

International Detention Coalition

Human rights for detained refugees,
asylum seekers and migrants

Children are children first and foremost:
*Australian Human Rights Commission
National Inquiry into Children in Immigration Detention*

IDC SUBMISSION

www.idcoalition.org

Envisioning a world without unnecessary immigration detention

CONTACT

International Detention Coalition (IDC)
C/Hub, Level 3, 673 Bourke Street
Melbourne, Victoria, 3000, Australia
Tel: +61 3 9999 1607
Fax: +61 3 9629 7213
Website: www.idcoalition.org
Follow us on twitter [@idcmonitor](https://twitter.com/idcmonitor)

ABOUT THE IDC

The International Detention Coalition (IDC) is a unique global network of over 300 non-governmental organisations, faith-based groups, academics and practitioners in more than 65 countries that advocate for and provide direct services to refugees, asylum-seekers and migrants in administrative detention. We are the only international organisation focused explicitly on immigration detention and alternatives to detention. With an international Secretariat based in Melbourne, Australia, the IDC works globally through Regional Coordinators in Africa, the Americas, Asia-Pacific, Europe, and the Middle East & North Africa (MENA).

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1. INTRODUCTION

1. This submission by the International Detention Coalition (IDC), a leading global human rights advocacy organisation with a particular expertise in immigration detention and alternatives to detention (ATD), sets out a number of issues for consideration by the Australian Human Rights Commission in its National Inquiry into Children in Immigration Detention 2014.
2. This submission will proceed in four parts. Beginning with section 2, this submission provides a summary of some of the key trends and findings in relation to the issue of immigration detention from a global perspective. Section 3 focuses specifically on children, including the profoundly negative impact that detention can have on their health, well-being and development. Section 4 contains a summary of the key international standards relating to the immigration detention of children. A brief Conclusion summarises the main points of this submission and additional resources are provided in an extensive Appendix.
3. As a preliminary point, we note that this submission is based upon extensive IDC member and partner consultations on the issue of immigration detention in the Asia-Pacific and globally since our establishment over 10 years ago.

2. GENERAL INFORMATION ON IMMIGRATION DETENTION AND ATD

The Issue

4. Globally, millions of refugees, asylum-seekers and migrants are at risk of immigration detention each year. The use of unnecessary immigration detention is on the rise and indeed already endemic to the management of complex mixed migration.¹
5. The detention of refugees, asylum-seekers and migrants represents a growing human rights challenge, despite only being permitted as a matter of international law where it is necessary, reasonable, and proportionate to a legitimate aim, and then only after ATD have been explored in each individual case.²
6. The increase in the use of immigration detention in most regions is closely linked to concerns regarding national security and attempts to limit irregular migration.³ However, there is a striking disconnect between empirical evidence and the increase in immigration detention practices. According to the academic literature, “there is a wide and growing gap between governments’ goals to control migration through [restrictive border control measures] and the efficacy of those migration policies in achieving measurable outcomes.”⁴
7. The most recent academic research demonstrates that there is no statistical correlation between restrictive border control measures aimed at interdiction and deterrence, for example, and the long-term impacts on refugees, asylum-seeker and migrant arrival.⁵ Rather, such restrictive border control measures actually increase the risks involved to vulnerable migrants while failing

¹ International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, (2011), 10-12, available at <http://idcoalition.org/cap/handbook/>.

² Article 9 ICCPR. For a comprehensive review of the international legal framework with regard to immigration detention, see generally International Commission of Jurists, *Migration and International Human Rights Law - Practitioners Guide No. 6*, (2011); and International Detention Coalition, *Legal framework and standards relating to the detention of refugees, asylum seekers and migrants: a guide*, (2011) available at <http://idcoalition.org/legal-detention-framework-guide/>.

³ See generally, Sampson, R.; Mitchell, G., *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, Journal on Migration and Human Security, (2013).

⁴ Robyn Sampson, Submission to the Australian Expert Panel on Asylum Seekers, (2012).

