Dear Secretariat

ASRC Submission to the UN Human Rights Committee concerning the List of Issues Prior to Reporting for the Sixth Periodic Report of Australia

Thank you for the opportunity to provide a submission to the Human Rights Committee. The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of 23 aid, advocacy and health services for asylum seekers in Australia. We deliver services to over 1,200 asylum seekers at any one time through programs such as material aid, health, legal, counseling, casework and foodbank.

ASRC’s vision is that all those seeking asylum in Australia have their human rights upheld and that those seeking asylum in our community receive the support and opportunities they need to live independently.

Our submission is based on 11 years of experience working directly with asylum seekers living in the community and in detention.

It is our belief that the continuation of the current indefinite mandatory detention policy (currently 5815 are in immigration detention), offshore processing, detention of children and the arbitrary treatment of asylum seekers living in the community are in breach of the ICCPR.

Yours faithfully
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Introduction

1. The Australian government’s current treatment of asylum seekers is a matter of grave concern. It is an issue which raises serious questions regarding Australia’s compliance with its international obligations enshrined in the International Covenant on Civil and Political Rights (the Covenant) and other international law to which Australia is a state party.

2. The purpose of this submission by the Asylum Seeker Resource Centre (ASRC) is to draw to the attention of the United Nations Human Rights Committee (the Committee) various aspects of the Australian government’s law and practice which are inconsistent with its obligations under the Covenant. By doing so, it is hoped that the Committee will encourage the Australian state to cease related human rights violations immediately and to modify practices to ensure that further violations do not occur.

3. The following submission will focus on the following areas of concern:
   a. Immigration detention
      i. Lack of review processes (article 9)
      ii. Prolonged and indefinite detention (article 9)
      iii. Children in detention (articles 9 & 24)
   b. Adverse mental health
      i. Detention (articles 6, 7 & 9)
      ii. Community based asylum seekers (article 6 & 12)
   c. Offshore processing of asylum seekers
      i. Christmas Island (articles 7 and 9)
      ii. Nauru and Malaysia (articles 7, 17 & 26)
   d. The new Complementary Protection regime
   e. Suggested questions to be posed to the Australian government by the Committee

a) Immigration Detention

4. In 2009 the Committee expressed concern regarding the State party’s mandatory use of immigration detention “in all cases of illegal entry” and recommended that the State “consider abolishing the remaining elements of its mandatory immigration detention policy.”\(^1\) There are currently 5815 people in immigration detention facilities (and alternatives places of detention) and 1437\(^2\) people in the community under residence determination, highlighting that Australia still has an active policy of detention despite the Committee’s recommendations.

5. The ASRC regrets to inform the Committee that this recommendation has not been implemented by the Australian government. Australia remains the only country in the world where immigration detention is mandatory for all unlawful non-citizens\(^3\) and where there exists no judicial or administrative review to challenge the basis for detention.

6. It is the view of the ASRC that the government’s principal purpose of mandatory detention of asylum seekers is to deter other asylum seekers arriving by boat. This is unacceptable under international law and the practice gives rise to numerous violations of articles 2, 6, 7, 9, 14,
17, 24 and 26 of the Covenant. These violations are caused *inter alia* by unjustifiably prolonged or indefinite detention, the lack of effective review processes, detention of children and adverse mental health issues relating to detention.

**Lack of review processes (article 9 and 26)**

7. Despite the concern expressed by the Committee in its 2009 observations “at the lack of effective review processes available with respect to detention decisions,” the Australian government has not amended the Migration Act 1958 (Cth) and as such there is still no right to immediate judicial review of immigration detention; in breach of article 9(4) of the ICCPR. Even if the detention is considered arbitrary by domestic courts, they have no authority to release a person from detention. Even when the continued detention is found by expert medical opinion to be deleterious to the health of asylum seekers, the courts have no capacity to order the release of the person.

8. Without such safeguards in place to verify the necessity and legality of detention, the Australian government is responsible for the violation of Covenant rights of an alarming number of asylum seekers.

