

## ENNHRI's Asylum and Migration Working Group submission to the Council of Europe's Drafting Group on Migration and Human Rights (CDDH-MIG) - consultation on the draft "Practical Guidance on Alternatives to Immigration Detention"

### Introduction

ENNHRI's Asylum and Migration Working Group (A&M WG) welcomes this opportunity to comment on the [draft](#) "Practical Guidance on Alternatives to Immigration Detention" (the Guidance) and believes it is a very comprehensive and timely publication, particularly given the worrying trends of increased detention of migrants throughout Europe. This Guidance will undeniably be of use for all State actors and for European NHRIs, particularly those that also act as the National Preventative Mechanism.

We underline that International Human Rights Law emphasises the individual right to liberty and security and determines that administrative detention should be a measure of last resort and only used where there is a legislative basis and appropriate justification. Application of these principles is particularly important with regard to migrants, who are often particularly vulnerable to deprivation of liberty and who must never be subject to sanction or punishment under criminal law solely due to their migration status.

In this Statement, ENNHRI's Asylum and Migration Working Group reiterates [its views](#) on alternatives to detention, suggests amendments to the current draft Guidance and highlights the role of NHRIs in this area.

### Alternatives to detention: from theory to practice

ENNHRI's A&M WG notes with great concern that, in general and in some European countries in particular, immigration detention has become the norm rather than the exception. Even when not labelled as immigration detention, different measures of *de facto* detention may be contrary to human rights standards. With this context in mind, the A&M WG welcomes the CDDH-MIG initiative in taking this draft forward and believes the Guidance will be instrumental in assisting public authorities and stakeholders to create a bridge from theory to practice regarding alternatives to detention.

The A&M WG stresses that depriving migrants of their liberty solely on account of their status as migrants is not in line with human rights standards. The use of administrative detention of migrants is subject to strict legal safeguards under international law. It follows from these well-

established standards that the administrative detention of migrants should always be a measure of last resort, should be avoided by any means and be carried out in full compliance with States' international obligations. Therefore, alternatives to detention in the context of migration should not be an afterthought – rather, it should always be a primary consideration.

We note with concern that migrants, including people in need of international protection, are increasingly detained due to a “risk of absconding” without respect to the applicable legal standards. Detention of migrants should not be used as a deterrent measure.

ENNHRI, when raising its [concerns](#) regarding the CDCJ's 'Draft European Rules on the Conditions for the Administrative Detention of Migrants', highlighted that children should never be placed in detention. The duty to consider alternatives to detention for children and their family also follows from States' obligation to assess and respect the best interest of the child, their right to non-discrimination and right to be heard. Special attention should be paid to unaccompanied and/or separated children, who should never be detained due to their enhanced vulnerability.

## Recommendations

In view of the considerations above, ENNHRI's Asylum and Migration Working Group recommends CDDH-MIG to consider the following amendments to the draft Guidance:

### Obligation to comply with international human rights standards

1. The A&M WG recommends that the Guidance emphasises further that any suggested alternatives to detention must comply with regional and international human rights standards. Although we understand that this Guidance does not deal with the legal aspects of detention, we stress that deprivation of liberty through other means cannot be seen as “alternatives to detention”.
2. The A&M WG raises strong concerns regarding the inclusion of “electronic monitoring” as an alternative to detention. We are concerned that this measure constitutes a violation of migrants' right to privacy under Article 8 ECHR, particularly where the legal safeguards are unclear or insufficient. It may also violate the right to freedom of movement. Therefore, we strongly advocate against including this measure as an alternative to detention, since it could inadvertently promote a practice in contravention of international standards.
3. The A&M WG would like to reiterate that detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. It should be emphasised in the Guidance that whilst governments may need to detain an individual who presents a threat to national security, special attention should be paid to ensure that detention in such cases also complies with human rights law, particularly that detention should be proportionate to the threat, non-discriminatory and subjected to judicial oversight.

