

4 May 2011

Dear Sir/Madame

### **Follow Up to Australia's Statements on the Practice of Immigration Detention during the Universal Periodic Review**

During the Human Rights Council's recent Universal Periodic Review (**UPR**) of Australia in January 2011, your representative raised questions about Australia's immigration policies and the practice of mandatory detention. The purpose of this letter is to provide you with up-to-date and accurate information in response to these questions as we are concerned that the response of the Australian delegation did not adequately reflect current law, policy and practice.

### **Australia's Response to Questions on Immigration Policy and Mandatory Detention**

During the interactive dialogue, the Australian delegation responded to questions about immigration detention by assuring the Human Rights Council that the Australian Government is "committed to treating asylum seekers and refugees humanely and fairly". To this end, the Australian Government stated that detention in an immigration detention centre is used "only as a last resort and for the shortest practicable time". The Australian Government assured the Human Rights Council that conditions of detention protect the inherent dignity of the human person. The delegation further stated that children and, where possible, their families were not detained in immigration detention centres. Finally, the Australian Government told delegates that all detainees are able to access services such as health, education, recreation and technology sufficient to meet their needs.<sup>1</sup>

The undersigned organisations are concerned that the statements made by the Australian delegation during the interactive dialogue do not reflect Australian law, policy or practice.

### **Australia's Actual Law, Policy and Practice on Immigration Detention**

#### ***Australian law provides for mandatory, indefinite detention without judicial oversight***

Australian law provides for mandatory immigration detention of "unlawful non-citizens" and does not allow for judicial consideration of the need for detention in individual cases.<sup>2</sup>

Immigration detention is not, as the Australian Government asserted, a measure of last resort. Asylum seekers who arrive in Australia informally are detained as a matter of course

before other options have been exhausted. Further, the law does not impose time limits on immigration detention and the Government may and does detain people in immigration detention indefinitely.<sup>3</sup>

***Detention is not only used as a last resort or for the shortest practicable time***

As of 18 February 2011 there were more than 6758 people in immigration detention across Australia.<sup>4</sup> More than 3600 of those people have been detained for longer than six months and 586 people have been detained for longer than 12 months.<sup>5</sup> Around 900 asylum seekers accepted as refugees by the Immigration Department are currently detained while they wait months for security checks to be completed.<sup>6</sup>

***Children in Detention***

The Australian Government's statement to the Human Rights Council that children and their families would not be detained in "immigration detention centres" refers to a policy that children will not be detained in particular high-security facilities. However, over 1000 children are currently detained in other secure facilities within the immigration detention network where they are kept under guard and have no freedom of movement.<sup>7</sup>

Since the Australian Government's announcement in October 2010 that it would move unaccompanied minors and vulnerable family groups out of immigration detention facilities and into community-based accommodation, the number of children in detention has increased by 342.<sup>8</sup>

***Conditions of immigration detention***

Detention, particularly prolonged and indefinite detention, has a detrimental impact on the mental health of detainees, particularly persons who have suffered torture and trauma.<sup>9</sup> Detainees also have limited access to legal counsel, interpreters, communication facilities, education, physical and mental health services and social, cultural and religious support networks and the isolation of many immigration detention centres makes the delivery of appropriate services very difficult.<sup>10</sup> There is growing concern about reported violence in immigration detention centres and the punitive measures used to control detainees.<sup>11</sup> Following recent protests at the immigration detention centre on Christmas Island, the Australian Federal Police used tear gas, shot guns and "beanbag" bullets to quell protests.<sup>12</sup> There have been at least five suicides in detention in the last seven months.

***Recommendations to Australia on Immigration Law, Policy and Practice***

Australia's policy and practice of mandatory immigration detention has been criticised by several UN Treaty Bodies and the Special Procedures of the Human Rights Council.<sup>13</sup> The Australian Government's response to these criticisms, before the Human Rights Council and elsewhere, is to quote from a 2008 policy document that is neither enshrined in law nor implemented in practice.

We restate our recommendations that Australia take immediate steps to:

1. repeal the provisions of the *Migration Act 1958* relating to mandatory detention;

2. enact legislation to ensure that asylum seekers are detained only where strictly necessary and as a last resort;
3. enact legislation to ensure that no children are held in immigration detention;
4. provide for regular, periodic, judicial review of a person's detention;
5. codify in law time limitations on immigration detention; and
6. ensure that all detainees have adequate access to legal counsel, interpreters, communication facilities, education, physical and mental health services and social, cultural and religious support networks.