⁵ *Id.*

to achieve government deterrence aims.⁶ More stringent border control policies in countries of transit also fail to prevent the arrival and onwards transit of irregular migrants and asylum-seekers.⁷

8. As a result, refugees, asylum-seekers and migrants are often subjected to arbitrary or unlawful detention and are in a position of particular vulnerability with regard to immigration detention.⁸
9. Globally, immigration detention remains far less regulated, reviewed and monitored than criminal or other forms of administrative detention,⁹ and many countries are using a one-size-fits-all immigration detention model, where refugees, asylum-seekers and migrants are detained regardless of individual circumstances, age, protection needs or particular vulnerabilities.
10. The increased attempts to restrict global migration movements is also exposing xenophobic and nationalistic anti-immigrant attitudes.¹⁰
11. Moreover, refugees, asylum-seekers and migrants may be detained in conditions that do not meet minimum standards or are unsuited to their particular circumstances. While practices and conditions of detention vary widely between states, more often than not, refugees, asylum-seekers and migrants are detained in criminal prisons or other prison-like settings inappropriate for non-punitive, administrative detention.¹¹
12. Many human rights violations can and do occur in these circumstances and the physical and psychological impacts of even very limited immigration detention are well documented.¹² Women and children are especially vulnerable to violence and abuse in places of immigration detention, and studies have shown that even short periods of immigration detention can have life-long mental and physical health impacts.¹³
13. Immigration detention can last for months or in some cases years, during which time men, women and children are deprived of their liberty, often in overcrowded and unhygienic conditions falling below international standards.
14. In some cases immigration detention is clearly illegal, with no basis in law. In other cases, immigration detention is arbitrary with little or no due process afforded, limited or non-existent independent oversight of the reasons for detention or conditions of detention, denial of access to international protection mechanisms, opportunities for release, judicial review or meaningful and effective avenues to challenge one's detention.
15. Although immigration detention may be permissible in an individual case, governments often make broad policy justifications for the detention of refugees, asylum-seekers and migrants that overshadow the carefully circumscribed international standards around deprivations of liberty, including norms of necessity, proportionality, non-discrimination, and individual assessment.
16. The IDC remains concerned that governments are cooperating bilaterally and multilaterally to promote criminalisation and detention initiatives that attempt to restrict refugee, asylum-seeker and migrant movement without considering the rights framework.

⁶ Id.

⁷ Id.

⁸ See generally, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, A/HRC/20/24. (hereinafter SRHRM, A/HRC/20/24)

⁹ APT, UNHCR, IDC, *Monitoring Places of Immigration Detention: a practical guide*, (forthcoming).

¹⁰ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, para. 79, A/HRC/23/46. (hereinafter SRHRM, A/HRC/23/46).

¹¹ SRHRM, para. 31, A/HRC/20/24.

¹² See, e.g. Silove D, Steel Z, Watters C., *Policies of deterrence and the mental health of asylum seekers*, JAMA, (2000); Medecins Sans Frontieres, *The Impact of Detention on Migrants' Health*, Briefing Paper, (2010); Coffey G, et al, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, Social Science & Medicine 70 (2010).

¹³ See, e.g. International Detention Coalition, *Captured Childhood*, (2012), available at: <http://idcoalition.org/ccap/>.

17. Industrialised countries also continue to fund, pressure and provide incentives to neighbouring countries to detain refugees, asylum-seekers and migrants, including non-signatories to the Refugee Convention or other human rights treaties, placing refugees, asylum-seekers and migrants at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

Alternatives to detention

18. Despite the global increase in the use of immigration detention, there are alternatives. ATD are increasingly becoming normalized in law, policy and practice that allow for the non-detention of refugees, asylum-seekers and migrants. This is being recognized not only at the UN level, but also in a number of regional and domestic contexts.¹⁴

19. Moreover, ATD have been shown to be incredibly effective at achieving migration management objectives. Community based ATD programmes have been shown to maintain high compliance rates with a range of migrant populations, in particular when migrants are able to meet their basic needs, and are able to access the legal and social support necessary to make informed decisions about their migration journey.¹⁵ In contrast, prolonged or unnecessary detention has been found in some contexts to be counterproductive to government objectives of achieving compliance with immigration outcomes, including returns.¹⁶

