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National Legal Aid

Committee Secretary
Joint Standing Committee on Migration
Department of House of Representatives
POB 6021
Parliament House
Canberra, ACT, 2600

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17th October '08

Dear Sir or Madam,

Re: Inquiry into Immigration Detention in Australia
National Legal Aid submission

About National Legal Aid

National Legal Aid (NLA) represents the Directors of each of the 8 State and Territory Legal Aid Commissions. The Legal Aid Commissions (Commissions) are independent statutory authorities established under respective State or Territory enabling legislation. The Commissions are funded by Federal and State or Territory governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and legal system

Background to submission

On the 29th July 2008, following the commencement of this Inquiry, the Federal Government announced a policy shift in relation to immigration detention.[1] This shift included that although mandatory detention would continue as a last resort and for the shortest practicable time, that where

[1] Senator Chris Evans, Minister for Immigration and Citizenship, Speech "New Directions in Detention Restoring Integrity to Australia's Immigration System. Australian National University Canberra Tuesday 29th July 2008

possible, asylum seekers would live in the community until their permanent protection visa applications had been determined. NLA is very supportive of this policy shift.

Senator Chris Evans, the Minister for Immigration and Citizenship said:

The challenge for Labor... is to introduce a new set of values to immigration detention- values that seek to emphasise a risk based approach to detention and prompt resolution of cases rather than punishment.[2]

The Government's seven key immigration values are:

1. Mandatory detention is an essential component of strong border control.

2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
   a. all unauthorised arrivals, for management of health, identity and security risks to the community
   b. unlawful non-citizens who present unacceptable risks to the community and
   c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.

5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.

6. People in detention will be treated fairly and reasonably within the law. Conditions of detention will ensure the inherent dignity of the human person[3]*.*

In his speech the Minister advises that "an architecture of excision of offshore islands and non-statutory processing of persons who arrive unauthorised at an excised place will remain." This is confirmed in subsequent press releases. Eg,

"We take a very firm stance against people-smugglers and the dangers they submit desperate people to in hazardous sea journeys,'....
The new 400-bed centre on Christmas Island is now available for use and people encouraged by people-smugglers to try to improperly enter Australia will be taken to Christmas Island for processing. This demonstrates to our

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[2] Ibid, p.1
[3] Ibid, p.3

regional partners our strong commitment to addressing these issues and the value we place on their cooperation".[4]

The Minister further advised that unauthorised boat arrivals at excised places, which include Christmas Island and Ashmore Reef, will still be subject to mandatory detention for health, identity and security checks "but will now have access to legal assistance and an independent review of unfavourable decisions. " [5] It is unclear whether this is a change in policy to allow offshore processes to mirror onshore processes, therefore also allowing legal proceedings in relation to the lawfulness of the detention of an off-shore entry person to be taken. The Minister's speech of the 29th July 2008 suggests that advice and assistance will be publicly funded.

This submission addresses the Inquiry's Terms of Reference from the perspective of Commissions as providers of legal services. In preparing the submission, Directors were not able to come to a unanimous position. However, the majority of Commissions agree the following recommendations and the basis of them also set out below.

NLA Recommendations

(i) That Australia should observe the International Covenant on Civil and Political Rights (ICCPR).
(ii) That indefinite mandatory detention be abolished through legislative amendment.
(iii) That alternatives to detention be developed.
(iv) That detainees be assessed immediately for mental health risks, and be subject to ongoing assessment at least once a month. If a detainee is at risk of psychological harm or poses a psychological harm to others, speedy arrangements should be made for alternative accommodation and treatment.
(v) That detainees should be immediately screened for infectious diseases before being placed with others in detention, the prison or the community.
(vi) That all other health checks be completed within one month or as soon as practicable.
(vii) That delegates of the Minister for Immigration and Citizenship have the power to make residence determinations allowing detention in the community, and this be subject to independent review.
(viii) That children and their family members should not be placed in immigration detention. Children should not be separated from parents or older siblings.
(ix)That detention for greater than one month require an application by the Department to the Federal Magistrates Court (FMC) or other independent Court or Tribunal and the onus should be on Department of Immigration and Citizenship (DIAC) to show why continued detention is justified.
(x) That in cases where detention for greater than one month is deemed necessary by the FMC or other independent Court or Tribunal, that the case

