

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

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Parliament of Australia

**Christopher Angus, Michael Beukelman, Ayrton Eldridge, Georgia Ellis, Lorne Franks,  
Laura John (editor), Tamsin Khor, Alice Meese, Jackson Taylor and Elizabeth Turner**

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Disclaimer: This submission does not represent the views of Monash University or the Monash Law Students' Society. The views expressed within represent only the views of the above named authors.

The Committee Secretary  
Joint Select Committee on Australia's Immigration Detention Network  
Parliament House  
Canberra ACT 2600  
Australia

Dear Secretary,

**Australia's Immigration Detention Network**

Thank you for the opportunity to provide a submission to the Senate Committee on Australia's Immigration Detention Network.

The authors of this submission are members of the Monash Law Students' Society Just Leadership Program (2011), and have a particular interest in immigration and refugee policy. The Just Leadership Program consists of a group of law students committed to promoting social justice. We believe in a humane immigration system that protects those fleeing from persecution and satisfies Australia's international obligations.

We appreciate the opportunity to share our views and hope that you will find our submission informative.

If you require any further information, please do not hesitate to contact us.

Yours sincerely,

Just Leadership Program (2011) participants

## Introduction

‘Detention of asylum seekers is not acceptable. It is particularly undesirable when those detained include the very vulnerable... They are not criminals; they have already suffered great hardship and jailing them is wrong.’

– United Nations High Commissioner for Refugees<sup>1</sup>

The authors of this submission do not support the policy of mandatory detention. We submit that mandatory detention is expensive, inhumane and contrary to Australia’s obligations under international law. We acknowledge however, that even if mandatory detention continues, there are other changes that can be made to the immigration detention network to improve its efficiency and provide a more appropriate environment for asylum seekers.

Our submission will focus on the following terms of reference:

(d) the health, safety and wellbeing of asylum seekers, including specifically children, detained within the detention network,

(e) impact of detention on children and families, and viable alternatives, and

(g) the impact, effectiveness and cost of mandatory detention and any alternatives, including community release.

Our submission is structured as follows:

**Part One - Mental health implications of immigration detention**

**Part Two - Long term effects of detention**

**Part Three – Children in the immigration detention network**

**Part Four - International approaches to immigration**

## Australia’s international obligations

Australia has a long and proud history of upholding human rights, but the policy of mandatory detention has ‘for many years cast a shadow over Australia’s human rights record.’<sup>2</sup>

We note that Australia has obligations to asylum seekers under the Convention on the Status of Refugees and its 1967 Optional Protocol, the Convention on the Rights of the Child (CROC), the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (ICCPR).

We direct the Committee to the submission made by the Castan Centre for Human Rights Law and concur with their findings in relation to Australia’s international obligations to those seeking asylum.

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<sup>1</sup> UNHCR The UN Refugee Agency, *The 1951 Refugee Convention* <<http://www.unhcr.ch/>> at 15 September 2011

<sup>2</sup> Quoting Mrs Navi Pillay, UN High Commissioner for Refugees: ABC Asia Pacific News, *Australia defends mandatory detention policy for refugees* (2011), ABC Asia Pacific News, <<http://abcasiapacificnews.com/stories/201105/3226706.htm?desktop>> at 18 September 2011

## Abbreviations

<b>AHRC</b>	Australian Human Rights Commission
<b>CROC</b>	Convention on the Rights of the Child
<b>DeHAG</b>	Detention Health Advisory Group
<b>DIAC</b>	Department of Immigration and Citizenship
<b>HREOC Act</b>	Human Rights and Equal Opportunity Commission Act
<b>HRC</b>	Human Rights Commission
<b>IDC</b>	Immigration Detention Centre
<b>IGOC Act</b>	Immigration (Guardianship of Children) Act
<b>IMA</b>	Irregular maritime arrival
<b>IT</b>	Information Technology
<b>GP</b>	General practitioner
<b>PTDS</b>	Post-traumatic stress disorder

## Summary of recommendations

**Recommendation 1:** That the Commonwealth Government creates a statutory instrument that outlines the Commonwealth's rights and obligations in regard to the provision of minimum standards of healthcare within detention centres.

**Recommendation 2:** That the Commonwealth Government enforces compulsory training for detention service providers before they are placed within an IDC. This training must provide skills in identifying people in mental distress and appropriate responses to acts of self-harm and suicide. The training should also include information on cultural sensitivity.