## Vulnerable situations and alternatives to immigration detention

4. The A&M WG welcomes the reference to the need to duly take into account the special needs of persons in a vulnerable situation when considering alternatives. However, we are of the view that gender-specific considerations could be further highlighted, particularly when there is a lack of separate places for women or for families with children.
5. The A&M WG suggest that the draft should pay more attention to the detention of asylum applicants, who are very often in a situation of vulnerability due to their need for international protection, journey or challenges in fulfilling their human rights in practice.
6. The A&M WG would like to stress the importance of using alternatives to detention also in relation to asylum applicants who irregularly entered or stayed in the territory – this alone should not give the authority an automatic power to detain or restrict freedom of movement. Detention that is imposed solely in order to deter asylum applicants is inconsistent with international norms and standards.
7. The A&M WG also suggests that the draft should attend to the specific rights pertaining to [stateless persons](#) under international law and the heightened risk they face of [arbitrary detention](#), emphasising the need to establish and facilitate referral to a dedicated procedure to identify and determine statelessness that provides for the possibility to grant a stateless person protection under the 1954 UN Convention on Statelessness.
8. In addition, we are concerned that detaining migrants often creates perceptions of criminality among the public, and that migrants often become vulnerable after or during detention.

## Elements of effective alternatives to immigration detention

9. The A&M WG suggests that the Guidance should better address the lack of information regarding if and how States use alternatives to immigration detention and with what frequency they implement them. A better collection and sharing of data would allow States to evaluate the results of alternatives to detention, and it would contribute to the accountability of national authorities' compliance with human rights standards. For this purpose, it is also necessary to provide detailed instructions and appropriate training for judges and other public servants, such as police, border and immigration officers to ensure the systematic use of alternative measures.
10. The A&M WG would like to emphasise that, where possible in the national context, migrants should have access to free, quality legal aid. This is an essential feature of an effective and human rights-compliant policy of alternatives to immigration detention. This is particularly the case where free legal assistance and representation is necessary to ensure migrants' enjoyment of their right to an effective remedy, including during the deportation process.

## Mainstreaming the role of NHRIs in relation to alternatives to immigration detention

11. ENNHRI's Asylum and Migration Working Group welcomes the inclusion of NHRIs as relevant actors for monitoring and evaluating the effectiveness of alternatives to immigration detention. We call on European States to duly consider the involvement and expertise of NHRIs when establishing, revising or evaluating policies or legislation related to alternatives to immigration detention.
12. Indeed, the A&M WG believes that the role of NHRIs could be further mainstreamed in the Guidance, particularly under "3.2. Scoping your national context: key questions". NHRIs are in a unique position to provide expertise, information and support given their mandate as independent national bodies that promote and protect human rights, as well as the fact that many NHRIs also hold the role of National Preventative Mechanisms and therefore are responsible for monitoring and reporting on detention conditions. Many European NHRIs already work together with national authorities on implementing policies for alternatives to immigration detention.
13. Among the actions raised by the Guidance on which NHRIs could provide support to national authorities are "3.2.2. Analysing the national legal and policy framework against international standards", "3.2.3 Comprehending the scale, nature and vulnerabilities of migration movements", "3.2.4 Identifying relevant domestic, regional and international good practice", and "3.2.5 Evaluating the availability and effectiveness of existing alternatives", "3.3.2 Building collaborative working relationships". These functions are all contained in NHRI's broad human rights mandate.

### Going forward

In order to help address these concerns, ENNHRI stands ready to provide further input and dialogue to CDDH-MIG's work on the draft Guidance in order to achieve a comprehensive approach, based on human rights standards, in relation to alternatives to detention of migrants.

## ENNHRI's Asylum and Migration Working Group

ENNHRI's Asylum and Migration Working Group (A&M WG) brings together 25 National Human Rights Institutions (NHRIs) from across the Council of Europe Member States. The A&M WG exchanges knowledge and experience in order to strengthen regional and international cooperation in the field of asylum and migration and facilitate European NHRIs' engagement with regional mechanisms on these issues.

The A&M WG engages and collaborates with the Council of Europe on a regular basis, in particular with its Drafting Group on Migration and Human Rights (CDDH-MIG). In the past, the A&M WG contributed to the work of CDDH-MIG by collating good practices from across Europe on effective alternatives to migrant detention and submitting [comments and recommendations](#) on the "Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration". In addition, ENNHRI has been [following the developments](#) at the level of CDCJ with regard to the Draft European Rules on the Conditions for the Administrative Detention of Migrants.

## ENNHRI

ENNHRI, the European Network of National Human Rights Institutions, brings together 44 NHRIs across wider Europe. ENNHRI's goal is to enhance the promotion and protection of human rights across the European region. It carries this out through assisting in the establishment and accreditation of NHRIs; coordinating exchange of information and best practice between members; facilitating capacity building and training; engaging with regional mechanisms; and intervening on legal and policy developments at a European level.