[4] Senator Chris Evans, Media Release, Talks to strengthen regional border security measures Tuesday 5 August 2008
[5] Senator Chris Evans, Media Release Labour Unveils new risk-based detention policy Tuesday 29th July 2008

be subject to review by a senior Departmental official every 1 and 2 months after the first and every subsequent Court/Tribunal review, and subject to further merits review by the FMC or independent Court/Tribunal every 3rd month after the FMC or independent Court or Tribunal's first review.
(xi) That offshore processing be abolished.
(xii) That detention centres be located close to public transport and support services, be accessible to visitors and not be sited in remote locations.
(xiii) That statutory protections be afforded and transparency of decision making ensured, in accordance with previous Immigration Ombudsmen recommendations including in the event that off shore processing is not abolished.
(xiv) That transparency of decision making about placement of detainees be improved, and that account be taken of the basis of detention, health, and any other issues when placements are made.
(xv) That time limits for detainees to lodge visa applications be extended to allow a reasonable period for detainees to make arrangements to lodge valid visa applications.
(xvi) That a free legal advice scheme should be funded to provide timely and independent advice to detainees so that valid applications can be made within time.
(xvii) That legal aid funding guidelines be amended so that Commissions are able to represent people, subject to means and merits tests, for applications to DIAC, to merits review tribunals in relation to applications for protection visas and other visas where there are humanitarian and/or compassionate circumstances, and for visa cancellation and deportation cases. Legal aid should be available to protection visa holders for offshore applications for family reunion, including spouse and child visas, as well as refugee and humanitarian visa classes. Aid should also be available for proceedings in the Federal Court, Federal Magistrates Court and High Court dealing with a migration matter.
(xviii) That funding to legal aid Commissions be increased to enable them to undertake migration work in accordance with the recommendation above.
(xiv) That the Attorney-General's Department (AGD) be the Department responsible for administering funding in relation to immigration matters.
(xv) That facilities for legal interviewing in detention centres be improved.
(xvi) That an FOI process be available through case management staff at detention centres.

Background to Commission services
(i) Commission services & funding arrangements generally
Each Commission offers a range of legal services to all members of the community including information and referral, advice, "minor assistance" (such as writing a letter or making a phone call), community legal education (including publications and presentations), and upon the making of a grant of legal aid, dispute resolution, and legal representation.

Each State, or the Commission in the respective state, and Territory has an agreement with the Commonwealth of Australia through the Commonwealth Attorney-General's Department, for the provision of legal assistance services.

Each of these agreements specifies Commonwealth Legal Aid Priorities. The Priorities set out matters arising under Commonwealth law on which the funding provided can be used by Commissions in making grants of legal assistance for representation by a lawyer. The Agreements also contain as a schedule the Commonwealth Legal Aid Guidelines ("the Guidelines"). The Guidelines provide that a Grant of Legal Assistance (for either an in-house or a private legal practitioner to represent an applicant) may be made if certain tests including "matter type", means, merits of the case, and available funds and competing priorities, are passed.

(ii) Commission services and funding arrangements in relation to Migration matters

Under the Guidelines legal representation in migration matters is limited to test case matters in the Federal or High Court. A copy of the relevant Guideline 3 "Migration Cases" is attached to this submission.

Current Commonwealth Legal Aid Commission funding agreements expire on the 31st December 2008. Discussions with the Attorney-General's Department in relation to new agreements have begun. It is understood that the new agreements will have a different form and focus. The detail of the new agreements and any guidelines which might form part of the agreements is not yet known.

NLA's view is that the current Commonwealth legal aid guidelines are too restrictive in the work that Commissions are able to undertake in matters arising under migration law. NLA submits that the guidelines should be expanded to enable legal aid to be granted, subject to the means and merits tests, for applications to DIAC and to merits review tribunals in relation to applications for protection visas and other visas where there are strong humanitarian and/or compassionate circumstances, and for visa cancellation and deportation cases. Legal aid should be available to protection visa holders for offshore applications for family reunion, including spouse and child visas, as well as refugee and humanitarian visa classes. Aid should also be available, subject to the merits test, for proceedings in the Federal Court, Federal Magistrates Court or High Court dealing with a migration matter.