**Prolonged and indefinite detention (article 9)**

9. The current practice of detaining asylum seekers for unjustifiable extended periods results in serious human rights violations. In many instances, when detention of asylum seekers becomes unjustifiably prolonged, that detention becomes arbitrary under article 9 (1) of the Covenant. This was the finding of this Committee in *A v Australia*. According to the latest figures 1197 asylum seekers have been detained for longer than a year, including 453 who have been detained for longer than 2 years.

10. Previously release from detention was contingent upon the Minister issuing the refugee with a visa after both a positive refugee decision and a positive security decision which often came months later. In November 2011 community arrangements were extended to vulnerable men as well as unaccompanied minors and families with children. However these were arbitrary and never for the majority of cases. At the same time extra reasons such as classifying someone as a ‘person of interest’ have been introduced which can hold a person in locked detention even after the decision to grant a positive refugee and positive security decision has been made. The Minister may require a person to have a character determination made by the Principle Assessor of the National Character Consideration Centre.

*Ali was given a positive refugee decision in August 2011 and positive security decision soon after. He remained in detention and was transferred from Christmas Island to Melbourne detention in December 2011 because of his deteriorating mental health and attempted suicide. In February 2012 he was flown 5000 kilometres back to Christmas Island to face charges of breaking a computer. Charges were dropped before the Court case began as no proof could be produced that a computer had even existed in the location in which he was supposed to have broken it and no witnesses could be found to give evidence. Ali was then flown back to Melbourne where he remained in detention for a further three months. Eventually the Minister agreed not to pursue the adverse character assessment and Ali was released. He was detained for 22 months in all and for nine months after he had been*

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4 Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant Concluding Observations Of The Human Rights Committee Australia CCPR/C/Aus/Co/5 7 May 2009 paragraph 23

5 *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 30 April 1997 paragraph 9.4

6 Department of Immigration and Citizenship, Immigration Detention Statistics, 30 June 2012

recognised as a refugee. In particular, the Australian government has not put safeguards in place to ensure the automatic periodic judicial review of individuals determined to be stateless, of adverse security assessment, or ‘persons of interest’.

Even when these reviews take place and recommendations are made by the Federal Ombudsman’s Office, these are recommendatory only and have no power of enforcement.

11. Recently, as a result of non-reviewable adverse security assessments, over 50 recognised refugees, including children, face indefinite detention with little prospect of release. The result has been a spate of suicide attempts. In March 2012 a multiparty parliamentary inquiry found that it ‘resolutely rejects the indefinite detention of people without any right of appeal. Such detention, effectively condemning refugees who have not been charged with any crime to detention for the term of their natural life, runs counter to the basic principles of justice underpinning Australian society.’ The inquiry recommended mandated time limits on detention. The Government has not yet responded formally to these recommendations. It is the view of the ASRC that this practice clearly amounts to arbitrary detention under international law and should be reformed immediately.

*Udi* is one of the men facing indefinite detention as a result of an adverse ASIO assessment. His mental health deteriorated until he became psychotic. He kept three balloons on his bed and showed them to visitors as his wife, mother and baby. He was suicidal and deeply disturbed. His treatment was temporary removal to hospital, increases in drug therapy until he could not walk unaided and then transfer back to the detention environment which is making him sick. Neither courts nor doctors have the power to overrule the Ministers direction that this man remains in locked detention.

12. The Commonwealth Ombudsman’s office has been mandated to conduct regular reviews into people detained longer than six months. However, the reviews at six and 12 months have not occurred and the two year reviews have been late due to under resourcing of the office. The Ombudsman resigned in late 2011 publicly stating the Government ‘was in breach of its own immigration detention values’ and, to date, this position is yet to be filled leaving a gap in oversight of those detained longer than six months.

Children in detention (article 24)

13. The Australian government continues to hold children in immigration detention, despite concerns expressed by this Committee in 2009 about children being subject to abuse while being held in immigration detention in violation of articles 9, 14 and 24 of the Covenant. The Committee also expressed concern regarding the adverse effects on children in detention in Australia in the case of Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia, where a violation of article 24 (1) of the Covenant was found.

