in processing arrangements will be introduced or withdrawn. This poor articulation of Government policy raises concerns that the changes are arbitrary and not based on proper grounds, and may be a violation of the international human rights principle of non-discrimination.

**Human Rights Liaison Unit
Division of International Protection
UNHCR
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