Commissions in New South Wales, Victoria, South Australia, Western Australia and the Northern Territory also have agreements with DIAC under the Immigration Advice and Application Assistance Scheme (IAAAS) to provide Application Assistance to protection visa applicants in detention in Australia and on Christmas Island. Under the IAAAS Scheme, the Detention Co-ordination Unit refers a detainee to the Commission for legal advice and assistance soon after such assistance is requested by the detainee.

In addition to the IAAAS detention contracts some Commissions also hold IAAAS community contracts through which "disadvantaged" (defined in contracts) people can be provided with free advice and, in some cases, application assistance. The funding provided under the community contracts is inadequate to meet the need in the community. Community funding is

subject to means and merits testing. VLA assists mainly protection visa applicants at DIAC and Refugee Review Tribunal stages and some spouse visa applicants, who have suffered domestic violence, at DIAC and Migration Review Tribunal stages. LANSW provides immigration advice and application assistance for protection visa and non-protection visa cases.

NT Legal Aid Commission's (NTLAC) IAAAS contract includes provision of full application assistance to "disadvantaged" persons living in the community - protection visa and non-protection visa applicants with cases of merit, and provision of advice to disadvantaged applicants and sponsors in the community. In addition, "partial application assistance" to second stage spouse visa applicants in the community whose relationship has broken down due to domestic violence is provided for.

In Victoria, Victoria Legal Aid (VLA) provides limited legal assistance within the Community Care Pilot Program (CCP) for high need and complex cases. This advice service is funded by DIAC and VLA receives additional funding at DIAC's discretion to represent specific cases. VLA has in the past been able to provide minor assistance to protection visa applicants and some other limited classes of visa applicants when IAAAS funding has been expended for the financial year and the case has merit, and has been able to assist clients to make requests to the Immigration Minister for discretionary intervention on humanitarian and public interest grounds under sections 417 and 351 of the Migration Act 1958. In NSW, LANSW is also referred clients through the CCP, but it does not cover detainees.

Commissions are representing some of the 247 persons who had been detained in immigration detention and later released "not unlawful" in compensation proceedings through an arrangement with DIAC following the Ombudsman's investigation finalised in July 2007. The arrangement provides that Commissions will be reimbursed reasonable costs and disbursements in assisting claimants.

NLA's view is that it is inappropriate for DIAC, which runs the IAAAS, to administer legal assistance funding for immigration matters as there is an inherent conflict of interest in having the body which makes decisions about visas also deciding who will receive legal assistance and who will provide the assistance. It is suggested that this funding should be administered by the Commonwealth Attorney-General's Department as part of legal aid funding.

Terms of Reference

- **the criteria that should be applied in determining how long a person should be held in immigration detention**

The damage done to people's mental and physical health by detention in remote high security detention centres has been well documented. Distance impedes access to necessary humanitarian support and legal assistance. In

relation to the Christmas Island facility, recent inspection by refugee advocates has resulted in a letter being forwarded to the Minister stating the centre is an extremely harsh and stark environment to detain people seeking asylum while their applications for protection are determined.[6]

A "least restrictive alternative" approach should be adopted in relation to the accommodation of people who enter or remain in Australia without a valid visa. Generally, once identity is established (with a flexible standard applied to those, particularly undocumented asylum seekers, who cannot readily prove identity) and health and security risks have been assessed, visa applicants should be released into the community and be provided with a bridging visa entitling the person to apply for work, and to access Medicare and obtain income support.

Detention of all unauthorised arrivals, for management of health and security risks and establishment of identity should be limited to a maximum period of one month. Where the DIAC considers that detention of an unlawful non-citizen is necessary because the person presents an unacceptable risk to the community, or because the person has repeatedly refused to comply with visa conditions, the Department should be required to apply to the FMC or other independent Court or Tribunal for an order permitting detention. Following any such order, the case should be subject to monthly review by a Senior Officer of DIAC every first and second month thereafter and to further review by the Court every 3 months thereafter.

Under section 197AB of the Migration Act only the Minister for Immigration and Citizenship may make a residence determination allowing detention in the community. It is our experience that this leads to delay in making residence determination decisions. We suggest that the power to make such decisions should not reside with the Minister alone but also within the Immigration Department at the State and Territory level.

