



# **Submission to the Joint Select Committee on Australia’s Immigration Detention Network**

**August 2011**

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## **Introduction**

The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) appreciates the opportunity to provide a submission to the inquiry of the Joint Select Committee on Australia's Immigration Detention Network.

FASSTT is a national network of agencies that provide specialist torture and trauma rehabilitation services to people from refugee and refugee-like backgrounds. FASSTT agencies are contracted by the Department of Health and Ageing to provide services under the Program of Assistance for Survivors of Torture and Trauma. FASSTT agencies collectively work with approximately 14,000 clients each year.

This submission reflects the considerable experience of FASSTT agencies in providing clinical and allied services to many people who were or are detained in immigration detention.

## **Submission focus**

This submission focuses on a number of terms of reference with respect to which we are well placed to contribute knowledgeably.

These concern three broad areas:

- the impact of immigration detention (Terms of reference 1b,1d,1e and1g)
- factors prolonging the length of detention (Terms of reference 1l,1q and1r)
- suggested reforms (Terms of reference 1a and1g)

The submission is primarily concerned with asylum-seekers who are detained, and in particular irregular maritime arrivals (IMAs) who arrived by boat without prior authorisation. FASSTT agencies do not generally work with individuals who are in immigration detention for reasons such as overstaying their visas or having visas cancelled.

## **The impact of immigration detention**

Being an asylum seeker is an inherently stressful status for any person. They await a decision from the Australian Government that will profoundly affect the rest of their lives – it may indeed have a life or death consequence. The decision-making process is a complex and alien experience over which they have little control, may little understand and which may take a long and indeterminate time to conclude. Many are separated from family members who have been left in circumstances of danger and deprivation. The pressures of enduring prolonged uncertainty over such critical aspects of one's existence are profound.

The strain endured by asylum seekers is greatly and unnecessarily aggravated by prolonged and indeterminate immigration detention. Asylum seekers in immigration detention have certain basic needs such as food and shelter met by the Australian Government. However, a number of deprivations and difficulties associated with detention have significant adverse effects.

Our experience, which is affirmed by a substantial body of research, is that prolonged and indeterminate immigration detention causes asylum seekers psychological harm. As summarised in the report of a study conducted by several FASSTT agency staff:

Studies have found that asylum seekers in detention have high rates of depression and Post Traumatic Stress Disorder (PTSD), and that the extent of their mental ill health is correlated with the length of time spent in detention. More particularly, among previously detained refugees, immigration detention has been found to contribute to levels of PTSD, depression and anxiety.<sup>1</sup>

There are certain characteristics of institutional detention, the predominant form in Australia, which are inherently damaging, regardless of the environment of the place of detention. In particular, the deprivation of liberty itself is a particularly harsh experience. As a former FASSTT agency client stated:

If they make all the walls or fence with gold, there is nothing different, there is nothing changed, prison is prison, still this system keeps me in detention for no reason.

Though the Australian Government asserts that immigration detention is for administrative rather than punitive purposes, that is not how detainees experience it. In the words of another former client:

We were wondering: why are we here? Are we criminals? We killed someone? We stole something? Why do they detain us?

Detention facilities are experienced as prisons because they treat people as presenting such risks to the community that they must be confined behind fences and subject to constant surveillance. It should also be recalled that many asylum seekers were imprisoned in their countries of origin and detention facilities represent all too vivid reminders of the persecution that they have fled. By aggravating past trauma, immigration detention may cause harm that impairs people's health and wellbeing for a significant period following their release to settle in Australia (the majority of asylum seekers) or return to their country of origin.

A number of aspects of at least some immigration detention facilities in Australia exacerbate the adverse experience of immigration detention. They include:

- remote locations – detention facilities that are a substantial distance from large residential centres are difficult for family and friends to visit and for migration agents and others (including torture and trauma services) to attend to provide services
- climatically and geographically harsh environments
- over-crowding
- regimentation – detainees are unable to make decisions about ordinary aspects of their lives
- inadequate facilities such as telecommunications to allow detainees to have regular contact with migration agents, family and friends

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<sup>1</sup> Coffey, G., Kaplan, I., Sampson, R. and Tucci, M. 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum', *Social Science & Medicine* 70 (2010) 2070-2079. The cited section includes sources, which have been omitted in the text for ease of reading.