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9 http://www.abc.net.au/sundayprofile/stories/3351367.htm
10 Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant Concluding Observations Of The Human Rights Committee Australia CCPR/C/Aus/Co/6 7 May 2009 Paragraph 24
14. In 2004, the Australian Human Rights Commission held that Australia’s Immigration laws ‘create a detention system that is fundamentally inconsistent with the Convention on the Rights of the Child (CRC)’ and constitute cruel, inhumane and degrading punishment.\(^{12}\) Today, children are still subject to Australia’s policy of mandatory detention. As of June 30 2012, there were 591 children in detention.\(^{13}\) Since April 2010, 59 babies have been born into detention facilities, 3 of whom still remain.\(^{14}\)

In May 2011 a mother and baby arrived by air with a valid visa. An immigration check revealed that her husband had arrived six months earlier on a valid visa and then had sought a protection visa. On the basis that his wife was likely to do the same, Immigration attempted to have her removed on the next plane but were unable to get her sent away. The woman was not allowed to see her husband who was waiting outside. The mother and child were placed in detention when there was an option for community detention which would have meant that the child was not locked up.

In 2011 a family with three children were picked up during a raid on a farm. They had lived in Australia for nine years and were going to school in the local area where their parents worked on a farm. The eleven year old boy and his six year old sister and one year old cousin were placed in an adult male detention centre with their parents when there was a community detention option available where they could live in a community house while their immigration matter was resolved.

15. Given the irreparable harm that is caused to children, the ASRC firmly believes that no child should be held in immigration detention and that by doing so the Australian government violates a myriad of children’s rights under the Covenant and other relevant international treaties.

16. The major finding of the Australian Human Rights Commission’s Inquiry into age assessment in 2012 is that Australia’s treatment of individuals suspected of people smuggling offences who said that they were children has led to numerous breaches of both the Convention on the Rights of the Child (CRC) and the ICCPR. For example, the 48 individuals who were charged as adults after their wrist were x-rayed, but ultimately had the prosecutions against them discontinued, spent an average of 431 days in detention, of which on average 199 days, or well over six months, were spent in adult correctional facilities. Many of these individuals are likely to have been children at the time of their apprehension. The Commission also found that the detention of many of the young Indonesians has been arbitrary, in breach of article 9(1) of the ICCPR\(^{15}\).

b) Mental health concerns (articles 6, 7 & 9)

17. There are an alarming number of cases of asylum seekers in detention with serious mental health issues and suicidal ideation, often caused by the duration and conditions of detention. This is in contravention of Australia’s positive obligations under articles 6 and 7 of the ICCPR

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to adopt measures to prevent the loss of life,\textsuperscript{16} and to prevent cruel and inhuman treatment caused by the limited mental health care services provided to asylum seekers in detention.

18. The duration and conditions of detention have come under stern and consistent criticism from leading health organisations, human rights bodies and official parliamentary inquires over the past 20 years. In November 2011, over 30 key health organisations and advocates demanded the government take urgent action to provide adequate mental health care for people in detention suffering from increased incidents of self-harm and suicide.\textsuperscript{17}

19. In March 2012, a parliamentary investigation into the mental health of asylum seekers found almost 90 per cent of detainees suffer from clinically significant depression; half have been diagnosed with post-traumatic stress disorder and a quarter report suicidal thoughts.\textsuperscript{18} The mental health impacts of detention are well established and known to the Australian government. Clinical psychologists are still treating children and parents today from the trauma they suffered in detention over a decade ago.\textsuperscript{19} Unfortunately, history is repeating itself. As the President of the Australian Medical Association in the Northern Territory, Dr Paul Bauret, said in response to long-term detention in 2012: 'once again, it looks as though we're producing a cohort of Australian citizens who can be permanently damaged because of what we are doing to them.'\textsuperscript{20}

20. Asylum seekers in the community face multiple barriers to accessing effective and appropriate mental health care even though they often present with complex social, psychological and psychiatric support needs. Access to mainstream mental health emergency services is inconsistent and whilst crisis and emergency response is available, ongoing care is absent. The Refugee Health and Wellbeing Action Plan 2008–2010 (DHS 2008) states that there is a higher rate of psychological disorders for those who have experienced events associated with the refugee experience than the general population\textsuperscript{21}. This lack of care could amount to inhuman treatment under article 7, and when it directly results in suicidal ideation of asylum seekers, it may be a breach of the positive obligations held under Article 6.