Related to the criteria to be applied in determining how long a person should be held in immigration detention are time limits in relation to making applications. The time limits currently imposed by the Act are unnecessarily short. This has led to people being detained for longer because the application was not made in time rather than because there was no merit in their circumstances. For example,

(a) when an unlawful non-citizen is detained and they have the right to apply for a visa (other than a protection visa), they are given only 2 working days from the date they are formally advised in writing of their rights to apply (see s195 Migration Act). This can be extended by 5 working days upon a written request lodged by the detainee within the first 2 working days.

(b) a detainee who could make a valid spouse visa application, could be denied the opportunity because of the interplay between short time limits and

[6] A Just Australia, Oxfam Australia and Oxfam Novib, Research Project

factors such as lack of readily available legal advice, language problems, educational background or other personal circumstances.

(c) Detainees are given an inadequate amount of time to provide information in support of a bridging visa application. An applicant for a substantive visa is taken to have applied for a bridging visa at the same time. DIAC considers the bridging visa application and decides if further information or a surety is required. In the case of protection visa applicants in detention a letter is sent with a twenty-four hour deadline for response. This is inadequate, even for applicants who are represented. An extension of time may be sought, but needs to be made within the deadline.

Possible outcomes in the examples set out above can be unnecessary and harsh, involving greater detention and removal costs, as well as personal hardship for the detainee and his/her Australian family.

NLA suggests that time limits ought to be extended to allow a reasonable period for detainees to make arrangements to lodge valid visa applications. A free legal advice scheme should be funded to provide timely and independent advice to detainees so that valid applications can be made within time.

- **the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks**

Case study
In a recent case Legal Aid NSW acted for a married couple in IDC Villawood. They were not eligible for bridging visas as they were not immigration cleared and they did not fit within one of the very narrow criteria for bridging visa eligibility for persons not immigration cleared. They applied for protection visas in January 2008 and were interviewed by Onshore Protection in February. The husband was asked to obtain a penal check from a country he had lived in. The wife had been arrested and suffered a miscarriage in detention in her home country. She fell pregnant in Australia. However she remained in detention at Villawood for four months until the penal check was completed and a protection visa was granted.

It is our experience that security and identity checks, can take a long time to complete. Sometimes this is the last requirement to be met before a visa may be granted. Approaches to the Inspector General of Intelligence and Security in relation to potential time frames for completion of security checks do not usually receive even a generally indicative response.

In relation to those detained on the basis of health, identity and/or security concerns, NLA welcomes the Government's proposal that once in detention a detainee's case will be reviewed every three months to certify that the further

detention of the individual is justified.[7] However, NLA believes that detention for greater than one month should require an application by DIAC to the FMC or other independent Court or Tribunal. DIAC should be required to demonstrate that there is a valid reason for continuing detention of the detainee. Further, there should be an ongoing review of the case by a senior officer of DIAC every 1 and 2 months after the first and every subsequent FMC or other independent Court/Tribunal decision which authorises continued detention with further merits review by the FMC or other independent Court or Tribunal every 3 months from its first review of the case. At each Court/Tribunal review the onus should be on DIAC to show why continued detention is justified. Both DIAC and Court/Tribunal reviews should impose deadlines on the making of decisions, eg decision within 3 working days. The detainee should be guaranteed certain procedural fairness rights, including the right to be heard personally both at DIAC and Court/Tribunal reviews.

- **options to expand the transparency and visibility of immigration detention centres**

Immigration detention facilities should be smaller and community based to facilitate access to health, education, legal and community supports. Detention centres should be close to public transport and accessible to visitors. They should not be sited in remote locations. Facilities in remote areas should be closed.

Since 2005 there have been valuable initiatives which have improved the transparency of detentions centre processes and helped to protect the rights of onshore detainees.

The most significant change in improving transparency, however, has been in the expanded role of the Commonwealth Ombudsman, under s 4 (1) (4) Ombudsman Act 1976, to report on detention centre conditions, and to assess the situation of individual detainees. The Ombudsman has been most active in this role and has reported on DIAC strategies which have hindered fair and open decision making about immigration detainees. [8] Legal Aid Commission solicitors have participated in the Ombudsman's enquiries and have welcomed Ombudsman's reports which have suggested positive outcomes for people in detention.