- stressful encounters with staff – institutional detention facilities particularly in remote locations can be very demanding on staff as well as on detainees; staff may be ill-prepared for the complex challenges of working with asylum-seekers of diverse cultures and languages, experiencing and displaying considerable anxiety about their futures
- inadequate physical and mental health services – in part a consequence of factors noted above such as remoteness and overcrowding
- lack of information in languages of the detainees about the systems and procedures and the status of the processing of their claims for protection
- limited number of recreational and other activities, leading to boredom and time to dwell on the uncertainty of their situation
- co-location of asylum-seekers with people in detention whose visas have been cancelled because they have committed violent and other serious crimes – we have had clients who are literally terrified of some of those with whom they are detained

Addressing these factors may ameliorate the adverse experience of detention but cannot relieve the harmful effects caused by the intrinsic nature of institutional detention.

## **Community Detention**

In our experience, while the stigma of the status of detention remains, community-based detention is far preferable to detention in restricted facilities. This is primarily because it does not impose the oppressive experiences of confinement and constant surveillance. The introduction of an innovative large-scale program of community detention for unaccompanied minors and families has been a particularly challenging task for Government and the non-governmental agencies involved. Not least among the demanding tasks has been to source a supply of suitable accommodation at reasonable cost and the options have in some instances been very limited (for example, some people have been located in outer suburban areas poorly served by public transport and have consequently experienced isolation and difficulty accessing services).

Community-based detention could be used more widely and should be expanded to other vulnerable groups, particularly survivors of torture and trauma. We are confident that evaluation of community detention will strongly affirm the worth of this option and also identify areas for improvement in its implementation.

## **Factors prolonging the length of detention**

The primary reason for the prolonged detention of many asylum seekers is that the present policy of the Australian Government is to detain IMAs for the duration of the processing of their claims for protection. Individuals are detained for whatever length of time may be involved in undertaking the various stages (including primary assessment by a DIAC officer, independent merits review of negative decisions, security assessments by ASIO, judicial review of appeals on legal grounds). The time taken for each of these stages has increased following an increase in the number of arrivals and so the length of detention has been prolonged.

The policy has been adopted without explicit repudiation of the 'immigration detention values' adopted by the Government in July 2009. These provide that:

- all unauthorised arrivals would be subject to mandatory detention 'for management of health, identity and security risks to the community' (2A)
- detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention ... would be subject to regular review (4)
- detention in Immigration Detention Centres is only to be used as a last resort and for the shortest practicable time (5)

The foundation of the stated policy is that 'persons will be detained only if the need is established'. As stated by the Minister for Immigration and Citizenship:

The presumption will be that persons will remain in the community while their immigration status is resolved. If a person is complying with immigration processes and is not a risk to the community then detention in a detention centre cannot be justified. The Department will have to justify a decision to detain – not presume detention.<sup>2</sup>

This policy has not been, and is not being, applied to IMAs. According to DIAC data, at the end of June 2011 there were 5880 IMAs in immigration detention.<sup>3</sup> They are not detained because DIAC has assessed each of these individuals as either non-compliant with immigration processes or as a risk to the community.

There are two other policies designed to ensure that particularly vulnerable individuals are, subject to risk assessment, released from institutional detention and placed in the community. These are the policies entitled 'Identification and Support of People in Immigration Detention Who are Survivors of Torture and Trauma' (3 April 2009) and 'Minister's Residence Determination Power under s197AB and s197AD of the Migration Act 1958 – Guidelines' (2009). We routinely refer to these policies when making representations on behalf of individual clients to be transferred from institutional detention into less restrictive settings. The representations commonly do not receive a timely response and it is clear from communications with DIAC officers that the policies are not applied in a systematic manner.

The key message of the preceding paragraphs is that the most significant cause of prolonged detention of IMAs is the decision to detain them for the duration of the process of deciding their applications for protection, despite explicit policies that detention should be determined on the basis of individual assessment of considerations of risk and compliance.