20. ATD are also significantly more cost-effective than custodial detention. Significant cost benefits of on average 80% are associated with ATD. If cases can be managed in community settings without a reduction in immigration application processing times, cost savings will be inevitable. Avoiding unnecessary cases of detention, or reducing the length of time someone is detained, is a key strategy in reducing the costs associated with detention.¹⁷

21. Finally, ATD better respect the human rights of refugees, asylum-seekers and migrants. Appropriate non-custodial, community-based ATD necessarily reduce the reliance on detention, thus preventing unlawful or arbitrary detention practices. Effective management in the community is also more likely to respect other fundamental civil, political, economic, cultural and social rights, thereby contributing to refugee, asylum-seeker and migrant well-being and self-sufficiency. The respect for fundamental human rights, therefore, allows individuals to contribute fully to society if residency is secured or to better face difficult futures, such as the possibility of return.¹⁸

Independent judicial oversight including automatic review

22. The IDC's global research has found that decisions regarding detention are best regulated through automatic, prompt and regular independent judicial review.¹⁹ The use of courts to review the decision to detain not only establishes a system of independent and non-partisan oversight of the state's power, but ensures transparency and that the reasons for any decision to detain have been well established by the decision maker and that the individual facing detention has a chance to raise their own concerns regarding the decision.

Legal aid provision

23. We have also seen the importance of impartial, timely and effective legal aid provision as a way of ensuring that refugees, asylum-seekers and migrants have the ability to challenge their detention both upon entering detention, during their detention if one's circumstances change, or through the automatic periodic review process. This is facilitated when lawyers have open access to the

¹⁴ See generally, IDC, *There are alternatives*; see also, Alice J. Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR, available at <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

¹⁵ IDC, *There are alternatives*, 51-52.

¹⁶ IDC, *There are alternatives*, 41-43.

¹⁷ IDC, *There are alternatives*, 52.

¹⁸ IDC, *There are alternatives*, 52.

¹⁹ IDC, *There are alternatives*, 46.

detention population to identify those who require legal support. In addition to protecting against arbitrary detention, the provision of effective legal aid puts refugees, asylum-seekers and migrants in a better position to comply with migration decisions.

24. Research shows that when provided with independent legal counsel throughout the migration management process, refugees, asylum-seekers and migrants are more likely to comply with authorities, understand their legal options, and be prepared for the futures that await them, whether to remain or depart the territory.²⁰ The use of legal aid has also been seen to benefit the migration management system itself by increasing fairness, efficiency and reducing overall costs.²¹
25. Positive practice examples with regard to providing legal aid have been noted in Argentina, Belgium, Canada, Hong Kong, Hungary, Spain, Sweden, the United Kingdom, and the U.S.A. among others.²²

Case management

26. When paired with legal aid, IDC's global research found that case management allowed for even better migration management outcomes. This includes high levels of compliance with migration decisions, less reliance on unnecessary custodial detention, and improved refugee, asylum-seeker and migrant health and wellbeing.²³ Case management that is centred on understanding and responding to the unique needs and challenges of individuals and their context can help protect refugee, asylum-seeker and migrant rights, and build resilience in the individual to deal with the range of outcomes before them.
27. The need for case management has also been echoed by the UN Special Rapporteur on the human rights of migrants, François Crépeau (SRHRM), who called on states to use case management as "a strategy for supporting and managing individuals while their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals."²⁴
28. Practical examples of the use of case management within migration systems have been noted in Australia, Belgium, Canada, Hong Kong, Hungary, Spain, Sweden, and the U.S.A. among others.²⁵

Interpretation and translation provision

29. Interpretation and translation were also shown to be important elements of successful migration management as they provide refugees, asylum-seekers and migrants with the information they need to be informed of their rights and responsibilities, in a language and cultural context they can understand. In addition to translated written materials, qualified interpreters improve communication with lawyers, case workers and immigration officials.²⁶

²⁰ IDC, *There are alternatives*, 46.

²¹ IDC, *There are alternatives*, 46.

