



Refugee & Immigration Legal Centre Inc

Submission to the Standing Committee on Legal and Constitutional Affairs: Inquiry into the Migration Amendment (Health Care for Asylum Seekers) Bill 2012

1. Introduction – Refugee & Immigration Legal Centre Inc.

- 1.1 The Refugee and Immigration Legal Centre (“RILC”) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.¹ Since its inception over 23 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.
- 1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration’s Immigration Advice and Application Assistance Scheme (“IAAAS”). RILC has been assisting clients in detention for over 18 years and has substantial casework experience. We have often been contacted for advice by detainees from remote centres and have visited Curtin, Perth, Scherger, Darwin, Christmas Island and Nauru immigration detention centres/‘facilities’ on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.
- 1.3 RILC is the largest provider of refugee and immigration law services in Australia. Each year we assist around 4,000 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Much of this work involves advice and/or full legal representation to review applicants at the Migration and Refugee Review Tribunals. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.
- 1.4 The focus of our submissions and recommendations reflect our experience and expertise as outlined above. In this regard, we note that we do not possess mental health expertise. We have worked closely with mental health experts, and rely on expert evidence and reports which closely align with our extensive observations and experience in the course of providing legal assistance to people seeking asylum.

2. Focus points

- 2.1 Our submission will primarily address the following issues:
 - the impact of prolonged detention and/or uncertainty of processing on the mental health of asylum seekers;
 - the consequences of poor mental health on accessing the legal process; and
 - the importance of a mechanism for monitoring health care in remote areas.

3. Background and key principles

A. Background

¹ RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (“RACS”) and the Victorian Immigration Advice and Rights Centre (“VIARC”) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

- 3.1 Australia's practice of subjecting asylum seekers, including those suffering from serious physical or psychological conditions to prolonged detention in prison-like conditions has been well-documented by numerous independent domestic and international reporting bodies.² So, too, has the serious harm which this often causes.³ In Australia, until very recently, this has meant that asylum seekers were unable to access release from detention before the resolution of their immigration status. We note that this has led to serious questions about whether effective treatment of existing or new psychological disorders can occur in the detention environment,⁴ and ethical concerns about treating people in detention.⁵
- 3.2 While the Australian government has signaled its intention that people transferred to regional processing countries will reside in 'open centres', thus far it remains unclear whether this intention will be put into practice. Moreover, the intention is that they will be subject to night-time curfews, with freedom of movement only during the day. In our view, it is highly questionable whether the environment for asylum-seekers is rightfully categorized as 'open', particularly given the small size of Nauru (21km²) and limited options for movement.
- 3.3 From our previous experience on Nauru during 2006 and 2007, during which time asylum seekers were permitted to leave the detention camp, we found that in reality many stayed within the camp, which, in light of the lack of meaningful options for movement or enjoyment of basic rights – including the right to work, resulted in many clients experiencing a form of constructive detention.
- 3.4 Moreover, as discussed below, even if those people who are sent to Nauru or elsewhere are permitted to move freely from the centre during daytime hours, the uncertainty of the duration of their stay and the absence of a known durable solution even once recognised as a refugee is likely to have severe adverse effects on mental health.
- 3.5 The guiding principle of the Expert Panel's recommendations and the government's subsequent policy and actions – 'no advantage' – necessarily implies a long, uncertain wait. Moreover, the Memoranda of Understanding (MOUs) agreed with Nauru and Papua New Guinea (PNG) do not contain a finite timeframe of stay for people entering those countries. They refer to "as short a time as is reasonably necessary, bearing in mind the objectives set out in the Preamble and Clause 1." The Preambles of both MOUs recognise "the need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements". Clause 1 refers to deterring or combating people smugglers. A policy of deterrence and of punishment involves a level of cruelty and uncertainty that will almost certainly inflict mental harm and suffering.
- 3.6 We further refer to the letter from the United Nations High Commissioner for Refugees, Antonio Guterres, of 5 September 2012, in relation to the fundamentally flawed nature of

² See for example, Commission on Human Rights, Economic and Social Council, United Nations, Civil and Political Rights, *Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Visit to Australia*, 24 October 2002; *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997; Human Rights and Equal Opportunity Commission, *A last resort?: National Inquiry into Children in Immigration Detention*, 2004.

³ See for example: D. Silove, P. Austin, Z. Steel: 'No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia', *Transcultural Psychiatry* 2007, 44(3):359-393.

⁴ Submissions by STARTTS to the Joint Select Committee on Australia's Immigration Detention Network (August 2011).