The Government's decision to detain IMAs pending the determination of their protection claims means that the duration of detention is then subject to the length of time it takes to finalise claims. This has been and is influenced by diverse factors over which the Government has

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<sup>2</sup> Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention: Restoring Integrity to Australia's Immigration System*, speech given at Centre for International and Public Law, Australian National University, 29 July 2008, available at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

<sup>3</sup> Evidence (answers to questions on notice) to Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, Canberra, 10 August 2011, Question 6 (DIAC)

varying degrees of control. For example, the decision in 2010 to suspend consideration of protection claims from people from Afghanistan and Sri Lanka was entirely a matter of Government policy.

It is also apparent that the length of detention experienced by many people could have been greatly reduced by the more timely adoption of measures to expedite the decision making process. Such measures have been introduced but only after large numbers of people were detained for prolonged periods and strong criticism of the delays. For example, until March 2011 it was government policy that IMAs were routinely referred to ASIO for security assessments after they had been found to be refugees and would remain in immigration detention until their ASIO security assessment was finalised. In February 2011, DIAC advised a Parliamentary Committee that 900 people who had been assessed as refugees were in detention pending the outcome of ASIO security assessments.<sup>4</sup> In March DIAC and ASIO implemented a new 'triage' process to identify which IMAs found to be refugees did not require referral for security assessments. In the initial period of application the great majority were identified as not requiring referral and so their processing could be completed far more expeditiously.

Ensuring the time taken to resolve applications in as short a time as reasonably possible without compromising rigour and fairness is important for the Government, the Australian community at large and the asylum seekers. Fair and efficient procedures are critical but their existence would still not provide a sound public policy basis for people to be detained as a matter of course until the conclusion of the status resolution process.

## **Indefinite detention following adverse security assessments**

A small group of people who have been found to be refugees are subject to indefinite detention in Australia because they have had adverse security assessments. They include a family with children aged around 7, 3 and 1.<sup>5</sup>

There are several aspects of their plight which we would urge the Committee to examine. One is the apparent presumption that all persons who have had adverse security assessment must be detained in institutional facilities, the most damaging of options for those affected. Alternatives to detention should be considered, subject to individual risk assessment. We believe such alternatives are already available; others should be established if required.

Another is that although adverse security assessments can have such profound consequences for the lives of individuals, the processes for reviewing the robustness of the assessments have serious shortcomings. For example, IMAs in detention are not entitled to have the merit of decisions reviewed by the AAT because access to this tribunal is restricted to Australian citizens and holders of either a valid permanent visa or a special purpose visa. As noted by the Australian Human Rights Commission, 'this is contrary to basic principles of due process and

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<sup>4</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee Estimates (Additional Estimates), 21 February 2011 Canberra, 130-131 (Gary Fleming, DIAC)

<sup>5</sup> They were aged 7, 3 and 9 months at May 2011 – Blanks, S., *Briefing Note: Adverse Security Assessments and Mandatory Detention in Australia*, NSW Council for Civil Liberties, 26 May 2011.

natural justice.<sup>6</sup> We support the view of the Commission, UNHCR and others that the Government should consider measures to enhance access to merit and judicial review of adverse security assessments.<sup>7</sup>

## Detention monitoring

While there are a number of independent bodies that monitor immigration detention facilities, none have the specific mandate, expertise and resources to oversee the adequacy of physical and mental health services. This is a matter of concern. The Palmer Inquiry concluded that there was a need for an independent body to audit the delivery of health services to people detained in immigration detention facilities, stating that ‘an expert body specifically dealing with health matters is required to complement and strengthen’ the efforts of bodies such as the Immigration Detention Advisory Group and the Commonwealth Ombudsman.<sup>8</sup> It recommended the establishment of an ‘Immigration Detention Health Review Commission’ which would among other things ‘initiate reviews and audits of health care standards and the welfare of immigration detainees’. In order to ensure it was able to undertake its functions effectively, Palmer recommended that the body have a statutory basis and be staffed ‘with a core of experienced people with relevant skills.’<sup>9</sup>

The government subsequently decided not to implement the recommendation on the grounds that ‘the Commission was not needed given the new oversight role of the Commonwealth Ombudsman for Immigration.’<sup>10</sup> In the event, the Commonwealth Ombudsman has not been resourced and staffed for this purpose. Nor are the other oversight bodies such as the Australian Human Rights Commission and the Council for Immigration Services and Status Resolution funded and equipped to undertake the function.