21. In addition to the mental health concerns for asylum seekers in the community, the lack of right to work and welfare may amount to cruel, inhuman or degrading treatment (Article 7)\textsuperscript{22}. In line with the Australian Human Rights Commission’s recommendations\textsuperscript{23}, there needs to be standardisation of the community arrangements for asylum seekers. At present, some have access to work rights, some not. Some have access to English, some not. There is a variety of access to medical services depending on visa status and mode of arrival. We are treating people in an inconsistent, arbitrary and inhumane way. The appropriate access to work rights, income support and essential medical health care and counselling must be guaranteed regardless of mode of arrival.

c) Offshore processing of asylum seekers

\textsuperscript{16} HRC General Comment 6 para 5
\textsuperscript{17} ‘Leading Organisations Demand Immediate Action on Mental Health Standards in Immigration Detention,’ Australian College of Mental Health Nurses media release, 1 November 2011, http://www.acmhn.org/images/stories/News/111101over30leadinghealthorgs.pdf.
\textsuperscript{19} ABC interview by Leigh Sales with Professor of Psychiatry Dr Louise Newman, ‘Immigration Detention system on verge of collapse,’’ 14 September 2010, http://www.abc.net.au/lateline/content/2010/s3011845.htm.
\textsuperscript{20} ABC interview by Fran Kelly with Dr Paul Bauret, President Australian Medical Association, Northern Territory, 22 March 2012, http://www.abc.net.au/radionational/programs/breakfast/asylum-seekers-hospitalised/3905668.
\textsuperscript{22} SYDNEY LAW REVIEW [VOL 33:687 2011], AUSTRALIAN COMPLEMENTARY PROTECTION Leaving people to live in the community without work rights or access to social security may amount to cruel, inhuman or degrading treatment. In 2005, the House of Lords held that the state’s failure to provide adequately for asylum seekers could amount to inhuman or degrading treatment if they were left ‘with no means and no alternative sources of support’, were ‘unable to support’ themselves, and were, ‘by the deliberate action of the state, denied shelter, food or the most basic necessities of life.’ (\textit{R v Secretary of State for the Home Department, ex parte Adam} [2006] 1 AC 396 (HL), [7] (Lord Bingham).
Christmas Island (articles 7, 9 & 24)

22. Despite the fact that this Committee recommended in 2009 that Australia “consider closing down the Christmas Island detention centre,” asylum seekers are still being held there. There are currently 14,762 asylum seekers, including 223 children being held in detention facilities (including Alternative Places of Detention) on Christmas Island.

23. Asylum seekers who arrive by boat are subject to a different process to those who arrive by air. Boat arrivals are interviewed without access to legal advice immediately after coming off the boat. These “entry interviews” (also called screening in interviews) with officers of the Department of Immigration. The ASRC is aware of cases where the content of these interviews is later being used by the IMR to highlight any inconsistencies in claims for asylum, despite the fact that legal advice was not offered prior to those initial interviews.

“They told me not to say that you are political because they will not accept you. I told them that I had come because of religion but this was not true. I was afraid to tell them the real reason in case they sent me back and told the regime what I had said.”

24. There have been reports that individuals are also being subjected to a highly confined, guarded and isolated compound on the island and that children are being held in ‘Alternatives Places of Detention’ on the island. These claims give rise to potential violations under articles 7, 9 and 24 of the Covenant.