⁵ L. Newman, M. Dudley and Z. Steel, "Asylum, Detention and Mental Health in Australia" (2008) 27(3) RSQ 110, at page 114.

the no advantage principle. The High Commissioner noted that the policy contemplates a time-frame comparable to UNHCR resettlement periods, which he explains “may not be a suitable comparator”, because there is “no ‘average’ time for resettlement”; UNHCR resettles on the basis of vulnerability rather than time spent awaiting resettlement; and because the ‘no advantage’ test is based on aspirations to an effective regional processing system, which is not yet in existence.

B. Key principles

3.7 The statement of reasons that accompanied the designations of Nauru and PNG as regional processing countries disavowed Australian legal responsibility for the people transferred, stating that the “content of Australia’s international obligations is contestable”.⁶

3.8 In our view, Australia’s international obligations, including at least *non-refoulement*⁷ clearly extend to people transferred from Australia to third countries.⁸ As well as ensuring that there is no well-founded fear of being persecuted in the receiving country, that country must also not send the person to another country where there is a threat to life or freedom. Under international law, Australia would be responsible for any indirect *refoulement* that occurred from PNG or Nauru.

3.9 Meeting this obligation is contingent on Nauru or PNG implementing fair refugee status determination systems, under which decision makers apply a consistent refugee definition. Access to such a system is critical to preventing *refoulement* of refugees. It follows that the asylum seekers participating in and reliant on the system must be mentally and physically fit enough to engage in the system. Australia is obliged to ensure real access to a robust refugee status determination mechanism and to facilitate monitoring of health status and access to adequate medical care.

4. The impact of prolonged detention and/or uncertainty of process on mental and physical health

4.1 A well-established body of independent reports have highlighted the effect on mental health of the remote and harsh conditions of detention in Australia, the high rates of mental disorders and limited access to mental health care.⁹ Indefinite and prolonged

⁶ Statement of Reasons for thinking that it is in the national interest to designate Nauru to be a regional processing country, at [34]; and Statement of Reasons for thinking that it is in the national interest to designate the Independent State of Papua New Guinea to be a regional processing country, at [34].

⁷ It is arguable that other Convention rights should also be guaranteed by a receiving State, see Hathaway, J., *Rights of Refugees under International Law* (Cambridge University Press, 2004), at 278 ff; *Michigan Guidelines on Protection Elsewhere* (2007), at [8]; and see *M.S.S. v. Belgium and Greece*, ECHR (30696/09, 21 January 2011).

⁸ Confirmed by leading academics and commentators in international law. See for example M. Foster, “Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State” (2006-07) 28 Mich. J. Intl. L. 223; *Michigan Guidelines on Protection Elsewhere* (2007), at [6] and [7]. See also the decision by the European Court of Human Rights in *T.I. v United Kingdom* (43844/98, 7 March 2000).

⁹ L. Newman, M. Dudley and Z. Steel, “Asylum, Detention and Mental Health in Australia” (2008) 27(3) RSQ 110, citing HREOC, *A last resort?: National Inquiry into Children in Immigration Detention*, 2004; Office of the United Nations High Commissioner for Human Rights, Report of the Working Group on Arbitrary Detention Visit to Australia, Geneva, E/CN.4/2003/8/Add.2, 25 Oct. 2002; Human Rights Watch, “By Invitation Only”, “By Invitation Only: Australian Asylum Policy”, New York, Human Rights Watch,

detention has been identified as particularly problematic. For example, an article by Louise Newman et al in 2008 stated that “[t]he prolonged nature of detention is regarded as a major contributing factor to mental deterioration, despondency, suicidality, anger, and frustration”¹⁰ and that research has supported the proposition that “there is an association between the length of time in detention and the severity of mental disorder.”¹¹

- 4.2 These difficulties also arise, or are most likely exacerbated, in the context of offshore processing. In 2006, the Victorian Foundation for the Survivors of Torture (VFST), a leading independent organisation specialising in the provision of counseling and other services to people from refugee backgrounds, gave the following warning of the dangers of offshore processing, in relation to Nauru:¹²

Detention and failure to find a speedy and durable settlement solution will have adverse mental health effects for those who have escaped persecution and human rights abuses. Amongst the causal factors of such adverse effects are isolation from community support, the ongoing deprivation of freedom, the profound sense of injustice associated with being subjected to the deprivation of liberty in the absence of a crime being committed, the almost complete sense of powerlessness, and the pain of seeing the health and well-being of children deteriorate in detention and/or conditions of prolonged uncertainty... In this context, **restricting asylum seekers who have prior experiences of trauma and torture and in particular those found to be refugees, to living on Nauru indefinitely would have deleterious psychological consequences whether they were held within the confines of the offshore processing centre or allowed to move freely around the island during the days.** [emphasis added]