## Bridging Visas

The option of granting IMAs bridging visas should be actively considered. This is the approach that is adopted with respect to asylum seekers apart from IMAs and it could and should be extended to IMAs, subject to initial checks and individual risk assessment as provided in the ‘New Directions’ policy framework. There is not a sound public policy basis for failing to do so. Permitting people to reside in the community on temporary visas is more humane, less damaging and significantly less expensive than detention. Those who have the opportunity to work regain the dignity of contributing to society and regain a sense of independence. The

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<sup>6</sup> Australian Human Rights Commission, *2011 Immigration detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood*, 12.

<sup>7</sup> For example, see Australian Human Rights Commission, *2011 Immigration detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood*, 12-13; UNHCR, *UNHCR-IDC Expert Roundtable on Alternatives to Detention, Canberra, 9-10 June 2011, Co-Chair Summary Statement*, paragraphs 9-11 ([http://www.unhcr.org/au/unhcr/images/2011-07-19\\_UNHCR-IDC%20Expert%20ATD%20Roundtable%20-%20Summary%20Report.pdf](http://www.unhcr.org/au/unhcr/images/2011-07-19_UNHCR-IDC%20Expert%20ATD%20Roundtable%20-%20Summary%20Report.pdf)).

<sup>8</sup> Palmer, M. *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth of Australia, July 2005, 153.

<sup>9</sup> See Palmer, M. *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth of Australia, July 2005, Recommendation 6.11, 153-156.

<sup>10</sup> Question taken on notice, Budget Estimates hearing, 22 May 2006, Immigration and Multicultural Affairs Portfolio, (215) Output 1.3: Enforcement of Immigration Law.

evidence of our experience and of studies of which we are aware<sup>11</sup> is that asylum-seekers as a cohort can be trusted to reside in the community while awaiting resolution of their applications and to comply with status resolution processes without endangering public safety.

There are already existing Government programs such as Community Assistance Support (CAS), the Asylum Seeker Assistance Scheme (ASAS), and Assisted Voluntary Return (AVR), which could be streamlined and more appropriately resourced to respond to IMAs living in the community on bridging visas.

We are very mindful that there are significant deficiencies in the support provided to asylum seekers with visas residing in the community – many are unable to provide for basic needs without assistance from family, friends and charitable sources. These should be addressed as a matter of priority. However, the financial costs of providing an adequately funded community based approach would still be significantly less than one based on detention.

## Suggested reforms

FASSTT makes the following recommendations for reform:

- The Australian Government should detain people awaiting the resolution of their claims for protection only when detention is demonstrably necessary on specific grounds – for example, to conduct identity, health and security checks.
- Initial checks to establish whether it is necessary to detain should be conducted as soon as reasonably practicable.
- If someone is detained, the necessity for detention should be subject to periodic review by an independent authority which can order the release of people if the Government does not provide persuasive evidence to justify continued detention.
- Immigration detention facilities should not be located in remote areas.
- Asylum seekers should not be detained in the same facilities as people whose visas have been cancelled because they have been convicted of serious criminal offences.
- The Government should introduce measures to permit any person found to be a refugee to have effective access to merit and judicial review of adverse security assessments.
- Community detention residences should be located in areas where people have ready access to services and support and can be involved in meaningful activities such as English conversation classes.

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<sup>11</sup> See for example, UN High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1 available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; International Detention Coalition, *There are alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, IDC, Melbourne, 2011.



- Developing and implementing measures to expedite the time taken to finalise visa applications without compromising the rigour and fairness of assessments should be a high priority.
- People who are not detained pending resolution of their status should be assisted to meet their basic living needs throughout the process.
- The Government should establish a body with the resources and mandate to monitor the adequacy of health services, as recommended by the Palmer inquiry.
- The range of alternatives to institutional detention that is actively used should include bridging visas.