**Recommendation 3:** That an independent group be empowered to monitor the provision of mental health services and facilities within IDCs. This group should be established by the Commonwealth, or implemented by increasing the powers of DeHAG or the Australian Red Cross.

**Recommendation 4:** That shorter processing times be introduced to minimise the escalation of mental health issues and to improve integration and the employability of refugees.

**Recommendation 5:** That all minors in detention be given external education opportunities. Schools should be provided with adequate resources to cater for the needs of asylum seekers.

**Recommendation 6:** That adequate indoor areas for education and recreational activities be provided in all parts of the immigration detention network.

**Recommendation 7:** That the Commonwealth Government introduce more holistic education programs into the immigration detention network, offering teaching flexibility in conjunction with other support services so that all detainees can benefit from the programs offered.

**Recommendation 8:** That the Commonwealth Government provide more appropriate educational programs to be made available to both detainees with more advanced educational backgrounds and to those who require additional assistance.

**Recommendation 9:** That the Commonwealth Government increase funding for non-governmental organisations to help implement programs such as the Refugee Sport Club, which would be beneficial for refugees both in detention and in the community, or in the alternative;

**Recommendation 10:** That coaches be employed in detention centres on a casual basis to teach a range of sports and act as mentors. Equipment should be provided to encourage self-directed sports and games.

**Recommendation 11:** That asylum seekers in detention be given access to more excursions to increase feelings of autonomy, reduction of mental health issues and aid integration.

**Recommendation 12:** That the Commonwealth Government reaffirms its commitment to keeping children out of immigration detention centres and ensures the prompt removal from detention of all children.

**Recommendation 13:** That the Commonwealth Parliament issue a declaration that CROC is an international instrument pursuant to the HREOC Act. The declaration should also state that CROC is incorporated into Australian domestic law.

**Recommendation 14:** That unaccompanied minors be provided with independent legal advice and that their legal guardian be well-informed and physically present during tribunal hearings.

**Recommendation 15:** That the Minister for Immigration is removed as the legal guardian of unaccompanied non-citizen children, and replaced by the Minister for Children and Youth Affairs, or an Independent Children's Commissioner.

**Recommendation 16:** That the obligations and duties of the legal guardian of unaccompanied non-citizen children, including in relation to the provision of independent legal advice, be legislatively protected in the IGOC Act.

**Recommendation 17:** That mandatory detention be abolished and that the detention of asylum seekers is used only as a last resort.

**Recommendation 18:** That a new Refugee Act be enacted to clearly state Australia's approach to asylum seekers. Alternatively, the current Migration Act be amended to clearly set out Australia's obligations and approach to asylum seekers. Indefinite detention of asylum seekers should be prohibited under any new Act or removed from the Migration Act.

**Recommendation 19:** That statutory regulations guiding the implementation and running of detention facilities or community based accommodation be created. This legislation should enshrine a clear minimum standard for processing facilities.

**Recommendation 20:** That asylum seekers be released into open community facilities. The Government should also invest in new sources of community accommodation to allow asylum seekers to remain in the community for the duration of the processing of their asylum claim. Accommodation should preferably be individual to avoid problems associated with larger reception centres.

**Recommendation 21:** That IMAs be detained for a maximum of 30 days for health and security checks. This maximum length of detention should be inserted into legislation.

**Recommendation 22:** That systems be implemented to adopt a continuum of community based programs for accommodation of asylum seekers during the assessment process. Existing community release options should also be expanded and extended.

**Recommendation 23:** That asylum seekers in the community be provided with a basic stipend to cover food and living expenses, work rights, legal advice and health while awaiting an outcome on their protection claim.

**Recommendation 24:** That the Australian immigration detention network move towards a community based detention system. This will significantly reduce costs. Savings should be used to improve support services for asylum seekers being processed in the community.