²² The benefits of legal counsel are described in detail in IDC, *There are alternatives*, at Box 3 Hungary, Box 5 Hong Kong, Box 7 United Kingdom, Box 8 Spain, Box 9 Sweden, Box 11 U.S.A., Box 13 Belgium, Box 14 Canada, Box 15 Hungary and Box 17 Argentina.

²³ IDC, *There are alternatives*, 29.

²⁴ SRHRM, para. 61, A/HRC/20/24.

²⁵ The benefits of case management are described in detail in IDC, *There are alternatives*, at Box 3 Hungary, Box 5 Hong Kong, Box 8 Spain, Box 9 Sweden, Box 11 U.S.A., Box 12 Australia, Box 13 Belgium, Box 14 Canada, and Box 6 Case Studies.

²⁶ IDC, *There are alternatives*, 33-34.

3. THE IMMIGRATION DETENTION OF CHILDREN

30. Every day, all around the world, tens of thousands of children are affected by immigration detention. Whether detained themselves or impacted by the detention of their guardians, children are particularly vulnerable to abuse and neglect. Children that are unaccompanied or separated from their parents or guardians are particularly at risk in places of immigration detention, and because they are minors, often they are unable to assert their fundamental human rights.
31. States detain children who are refugees, asylum seekers, irregular migrants and stateless persons for a number of reasons, such as health and security screening, to verify their identities, or to facilitate their removal from the territory. Sometimes, children may be inadvertently detained because there is a failure to distinguish between child and adult migrants, or if children are unable to prove their age.
32. Such practices constitute a child rights violation and are always contrary to the best interests of the child. This has recently been clarified by the Committee on the Rights of the Child (CRC) and States have been urged to “expeditiously and completely cease the detention of children on the basis of their immigration status.”²⁷

The Impact on Child Health and Development

33. Regardless of the conditions in which children are held, a number of studies have shown that detention has a profound and negative impact on child health and development. Even very short periods of detention can undermine child psychological and physical well-being and compromise their cognitive development. Children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder (PTSD) such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can manifest as acts of violence against themselves or others.
34. Reports on the effects of immigration detention on children have found higher rates of suicide, suicide attempts and self-harm, mental disorder and developmental problems, including severe attachment disorder.²⁸ They also found “marked differences between adults and children in the distress associated with various incidents.”²⁹

Family Care and Support

35. Sometimes children are detained due to their parents’ migration status or because States believe that it is in the best interests of the child to keep children with their parents in immigration detention. This is in conflict with a child’s right to liberty, and may also contravene a child’s individual right to seek asylum.
36. However, the best interests of the child are also not served when parents or guardians are detained and their children transferred to an alternative care system. The separation of children from their parents or guardians for such reasons is in conflict with the rights of the child³⁰ and erodes the functioning of families. As a result of this practice, children often lose the support and protection of their parents, or are forced to take on roles beyond their level of maturity. For this reason, the CRC has clarified that migrant families with children should be accommodated as a

²⁷ CRC Report of the Day of General Discussion, *The rights of all children in international migration* (2012).

²⁸ M Dudley and B Blick, Appendix E to *The heart of the nation’s existence – a review of reports on the treatment of children in Australian detention centres*, ChilOut (2002); S Mares and J Jreidini, *Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues*, Australian and New Zealand Journal of Public Health 520 (2004); Human Rights and Equal Opportunity Commission, *A Last Resort? National Enquiry into Children in Detention* HREOC, (April 2004); Z Steel, S Momartin, C Bateman, A Hafshejani, D M Silove, N Everson, K Roy, M Dudley, L Newman, B Blick, S; Z Steel, *The politics of exclusion and denial: the mental health costs of Australia’s refugee policy*, p.10 (May 2003).

²⁹ Z Steel, p.8 (May 2003).