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[7] *New Directions in Detention - Restoring Integrity to Australia's Immigration System*

Australian National University, Canberra, Tuesday 29 July 2008

[8] Commonwealth Ombudsman Report No. 07/2006 "Report into Referred Immigration Cases: Mental Health and Incapacity" at 6-7.

The Ombudsman's ability to prevent future shortcomings is limited by the periodic nature of the investigation process and the inability of the Ombudsman's staff to assess the migration status of individual detainees. It is to be hoped that the ongoing role of the Ombudsman and regular review of detention decisions will together resolve issues.

Other options to expand the transparency of immigration detention centres are 1) funding for general immigration advice and assistance services and 2) case management systems like those at Villawood IDC and the Victorian CCP. LANSW reports that the system at Villawood IDC has benefited detainees and their legal representatives by having a DIAC staff member on hand to facilitate medical treatment, identity checking processes and contact with detainees.

Through the CCP all detainees are case managed by a DIAC officer and if the DIAC case officer considers that a detainee would benefit from legal assistance they will be referred to VLA. Whilst to date CCP officers have been accessible and open to suggestions for referrals, the fact that access to legal advice is controlled by the Department with decision making functions in relation to the applicant's immigration status is potentially problematic. VLA reports that the decision making process lacks transparency and only a very small number of CCP cases are referred for legal advice and an even smaller number contact VLA which would then allow VLA to seek a referral from DIAC. Currently, DIAC in Victoria has about 250 cases in CCP and only a handful have been referred to VLA for legal assistance. LANSW similarly reports very few referrals through the CCP for detainees.

LANSW is also concerned that decisions about placements of detainees within Villawood IDC are not transparent. At Villawood there is a range of detention facilities, Stage One, generally used to hold detainees with criminal records or other security concerns, Stages Two and Three for males and 'Lima' for females not of security concern, Immigration Residential Housing for families and some vulnerable applicants and community detention. Detainees and their representatives are often uncertain how to request a transfer from one part of the detention centre to another or to whom to address the request and it can be very difficult to understand the criteria used to decide where a detainee will be placed. Detainees are particularly upset if moved between different types of accommodation against their wishes without understanding the reasons. There appears to be little or no information publicly available about the criteria for access to Immigration Residential Housing and community detention and who to contact in relation to these. It is therefore suggested that information about such criteria should be more readily available.

- **the preferred infrastructure option for contemporary immigration detention**

NLA recommends that Australia should move away from the use of large immigration detention facilities and allow people to reside in community

facilities, which is a more humanitarian approach as opposed to holding people in “prison like” facilities that have an adverse impact on the health and welfare of detainees. NLA suggests that individuals held for different reasons may need to be housed separately. Screening for both mental health and infectious disease issues should be capable of taking place immediately. The NTLAC for example has reported four recent cases of prisoners contracting TB from fishermen in immigration detention at the prison.

It would be better to accommodate people applying for visas in the community whereby families can remain intact and access local health facilities and children can attend school in the local area. It is suggested that this option would be a much less costly option than the present detention model especially if visa seekers are able to work and pay rent. Settlement programs incorporating life skills training, the provision of health care, and information on accessing services should be adequately funded to support effective integration into the community by visa applicants.

A significant issue is the lack of rights for those on Bridging Visa E (BVE) which is granted to asylum seekers who do not apply for a Protection visa within 45 days of arrival in Australia. BVE holders are currently denied the right to work, access to Medicare or any government funded income support. There are several thousand people on BVEs, some of whom who have been on these visas for many years and are totally dependent on support from charitable organisations. Many are living in conditions of poverty and suffer a series of health and welfare crises including family breakdown, isolation, depression and cumulative debt.

Improved facilities for consultations with detainees

The provision of legal advice (and other) services in detention centres requires proper facilities. Current facilities are considered inadequate and or inappropriate for the purpose. Some examples of Commission experience follow:

Western Australia

The immigration detention facility in Perth, the Perth IDC, is at the domestic airport, which is an extremely busy and noisy location due to aircraft landing and taking off. There is very limited outdoor space.

New South Wales

Facilities at Villawood for legal interviews are not adequate for current needs. While accessing interview rooms by representatives has improved at Villawood, basic problems which have been raised for many years by advocates remain. These include:

<u>Insufficient number of interview rooms, especially for Stage 2/3 detainees</u>. There are currently 3 interview rooms available. The fourth is reserved for DIAC interviews and cannot be accessed otherwise. It has also been advised that DIAC Compliance interviews take precedence, and representatives will be refused access to a pre-booked room or asked to vacate the room in the

event that a number of detainees must be interviewed. This problem has also arisen in Stage 1, although less often.