Mirza*
Mirza is a young Iranian who has been in Australian detention for 15 months, firstly on Christmas Island and now in Northern IDC. He is a Faili Kurd, an ethnic minority group persecuted and denied citizenship by Iranian authorities, rendering him stateless. Mirza displayed burn marks on his body from the violence he experienced in Iran, alongside these older scars were deep gashes he had cut across his own torso more recently.
Mirza shook uncontrollably as he spoke and apologised as he struggled to remember the details of his own life, and the current status of his refugee claim in Australia. He said, “In Iran I have been tortured and I have been threatened, but I have never been in prison before Australia. When I came to this country I was strong and healthy, now I am ill. I take sleeping pills, I am weak. The pain and frustration here is unlimited. The only way to release it is to hurt ourselves. They do not allow us to end our lives, but they don’t let us save our lives either. We are so stuck, we have no options I know the officers are just doing a job. It is the politicians who play with my life like it’s a ball in a soccer game.”
He couldn’t remember the last time he had left the detention centre.

Offshore processing in Malaysia and Nauru (articles 2, 6, 7, 9, 17 and 26)

25. The ASRC has serious concerns regarding the proposals being debated by the Australian parliament to process asylum seekers in Nauru and/or Malaysia. The ASRC believes that offshore processing of asylum seekers would cause numerous violations of the Covenant and other relevant international law and as such is an unacceptable proposal.

26. The UNHCR has stated that its “preference has always been an arrangement which would enable all asylum-seekers arriving by boat into Australian territory to be processed in Australia.”

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24 Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant Concluding Observations Of The Human Rights Committee Australia CCPR/C/Aus/Co/5 7 May 2009 paragraph 23 (c)
27. It is a clear concept of international law that Australia cannot ‘contract out’ of its international obligations. Australia has undertaken the implicit obligation of non-refoulement under articles 6 and 7 of the ICCPR as well as the explicit obligation under other UN human rights treaties and the 1951 UN Refugee Convention.

28. Recommendation 19 of the 2009 Human Rights Committee requested the government enact legislative measures to prevent asylum seekers from being returned to places where ‘they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.’

29. The proposal to send asylum seekers to Malaysia, where international treaties such as the ICCPR, the CAT and the Refugee Convention have not been ratified, puts Australia at risk of violating its international human rights obligations.

30. In 2011 the High Court of Australia struck down the government’s plan to send asylum seekers to Malaysia as unconstitutional. However, the Australian government is currently attempting to abrogate existing legislative arrangements in order to circumvent the High Court’s ruling and implement its plan to transfer asylum seekers to Malaysia, clearly avoiding its own protection obligations and breaching Article 7 and 9 of the Covenant.

31. When determining whether a third country such as Malaysia is a safe place to send asylum seekers, consideration must be given not solely to the international and domestic legal framework in place to provide protection, but also the treatment of asylum seekers in practice. Other human rights organizations have documented the prevalence of ill-treatment of asylum seekers in Malaysia. Amnesty International has stated that “they face the daily prospect of being arrested, detained in squalid conditions, and tortured and otherwise ill-treated, including by caning.” In December 2010 the European parliament passed a resolution calling for an end to the practice of caning in Malaysia, having regard to the absolute ban on torture and other cruel, inhuman and degrading treatment or punishment. The ASRC believes that if asylum seekers were transferred to Malaysia by the Australian government they would be at risk of this treatment in violation of article 7 of the ICCPR.

32. Furthermore, given the lack of international obligations assumed by Malaysia, once sent there for processing asylum seekers will be at greater risk of being returned to their country of origin where they may face persecution, torture, arbitrary execution or other grave human rights violations.

33. If asylum seekers when sent to Malaysia are separated from family in Australia their rights under article 17 of the Covenant could be violated.

34. By creating a discriminatory system whereby those asylum seekers that arrive by plane are permitted to remain in Australia whilst processing their application for protection whereas those that arrive by boat are mandatorily sent offshore, Australia is violating article 26 of the Covenant.