³⁰ Article 9 of the Convention on the Rights of the Child

family in non-custodial, community-based contexts while their immigration status is being resolved.³¹

There Are Alternatives

37. While globally the use of detention has been increasing, there has also been a recent move in some countries to avoid detaining children consistent with international law and good practice. Governments are increasingly seeking innovative ways to prevent refugee, asylum seeker and migrant children from being detained in the first instance, or to expeditiously seek the release of children into child-sensitive ATD.
38. Research shows that ATD, when implemented properly, are more effective, cheaper, and respect the human rights of migrants; they lead to high rates of compliance with migration-related decisions, high rates of voluntary return, and are on average more cost effective than traditional detention models. Building trust, respecting and valuing the dignity of the migrant, and providing a fair, transparent process are fundamental.
39. To promote and facilitate such policy and practice, the IDC has developed a Child-sensitive Community Assessment and Placement (CCAP) model,³² which provides a decision making tool for Governments, NGOs and other stakeholders seeking to prevent child immigration detention.
40. The five-step CCAP model takes into account State interests in managing complex migration, while at the same time recognising that it is never in the best interests of a child to be detained.

- Step 1: Prevention -

A presumption in law or policy against the detention of children. It applies prior to the arrival at a State's territory of any child who is a refugee, asylum-seeker or migrant.

- Step 2: Assessment and Referral -

Ideally takes place within hours of a child migrant being discovered at the border of, or within, a State's territory. It includes screening the individual to determine age, the assignment of a guardian to unaccompanied or separated children, the allocation of a caseworker to children who are travelling with their families, an intake assessment, and the placement of the child or family into a community setting.

- Step 3: Management and Processing -

Involves 'case management,' including an exploration of the migration options available to the child and their family, a best interest determination, and an assessment of the protection needs of the child and/or their family.

- Step 4: Reviewing and Safeguarding -

Ensuring that the rights of children and their best interests are safeguarded. It includes legal review of decisions taken regarding children and their families, including decisions about where children are accommodated and about their legal status. It also includes an opportunity on the part of States to review the conditions accompanying the child or family's placement in the community following a final immigration status decision.

- Step 5: Case Resolution -

The realisation of sustainable migration solutions for the child and their family.

³¹ CRC Report of the Day of General Discussion, *The rights of all children in international migration* (2012).

³² International Detention Coalition, *Captured Childhood*, (2011) available at <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>.

3. INTERNATIONAL LEGAL STANDARDS RELATED TO THE IMMIGRATION DETENTION OF CHILDREN

41. The following international legal standards are sourced from IDC publication, Legal framework and standards relating to the detention of refugees³³.
42. The UN Convention on the Rights of the Child (CRC) is the most widely ratified UN treaty and contains a number of fundamental protections for children at risk of immigration detention. Among other things, the CRC requires that “State Parties take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status . . . of the child’s parents, legal guardians, or family members.” This includes, for example, the status of irregularly arriving refugees, asylum seekers and migrants. [cite Article 2.2]
43. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3³⁴

Article 2.2. State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

Article 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9.1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

Article 9.2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

Article 9.3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

Article 9.4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 20.1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

Article 20.2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

³³ Legal framework and standards relating to the detention of refugees, asylum seekers and migrants, Melbourne: The International Detention Coalition, 2011.

³⁴ <http://www.un.org/documents/ga/res/44/a44r025.htm>

Article 20.3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 22.1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 37. States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

44. UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution/ adopted by the General Assembly., 14 December 1990, A/RES/45/113³⁵

Article 1.2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

45. UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, E/CN.4/1999/63/Add.3³⁶

Article 37. Unaccompanied minors should never be detained.

46. UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2002/23 on

³⁵ <http://www.un.org/documents/ga/res/45/a45r113.htm>

³⁶ <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/4cd8d9a17ff06b01802567230059e05c?Opendocument>

Article 4. The Sub-Commission on the Promotion and Protection of Human Rights: Reminds States that the detention of asylum-seekers and refugees is an exceptional measure and should only be applied in the individual case where it has been determined by the appropriate authority to be necessary in line with international refugee and human rights law, and encourages States to explore alternatives to detention and to ensure that children under 18 are not detained.

47. UN Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/85, 30 December 2002³⁸

54. ...Article 37 of the Convention on the Rights of the Child also establishes that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

75. ...Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(a) Ensuring that the legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child, including access to education and health. Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings. Children should be provided with adequate food, bedding and medical assistance and granted access to education and to open-air recreational activities. When migrant children are detained, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be strictly adhered to. Should the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor.

48. UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999³⁹

Guideline 6: Detention of Persons under the Age of 18 years. In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, minors who are asylum-seekers should not be detained.

49. UN High Commissioner for Refugees, Conclusion on International Protection, 9 October 1998, No. 85 (XLIX) - 1998⁴⁰

(dd) Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status: notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

³⁷[http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2002.23.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2002.23.En?Opendocument)

³⁸[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfb8/\\$FILE/G0216255.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfb8/$FILE/G0216255.pdf)

³⁹ <http://www.unhcr.org/refworld/docid/3c2b3f844.html>

⁴⁰ <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6e30>

50. UN High Commissioner for Refugees, Refugee Children, 12 October 1987, No. 47 (XXXVIII) - 1987⁴¹

The Executive Committee (d) Stressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity;

(e) Condemned the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, and called for national and international action to prevent such violations and assist the victims.

51. UN High Commissioner for Refugees, Agenda for Protection [Global Consultations on International Protection/General], 26 June 2002, A/AC.96/965/Add.1⁴²

Goal 1, Point 9. Adequate reception arrangements: States, UNHCR, NGOs and other partners to work with refugee communities to address the needs of unaccompanied minors and separated child asylum-seekers and refugees, including, as necessary, their temporary placement in foster families or appointment of State or non-State guardians, and the monitoring of such arrangements.

Goal 6, Point 2. Measures to improve the framework for the protection of refugee children: States, UNHCR and partners to set in place measures to ensure that, as appropriate, refugee children and adolescents participate equitably in decision-making in all areas of refugee life, as well as in the implementation of such decisions, and that protection and age-sensitive approaches are applied at every stage of programme development, implementation, monitoring and evaluation

⁴¹ <http://www.unhcr.org/refworld/docid/3ae68c432c.html>

⁴² <http://www.unhcr.org/refworld/topic,4565c2251a,470a33e22,3d4fd0266,0.html>

6. CONCLUSION

52. The IDC welcomes the AHRC's National Inquiry into Children in Immigration Detention as a critical opportunity to further highlight and reinforce both the negative impact that immigration detention has on the health, well-being and development of children, as well as the fact that Australia's current practice of mandatory, indefinite detention of children is in clear violation of the country's international human rights obligations.
53. As empirical evidence shows, government concerns related to border protection and security will not be resolved through criminalisation and detention policies. A more humane and rights-based agenda must be forged. These are complex issues that can only be addressed through international, regional and national cooperation, ensuring that human rights and the protection of migrants are central considerations.
54. As such, we re-iterate the following key principles, many of which have already been stressed by the AHRC in its previous reports and statements on Australia's practice of mandatory, indefinite detention of refugees and asylum seekers:
- a. Refugees, asylum-seekers and migrants should never be detained or penalised for merely entering a country irregularly or without proper documentation. They must not be detained in punitive or other prison-like detention settings. They must have the opportunity to seek asylum and access protection procedures, and must be provided meaningful and effective opportunities to challenge the legality of their detention, with access to legal counsel, consular officials and family members. Under no circumstances should they be subject to *refoulement* or returned to countries where they may be subject to torture or other violations of their security of person.
 - b. Australia should take up the guidance of the UN Committee of the Rights of the Child and reiterate that the immigration detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. Instead, Australia should ensure that children are not separated from their families and caregivers for reasons related to immigration status, and that states adopt ATD that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved.⁴³
 - c. To respect existing international human rights obligations, Australia must fundamentally shift its focus from the use of immigration detention as a first-instance priority tool of migration management to a measure of last resort. This means ensuring that immigration detention is only applied where it is necessary, reasonable and proportionate to a legitimate government aim and based upon the individual circumstances of each case.
 - d. Ending unnecessary immigration detention will also require the exploration, piloting, and implementation of non-custodial, community-based ATD as a matter of priority
 - e. This should be part of a broader policy by Australia to uphold its obligation to protect particularly vulnerable individuals against violations of their liberty and security of person by avoiding immigration detention altogether for such individuals and seeking less-restrictive ATD in accordance with the principles of necessity and proportionality.

⁴³ Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, 78-79, available at: http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGDChildrens_Rights_InternationalMigration.pdf.