These conditions and the need to meet timelines have led in the past to the unsatisfactory situation where detainees are interviewed in the open in public areas (e.g. the dining area in Stage 1 or the outdoor visiting area in Stage 2) by their legal representatives.

Quality of the interview rooms

The rooms in Stage 2 have been improved in recent times, with the addition of telephones and heating and air conditioning. However, the rooms are not sound proof and conversations from the adjoining room are easily heard. This is also the case in the DIAC interviewing room, where interviews are recorded Apart from the distraction there is also an issue of privacy and loss of confidentiality.

The Stage 2 interview rooms are located adjacent to the visiting area, where there are frequently religious and other gatherings involving singing and music. These activities are important for detainees, and it is not suggested that these be stopped. However, the location of the rooms combined with the poor sound proofing means that there is an unacceptable level of outside noise in the interview room which is distracting for detainees and their representatives.

The Stage 1 interview rooms also have a lack of privacy, especially one room which has an open area at the top so that conversations can be easily heard in the corridor outside the room.

Victoria

There are not enough interview rooms, and the rooms are not sound proof. There is video camera surveillance of all interviews and it is unclear whether there is sound surveillance.

- **Options for additional community-based alternatives to immigration detention by:**

  a) inquiring into international experience;
  b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;
  c) comparing the cost effectiveness of these alternatives with current options.

In April 2006 the United Nations High Commission for Refugees (UNHCR) published a detailed study examining alternatives to detention of asylum seekers and refugees.9 The report considers alternative measures including:

[9] Ophelia Field with the assistance of Alice Edwards, UNHCR Legal and Protection Policy Research Series, *Alternatives to Detention of Asylum Seekers and Refugees,* POLAS/2006/03, April 2006, http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf, accessed on 14 July 2008.

(a) Release with an obligation to register one's place of residence with the relevant authorities and to notify them or to obtain their permission prior to changing that address;
(b) Release upon surrender of one's passport and/or other documents;
(c) Registration, with or without identity cards (sometimes electronic) or other documents;
(d) Release with the provision of a designated case worker, legal referral and an intensive support framework (possibly combined with some of the following, more enforcement-oriented measures);
(e) Supervised release of separated children to local social services;
(f) Supervised release to (i) an individual, (ii) family member/s, or (iii) nongovernmental, religious or community organisations, with varying degrees of supervision agreed under contract with the authorities;
(g) Release on bail or bond, or after payment of a surety (often an element in release under (f)) *de facto* restrictions) – for example, by the logistics of receiving basic needs assistance or by the terms of a work permit;
(h) Reporting requirements of varying frequencies, in person and/or by telephone or in writing, to (i) the police, (ii) immigration authorities, or (iii) a contracted agency (often an element combined with (f));
(i) Designated residence in (i) State-sponsored accommodation, (ii) contracted private accommodation, or (iii) open or semi-open centres or refugee camps;
(j) Designated residence to an administrative district or municipality (often in conjunction with (i) and (j)), or exclusion from specified locations;
(k) Electronic monitoring involving 'tagging' and home curfew or satellite tracking.10

The UNHCR report provides a comprehensive study of international practice and the effectiveness (including cost effectiveness) of such alternatives. While its focus is on asylum seekers and refugees, the alternative mechanisms which it canvasses in the report have equal relevance to other immigration detainees.

It is beyond the scope of this submission to propose or endorse a particular alternative mechanism. However, NLA strongly supports the Committee's stated intention to consider such alternatives and emphasises that they should be genuine alternatives to immigration detention. Models such as residential housing within immigration detention centres, while an improvement on standard immigration detention practices, still fall under the general umbrella of 'immigration detention' by which a person's liberty is completely curtailed.

NLA draws the Committee's attention to certain features of the UNHCR report which are particularly significant from a legal perspective. These include:

[10] Ophelia Field with the assistance of Alice Edwards, UNHCR Legal and Protection Policy Research Series, *Alternatives to Detention of Asylum Seekers and Refugees,* as above at pp.22-23 and the commentary which follows.