- 4.3 These causal factors, combined with the difficulties in providing adequate mental health care,¹³ led to severe psychological damage, manifested through hunger-strikes and self-harm on Nauru in the early to mid 2000s.¹⁴
- 4.4 There is a real risk that serious psychological harm will occur again in Nauru and on Manus Island. As noted in the above extract by VFST, it makes little difference to well-being whether people are being held in open centres or in closed detention in regional processing locations. Were the promise of ‘open centres’ to be fulfilled, expert evidence suggests that it is not likely to ameliorate the psychological damage of a long stay on Nauru or Manus Island. Even outside of a detention environment, the uncertainty of

2002, available at: <http://hrw.org/reports/2002/australia>, Silove, Austin, and Steel, “No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia”, *Transcultural Psychiatry*, Vol. 44, 2007; Z. Steel and D. Silove, “The mental health implications of detaining asylum seekers”, *Medical Journal of Australia*, Vol. 175, 2001.

¹⁰ Ibid, at 116.

¹¹ Ibid, citing by way of example A. Sultan and K. O’Sullivan, “Psychological disturbances in asylum seekers held in longterm detention: a participant-observer account”, *Medical Journal of Australia*, Vol. 175, 2001, 593–6; Z. Steel et al., “Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia”, *Australian & New Zealand Journal of Public Health*, Vol. 28, 2004, 527–36.

¹² Final report, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006, section 3.51, pp24-25, as cited in Oxfam and A Just Australia, “A price too high: the cost of Australia’s approach to asylum-seekers” (August 2007), (the Oxfam report) at page 18.

¹³ Documented by the Royal Australian and New Zealand College of Psychiatrists, published in Final report, Senate Legal and Constitutional hearings into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006, section 3.52, p25 as cited in the Oxfam Report, page 18.

¹⁴ Parliamentary Library, “Background Note: the ‘Pacific Solution revisited’ – a statistical guide to the asylum seeker case loads on Nauru and Manus Island (4 September 2012), page 7.

unresolved legal status may inflict mental suffering and harm. For those who are found to be refugees, a new period of uncertainty and limbo will begin as they await permanent resettlement to another country. There has been no indication of, and there is no way to predict with any precision, how long this wait may be in the present context where there are as yet unresolved and uncertain matters, such as the establishment of a properly functioning regional protection system.

- 4.5 Analogous circumstances of uncertainty, limbo and lack of access to settlement support services existed under the Temporary Protection Visa (TPV) regime, and the adverse mental health effects in this context have been well-documented.¹⁵ Zachary Steel and others published research which indicated that because of the uncertainty and lack of access to assistance, the mental health of holders of TPVs was very different to permanent visa holders.¹⁶ The ongoing difficult living conditions and separation from family members was linked to “persisting and wide-ranging mental health problems and associated disability.”¹⁷ They went on to conclude:¹⁸

TPV holders exceeded PPV holders on all measures of psychiatric disturbance and mental disability. Consistent with the body of refugee literature, regression analyses showed that trauma was a predictor of all mental health indices. **Nevertheless, TPV status made a substantial additional contribution, being by far the greatest predictor of PTSD symptoms, accounting for 68% of the variance.** Adverse prior detention experiences and current living difficulties each made substantial and independent contributions to PTSD symptoms. Current living difficulties were also associated with general distress, anxiety and depressive symptoms. [emphasis added]

5. The consequences of poor mental health on the legal process

- 5.1 In our experience, the remoteness and isolation of offshore processing centres, combined with poor mental health, has been prejudicial to the rights of many people to seek and obtain adequate legal and other independent supports and creates significant obstacles to people being able to present their case for protection in a timely, comprehensive and effective manner.
- 5.2 This can hinder and harm the prospects of due recognition of refugee status, and can contribute significantly to whether and when release from detention or access to a durable solution could be procured. In turn, serious implications in relation to Australia’s compliance with core obligations under the Refugee Convention and other human rights treaties can arise. These include prohibitions on return to torture, and/or cruel, inhuman or degrading treatment.
- 5.3 Put simply, discharge of Australia’s fundamental obligations to protect people from future human rights abuse require proper examination, under due process, of whether a person needs protection. This requires that the person seeking protection be able to present his/her claims for protection to authorities. If a person is incapable of properly presenting their claims for examination under due process, because, for example, they are

¹⁵ See for example: Australian Psychological Society, Media Release, “Temporary status brings about mental health crisis for refugees” (10 October 2006); S. Momartin, Z. Steel, M. Coello, J. Aroche, D. Silove and R. Brooks, “A comparison of the mental health of refugees with temporary versus permanent protection visas” *Med J Aust* 2006; 185 (7): 357-361.