35. Similar issues arise with the proposal to send asylum seekers for “offshore processing” in Nauru. Although Nauru has ratified the UN Refugee Convention, it has not ratified key UN human rights treaties such as the ICCPR or the CAT. This apparent lack of commitment to international human rights standards would be a matter of great concern to the ASRC if asylum seekers were sent there for “offshore processing”.

36. The devastating effects of processing asylum seekers in Nauru and Manus Island under the “Pacific Solution” should not be forgotten. Mental illness and self-harm were irreparable results of the offshore processing policies of the Australian government at that time. These violations were unacceptable then and they would be unacceptable now if this practice was reinstated by the Australian government.

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30 Although the proposed bill to achieve this was recently defeated, the government is still committed to its ‘Malaysia solution’ plan. Judith Ireland, ‘Senate rejects ‘compromise’ asylum seeker bill,’ Sydney Morning Herald, 28 June 2012, http://www.smh.com.au/opinion/political-news/senate-rejects-compromise-asylum-seeker-bill-20120628-214x4.html
31 Amnesty International “Malaysia: Abused and abandoned: Refugees denied rights in Malaysia (2010)”
32 Amnesty International “Malaysia: Abused and abandoned: Refugees denied rights in Malaysia (2010)"
c) The Australian Complementary Protection Regime

37. Recent amendments to the Migration Act 1958 and Migration Regulations 1994 now provide a new ground upon which protection visas may be granted in Australia. This new regime came into force in March 2012 and is known as ‘Complementary Protection.’ It supplements current obligations under the UN Refugee Convention by codifying Australia’s non-refoulement obligations under international human rights law; including under the ICCPR. While the ASRC generally recognizes the positive advance that this regime should bring to the protection of asylum seekers in Australia, it raises concerns that the ASRC wishes to draw to the attention of the Human Rights Committee.

38. In particular, the ASRC is concerned that the standard of proof required under the regime is unusually high and not consistent with international law, and as such creates a risk that individuals will be returned despite Australia’s non-refoulement obligations.

39. Section 36 (2) (aa) of the Migration Act sets out the threshold which applicants for complementary protection must meet. It provides that a protection visa is to be granted to non-citizens with respect to whom “the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.”

40. Leading refugee law academics have expressed in an Australian Government document that “this is a much higher threshold than is required in international human rights law and complementary protection regimes elsewhere. This is because the section combines a number of independent threshold tests – intended to explain each other, not to be read together – into a single cumulative test. (...) The reason why this is problematic is because if the threshold for obtaining complementary protection is set too high, there is a risk that people will be exposed to refoulement, contrary to Australia’s obligations. This would undermine the very protection that the legislation is intended to ensure.”

41. The ASRC believes that the Australian government should take measures to ensure that the standard of proof applied in complementary protection claims is not higher than required in international law.

Proposed questions for list of issues

How has Australia complied with the Committee’s previous recommendations to consider the abolition of the mandatory immigration detention policy?

What measures have been taken to address the Committee’s concerns about the lack of effective review processes available for detention decisions (Arts 9 and 14). In particular, what safeguards are in place to ensure the automatic periodic judicial review of the necessity and legality of detention of individuals determined to be stateless, of adverse security assessment, or ‘persons of interest’. (Art 9.4) Finally, are there any cases of asylum seekers being told they will be detained for reasons other than those established by law. (Art 9.1)

How does the Government intend to address the high prevalence of mental health concerns experienced by asylum seekers in Australian detention centres? How does the Government intend to improve the current inadequate availability of mental health care?

Please explain how the Australian Government intends to comply with its positive obligations under Articles 6, 7 and 10 of the ICCPR to protect the rights of asylum seekers. Specifically, please identify steps it will take to:

• prevent the loss of life; and
• prevent cruel and inhuman treatment.

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34 Migration Act S 36 (2) (aa)
Please describe the proposed safeguards in place to ensure that the State party will not violate the rights enshrined in the ICCPR and other relevant UN conventions of asylum seekers if they are sent to countries such as Malaysia and Nauru for ‘off-shore processing’. Additionally, please explain why the State party has not implemented the Committee’s recommendation to consider closing down the Christmas Island detention centre.