(i) Non-compliance with international human rights standards

There are serious concerns that Australia's system of mandatory detention fails to meet international legal standards. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right not to be arbitrarily detained. As a matter of international law, this requires at least that the detention be proportional and necessary in the circumstances. The United Nations Human Rights Committee (HRC) has repeatedly found that Australia has breached the ICCPR by failing to demonstrate that the detention of individual complainants had been necessary or proportional11. The HRC has emphasised that Australia was unable to demonstrate that compliance with its immigration policy could not have been achieved by less intrusive methods, such as sureties or reporting obligations[12].

The offshore refugee status determination process is significantly different to the refugee determination status of asylum seekers within Australia. Australia's offshore processing arrangements do not address the possibility of excessive or indefinite detention in offshore processing centres. Under section 494AA of the Migration Act legal proceedings cannot be instituted or continued in relation to the lawfulness of the detention of an offshore entry person. The problem with offshore processing is it results in a distinction between the procedural rights of asylum seekers based on their mode and place of arrival. The end result arguably penalises asylum seekers who are intercepted in an offshore place13.

In the six years since the Tampa crisis in August 2001 Australian taxpayers have spent more than $1 billion dollars to process less than 1 700 asylum seekers in offshore locations or more than half a million dollars per person14.

A recent research project funded by a Just Australia, OXFAM Australia and Oxfam Novib highlights that the costs to Australia are not confined to financial costs but include human costs and the costs to Australia's legal and democratic system. This study was released in August 2007 and also highlights the difficulties faced by the communities in which the centres are located. For example, the study reveals that on Christmas Island, several individuals within the community volunteered to undertake activities such as teaching English lessons to detainees and providing care and assistance to them. However, the population of Christmas Island is only 1,200 and many of

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[11] D & E v Australia, Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006).; Baban v. Australia, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003); Bakhtiyari v Australia, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003; C. v. Australia, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002); A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

[12] D & E v Australia, Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006) at [7.2]. Australia may also be in breach of its obligations under other international conventions including the Refugees Convention itself: see for example Ophelia Field with the assistance of Alice Edwards, UNHCR Legal and Protection Policy Research Series, *Alternatives to Detention of Asylum Seekers and Refugees,* as above at p.4.

[13] Human Rights and Offshore Processing J von Doussa No 9 UTS Law Review 45

[14] A price too high :the cost of Australia's approach to asylum seekers Kazimierz Bem, Nina Field,Nic Macllellan, Sarah Meyer, Dr Tony Morris p3

the volunteers interviewed for this report recounted feeling isolated from the wider community support and organizations that exist onshore, such as non-governmental organizations, legal assistance and advocacy centres and refugee service provision organizations.

One Christmas Island resident who did not wish to be named said:

"This community is by and large relatively receptive to the issue of the refugees' plight - that's a positive. But by the same token there are broader types of community care, social welfare, professional assistance, mental and psychological problems, health problems; they have a very small resource to draw on here. So detention in the community here places a real problem on the
community and it's not fair on them.

He continued that in an on-shore context:

In a bigger community you've got more people who can come in and fill the void, but here you felt you had a responsibility to keep going even though you really needed a break or time off. There was no external support coming in. It was up to you to motivate yourself. It is just wearing. You wear out after a time. You can't do it forever."

(ii) Factors influencing effectiveness of alternative mechanisms – availability of legal advice

UNHCR's position is that the availability of legal advice and representation is one of the major factors influencing the effectiveness of alternatives to immigration detention[15]. Its research also indicates that the effectiveness of alternative mechanisms will be much greater if people are fully informed of and understand their rights and obligations, the conditions of their release and the consequences of failing to appear for a hearing.

Commission experience, based on working with many people in immigration detention over time, is that some detainees are extremely poorly informed about their migration options and that applicants who are fully informed about their legal position and prospects of success are likely to make more realistic choices about their migration options. DIAC's CCP operates on like principles. Similarly, the Federal Court has recently emphasised the importance of competent, publicly funded legal advice in reducing costs and demands on the migration system16.