¹⁶ S. Momartin, Z. Steel, M. Coello, J. Aroche, D. Silove and R. Brooks, “A comparison of the mental health of refugees with temporary versus permanent protection visas” *Med J Aust* 2006; 185 (7): 357-361.

¹⁷ *Ibid*, at page 360.

¹⁸ *Ibid*.

suffering from trauma and acute mental illness, caused or contributed to by their incarceration, this could severely impede the proper identification of whether or not this person requires international protection. The consequences are this stark: if due process fails or miscarries, a person could be wrongly refused refugee protection and expelled to the real prospect of torture or death in their homeland.

- 5.4 The 2007 Oxfam report recounted the observations of an independent visitor to Nauru who noted the effects of poor mental health on the legal process:¹⁹

...The asylum seekers are traumatised by the events and many show clear signs of vulnerability. It is often difficult to interview them. **It could be discussed whether it is appropriate to perform RSD [refugee status determination] in such situations, when the symptoms of Post Traumatic Stress Disorder (PTSD) are evident and seriously affect the eligibility process...**

'I am reliably informed that in the interviews, the following symptoms of PTSD were observed: nervousness, anxiety, aggressive attitude, muteness, distrust, withdrawal, lack of focus and concentration, often shivering of hands during interviews, outburst of crying'. [emphasis added].

- 5.5 Maintaining well-being is linked to the legal process. The symptoms of trauma affect the ability to engage meaningfully in the process, including the ability to understand advice and instructions, to articulate claims, and provide the necessary detail with coherence and accuracy to establish a subjective fear and/or credibility.
- 5.6 In our experience, a claim may be rejected because of lack of credibility where an applicant appears vague, gives sparse and/or inconsistent answers to questions, and/or cannot remember dates or sequence of events. Often demeanour will also be taken into account. Being completely unemotional, or overly nervous could result in an adverse conclusion in relation to credibility, which could be fatal to a claim and ultimately lead to return to the country of origin.
- 5.7 In essence, the more diminished a person's health, the more diminished their capacity to present their claims for protection, and in turn, the more diminished the capacity for, and likelihood of, a fair and just determination of a person's need for protection.
- 5.8 Therefore, monitoring of the health of those transferred to Nauru and Manus Island (and of access to and standards of medical care) is crucial to ensuring that refugees are not denied protection.

6. Importance of a monitoring mechanism

- 6.1 Given the context outlined above, we welcome the *Migration Amendment (Health Care for Asylum Seekers) Bill 2012* (the Bill) as a means of minimising harm in a profoundly challenging, flawed and undesirable environment where liberty and other rights have already been and continue to be violated. Therefore, the expectations on and discussion of the Bill necessarily must focus on preventing foreseeable and unnecessary harm, rather than all harm.
- 6.2 In this regard, the Bill provides a good framework from which to build. The practicalities of access to data, particularly given that the health service providers are located in

¹⁹ Oxfam Report, cited in Parliamentary Library, "Background Note: the 'Pacific Solution revisited' – a statistical guide to the asylum seeker case loads on Nauru and Manus Island (4 September 2012), page 7.

countries other than Australia, resourcing and similar issues may need to be considered in more detail. However, we welcome the independence of the proposed health advisory panel and the provision for reporting directly to Parliament. It is hoped that this provision for political and public accountability promotes better awareness and provision of health care, which in turn, may have the capacity to minimise the harm which is likely to be suffered by those people fleeing from harm.

- 6.3 We also welcome the proposal at s198ABA(6)(b) for recommendations to the Minister in respect of the health of offshore entry persons taken to regional processing countries. Regular provision of information relating to particular individuals' health, and any deterioration of their condition, will be critical to the effective use of the power under s198B to bring individuals back to Australia for particular purposes, including, it is to be hoped, treatment of physical and mental health problems or disorders.
- 6.4 In our view, the Bill represents an important step in acknowledging the particular challenges in providing health care in any detention and/or remote context, and therefore the need for regular, independent monitoring and reporting on access to and standards of healthcare.

**Refugee & Immigration Legal Centre Inc
(16 October 2012)**