We urge your mission to raise these issues with Australia as it considers its response to the recommendations of the UPR Working Group, both bilaterally and in the Council itself.

Yours sincerely



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For and on Behalf of:



**Human Rights Law Centre**



**Refugee Council of Australia**



### Asylum Seeker Resource Centre



### Human Rights Watch

### Migrant and Refugee Rights Project, University of New South Wales; and

### Refugee and Immigration Legal Centre

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<sup>1</sup> See comments of Ms Vicky Parker, Department of Immigration and Citizenship, during the interactive dialogue for the Universal Periodic Review of Australia by the Human Rights Council made on 27 January 2011. The audio is available here <http://www.un.org/webcast/unhrc/archive.asp?go=110127>.

<sup>2</sup> *Migration Act 1985* (Cth), ss189(1), 189(2) and 196(1).

<sup>3</sup> See the decision of the High Court of Australia in *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>4</sup> Australian Government, Department of Immigration and Citizenship, "Immigration Detention Statistics Summary", 4 February 2011, available at <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>.

<sup>5</sup> *Ibid.*

<sup>6</sup> Legal and Constitutional Affairs Committee, Estimates Transcripts, Outcome 4, 28 March 2011; Australian Human Rights Commissions (AHRC), *Immigration Detention in Darwin*, 2010, available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_darwin.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.pdf).

<sup>7</sup> Australian Government, Department of Immigration and Citizenship, "Immigration Detention Statistics Summary", 4 February 2011, available at <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>.

<sup>8</sup> *Draft Report of the Working Group on the Universal Periodic Review: Australia*, 31 January 2011, para 56, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/Australia-A\\_HRC\\_WG.6\\_10\\_L.8-eng.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/Australia-A_HRC_WG.6_10_L.8-eng.pdf).

<sup>9</sup> See, for example, Royal Australian College of General Practitioners, *Refugee and Asylum Seeker Resources: Health Care For Refugees and Asylum Seekers* (2002), available at <http://www.racgp.org.au/refugeehealth/>

<sup>10</sup> AHRC, *Immigration Detention in Leonora*, 2011, available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2011\\_leonora.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2011_leonora.pdf), AHRC, *Immigration Detention on*

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Christmas Island, 2010, available at

[http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.pdf); AHRC, *Immigration Detention in Darwin*, 2010, available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_darwin.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.pdf) and AHRC, *2008 Immigration Detention Report*, available at [http://www.hreoc.gov.au/human\\_rights/immigration/idc2008.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2008.pdf).

<sup>11</sup> See, for example, R Skelton and L Murdoch, "Crying Out for Change", *The Age*, 18 February 2011, available at <http://www.theage.com.au/national/crying-out-for-change-20110217-1ay7q.html>.

<sup>12</sup> K Needham, "Inquiries to be Held into Teargas Use against Detainees", *Sydney Morning Herald*, 15 March 2011, available at <http://www.smh.com.au/national/inquiries-to-be-held-into-teargas-use-against-detainees-20110314-1bukz.html>; J Kelly, "Chris Bowen Defends Use of Beanbag Rounds Fired at Detainees", *The Australian*, 16 March 2011, available at <http://www.theaustralian.com.au/national-affairs/chris-bowen-defends-use-of-beanbah-rounds-by-afp-during-christmas-island-riots/story-fn59niix-1226022378576>; K Needham, "Outrage over Beanbag Rounds Fired at Detainees", *Sydney Morning Herald*, 17 March 2011, available at <http://www.smh.com.au/national/outrage-over-beanbag-rounds-fired-at-detainees-20110316-1bxc6.html>.

<sup>13</sup> See [11], [12], [15], [16], [17], [18], [21], [25], [26], [32], [39], [40], [41] and [43] of the Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding Observations of the Committee Against Torture, Australia, 40th session, 15 May 2008, CAT/C/AUS/CO/1; [24] of the Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia, 77th session, 27 August 2010, CERD/C/AUS/CO/1517; [16] [18] [20] and [25] of the Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia, 42nd session, 22 May 2009, E/C.12/AUS/CO/4; See [64] and [74] of the Committee on the Rights of the Child, Concluding Observations: Australia, UN Doc CRC/C/15/Add.268 (2005); [23] and [24] of the Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Australia, 95th session, 7 May 2009, CCPR/C/AUS/CO/5 and [100] of the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Human Rights Council on his Mission to Australia (2010).