It is unsurprising that international experience suggests that the availability of adequate, publicly funded legal advice plays a major part in ensuring the effectiveness of alternatives to immigration detention. Importantly,

[15] Ophelia Field with the assistance of Alice Edwards, UNHCR Legal and Protection Policy Research Series, *Alternatives to Detention of Asylum Seekers and Refugees* as above, particularly at pp.45-50.
[16] *SZLHM v MIAC* [2008] FCA 754 (23 May 2008), per Flick J at [41].

international experience also suggests that such alternatives have a high rate of compliance and are more cost effective than immigration detention17.

If alternatives to immigration detention are implemented, NLA considers that adequate funding for the provision of free legal services to affected people is likely to result in a far more effective (including cost effective) system.

FOI

An effective legal advice scheme would also require timely access to a detainee's file from both DIAC and the detention centre. Commission solicitors have experienced difficulties in accessing medical records from detention centre files, yet such reports are crucial in representing clients in review applications or assisting with requests for Ministerial intervention can significantly impact on an applicant's chance of success. The current delays in accessing reports through the FOI unit in DIAC mean solicitors are unable to meet required time limits imposed by the review tribunals or, when time limits must be met, can mean that applications are presented using incomplete information. These delays could be avoided if there was an FOI process available through case management staff at the detention centre.

In Victoria, where Community Care Pilot referrals are made, the DIAC Case Management Staff make FOI requests prior to referring the matter which has sped up access to information. VLA reports significant improvements in the efficiency of FOI processing in the past year (although there are still delays which affect cases where there are tight time limits), but notes that delay continues to be experienced in relation to accessing offshore visa applications.

In order to provide an efficient advice service to detainees there should be a way for an adviser to get information about the detainees' history and other relevant details from a DIAC office informally (eg telephone etc) after the provision of an authority from a detainee. This would make access to relevant information quicker for the purpose of providing general immigration advice.

The Ombudsman has recently released a report[18] addressing FOI issues, with recommendations which have been accepted by the Immigration Department and it is hoped that the problem of delay will be overcome.

[17] Ophelia Field with the assistance of Alice Edwards, UNHCR Legal and Protection Policy Research Series, *Alternatives to Detention of Asylum Seekers and Refugees* as above at pp.45-50.

[18] Commonwealth Ombudsman report no 06/2008, "Department of Immigration and Citizenship: Timeliness of Decision Making Under the Freedom of Information Act 1982, June 2008

Conclusion

Thankyou for the opportunity to make this submission. Please contact Ms Smith at the Secretariat if you require anything further. Ms Smith will refer the matter accordingly.

Yours sincerely,

Hamish Gilmore
Chairperson
National Legal Aid

2.2 Appeals to Administrative Appeals Tribunal

The Commission may make a Grant of Legal Assistance to an applicant for assistance to obtain instructions and necessary reports and prepare submissions for an appeal to the Administrative Appeals Tribunal, if:

(a) the appeal may result in the applicant being charged with a criminal offence

(b) the applicant cannot afford to pay for medical reports, and the appeal is about the health of the applicant or someone for whom the applicant has parental or legal responsibility

(c) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities, or

Note Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

(d) the Commission determines that the appeal involves important or complex questions of law.

Guideline 3 Migration cases

3.1 Assistance for limited migration matters

(1) The Commission may make a Grant of Legal Assistance for proceedings in the Federal Court, Federal Magistrates Court or High Court dealing with a migration matter, including a refugee matter, only if:

(a) there are differences of judicial opinion that:

(i) have not been settled by the Full Court of the Federal Court or the High Court, and

(ii) relate to an issue in dispute in the matter, or

(b) the proceedings seek to challenge the lawfulness of detention.

Note Guideline 3.1(1)(b) does not include a challenge to a decision about a visa or a deportation order.

(2) Guideline 3.1(1) applies to a matter, even if the matter could also be characterised as falling within another Commonwealth Legal Aid Priority or guideline in these Commonwealth Legal Aid Guidelines.

(3) In all other cases, applicants should be referred to the Immigration Advice and Application Assistance Scheme (IAAAS) for possible assistance.

Guideline 4 Equal opportunity and discrimination cases

4.1 Assistance for certain matters if substantial benefit

Subject to guideline 1.2 in this Part 4, the Commission may make a Grant of Legal Assistance for an equal opportunity or discrimination case if there is a strong prospect of substantial benefit being gained by the applicant for assistance and also by the public or a section of the public in relation to the matter.