- f. Finally, Australia should support broader efforts at the UN level to progressively end the immigration detention of children over the next five years, and should support the Global Campaign to End the Immigration Detention of Children.⁴⁴

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⁴⁴ See <http://www.endchilddetention.org>.

7. APPENDIX

Appendix 1: IDC Core Position

1. The detention of refugees, asylum-seekers and migrants is inherently undesirable.
2. Vulnerable individuals - including children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, elderly persons, the disabled or those with physical or mental health needs - should not be placed in detention.
3. Children should not be detained for migration-related purposes. Their best interests must be protected in accordance with the Convention on the Rights of the Child. Children should not be separated from their caregivers and if they are unaccompanied, care arrangements must be made.
4. Asylum-seekers should not be detained or penalised because they were compelled to enter a country irregularly or without proper documentation. They must not be detained with criminals and must have the opportunity to seek asylum and to access asylum procedures.
5. Detention should only be used as a measure of last resort. When used it must be necessary and proportionate to the objective of identity and security checks, prevention of absconding or compliance with an expulsion order.
6. Where a person is subject to detention, alternatives must first be pursued. Governments should implement alternatives to detention that ensure the protection of the rights, dignity and wellbeing of individuals.
7. No one should be subject to indefinite detention. Detention should be for the shortest possible time with defined limits on the length of detention, which are strictly adhered to.
8. No one should be subject to arbitrary detention. Decisions to detain must be exercised in accordance with fair policy and procedures and subject to regular independent judicial review. Detainees must have the right to challenge the lawfulness of their detention, which must include the right to legal counsel and the power of the court to release the detained individual.
9. Conditions of detention must comply with basic minimum human rights standards. There must be regular independent monitoring of places of detention to ensure these standards are met. States should ratify the Optional Protocol to the Convention against Torture, which provides a strong legal basis for a regular and independent monitoring of places of detention.
10. The confinement of refugees in closed camps constitutes detention. Governments should consider alternatives that allow refugees freedom of movement.

Available at http://idcoalition.org/wp-content/uploads/2008/12/idc_posterfinal.pdf

Appendix 2: IDC Guide: *Legal framework relating to the detention of refugees, asylum-seekers and migrants*

The International Detention Coalition has developed a legal resource for IDC members, stakeholders and governments working on immigration detention law, policy and practice. This guide outlines the legal framework and standards relating to the detention of refugees, asylum-seekers and migrants. It is an annotated guide to identify relevant supporting international legal authority relating to the detention of refugees, asylum-seekers and migrants.

Available at <http://idcoalition.org/idc-guide-to-the-legal-framework-and-standards-relating-to-the-detention-of-refugees-asylum-seekers-and-migrants/>

Appendix 3: IDC Handbook: *There are Alternatives*

Governments around the world are increasingly using detention as a migration management tool, with refugees, asylum-seekers and migrants detained for prolonged periods. However, there are humane and cost effective alternatives to detention that prevent unnecessary and damaging detention and that ensure detention is only ever used as a last resort. The IDC has identified good practices from around the world and compiled them in a handbook, while also introducing CAP, the Community Assessment and Placement model, as a way for governments to uphold their article 9 responsibilities in the context of immigration detention.

Available at <http://idcoalition.org/cap/handbook/>

Appendix 4: IDC Handbook: *Captured Childhood*

The immigration detention of children and families is a particularly concerning global practice and, indeed, is on the rise. Yet the goals of migration management can be better achieved and with fewer detrimental effects by seeking not to detain children and families. Some governments are seeking innovative ways in which to limit or prevent refugee, asylum-seeker and migrant children from being detained. This policy document details a number of these good practice examples, while also presenting a model for states to use to prevent child immigration detention. The Child-Sensitive Community Assessment & Placement (CCAP) model, involves three core principles:

- Child migrants are, first and foremost, children
- The best interests of the child must be a primary consideration in any action taken in relation to the child and the child's family
- The liberty of the child is a fundamental human right

This model presents states with concrete steps to manage migration while respecting their international obligations around child protection and article 9.

Available at <http://idcoalition.org/ccap/>