## Part One - Mental health implications of immigration detention

### Introduction

- 1.1 There is an irrefutable link between immigration detention and deteriorating mental health.<sup>3</sup> This is partly due to the environment of IDCs, which induces mental illness as a response to the conditions of threat, frustration, dehumanisation and confinement.<sup>4</sup> This is illustrated by the occurrence of hunger strikes, self-harm, suicide and rioting in detention facilities across Australia.
- 1.2 It is reported that in the first six months of 2011, 1500 detainees were hospitalised. Of this number, 72 were hospitalised for psychological reasons, 213 for self-harm injuries and 723 for voluntary starvation.<sup>5</sup>
- 1.3 There is also evidence of violence among detainees and between detainees and custodial officers. Detainees may be exposed to degrading treatment, such as denials of communication, intrusions into privacy, isolation, the use of force and strip searching.
- 1.4 Time spent within detention has also been found to contribute to the severity of symptoms relating to PTSD, depression, anxiety and suicidality.<sup>6</sup> These issues will be discussed in detail in Part Two -Long term effects of detention.
- 1.5 According to the website of the Department of Immigration and Citizenship, immigration detention 'is not used to punish people'.<sup>7</sup> Rather, it serves a purely 'administrative' function.<sup>8</sup>
- 1.6 It is against this background that this section will explore the provision of mental health services to IDCs, first exploring the legal obligations of the Government and then proposing recommendations to reduce the incidence and severity of mental health problems in IDCs.

### Commonwealth's obligations to detainees

- 1.7 Australia has obligations to immigration detainees under international law and domestic law. The High Court has previously held that the Commonwealth can detain asylum seekers under the *Migration Act 1958* even where that detention is for an indefinite time,<sup>9</sup> and irrespective of the conditions of the detention.<sup>10</sup>

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<sup>3</sup> Steel, Z. and Silove, D. The Mental Health implications of detaining asylum seekers, *Medical Journal of Australia* (2001) 175, 596-599

<sup>4</sup> Ibid

<sup>5</sup> Needham, Kirsty, 'Detainee Despair: 1500 in hospital' *Sydney Morning Herald* (online), <<http://www.smh.com.au/national/detainee-despair-1500-in-hospital-20110816-1iwgd.html>>

<sup>6</sup> Coffey, G.J. et al, 'The meaning of mental health consequences of long term immigration detention for people seeking asylum' (2010) *Social Sciences and Medicine* 70

<sup>7</sup> Department of Immigration and Citizenship, 'Background to Immigration Detention', <<http://www.immi.gov.au/managing-australias-borders/detention/about/background.htm>>

<sup>8</sup> Ibid

<sup>9</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124

<sup>10</sup> *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271

- 1.8 This does not give the Government a blank cheque with respect to the conditions of immigration detention. The Commonwealth has a duty of care to immigration detainees, a duty which extends to ensuring that they do not incur psychiatric injuries while they are detained.<sup>11</sup> In the words of the then Chief Justice Murray Gleeson, '[a]n alien does not stand outside the protection of the civil and criminal law.'<sup>12</sup>
- 1.9 All detention centres, including health services provided within detention, are managed by private entities. We submit that the provision of this 'outsourced' healthcare has been inadequate, particularly in the area of mental health. Although service providers are liable in tort if they fail to comply with their duty of care to detainees,<sup>13</sup> this does not excuse the Commonwealth from upholding its own duty of care to detainees.<sup>14</sup>
- 1.10 The Commonwealth's duty of care to detainees is further explored in the case studies of S<sup>15</sup> and Shayan Badraie below.

### Case study one – S's case

S was a detainee at Baxter Detention Centre who developed psychiatric injuries while in immigration detention. It was held that S did not receive adequate care despite the opinions of two psychiatrists and a GP.<sup>16</sup> In the judgment of Finn J, the Commonwealth's outsourcing of mental health services resulted in a situation that:

- required 'regular and systematic auditing of the psychological and psychiatric services provided,'<sup>17</sup> and
- led the Commonwealth to place too much faith in service providers and essentially delegate its duty of care.

As Finn J puts it, 'it is difficult to avoid the conclusion that the Commonwealth's own arrangement for outsourcing healthcare services itself requires review. Its aptness is open to real question'.<sup>18</sup>

This case highlights the need for enforceable independent monitoring bodies and enforceable guidelines to ensure the humane and effective management of Australia's detention network. A more effective system of management will assist in improving the mental health of detainees by improving the conditions within detention centres and providing a systematic assessment of detainee's mental health.

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<sup>11</sup> *S v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* (2005) 216 ALR 252

<sup>12</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124 [21]

<sup>13</sup> *Ibid*

<sup>14</sup> *S v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* (2005) 216 ALR 252

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid* [261]

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*



## Case study two – Shayan Badraie’s case<sup>19</sup>

Shayan Badraie and his family were members of the 'Al-Haqq' religious group. Fearing persecution in their native Iran, the Badraies arrived in Australia on 27 March 2000. After seeking asylum, the Badraies were initially detained at Woomera Immigration Reception and Processing Centre

Shayan, then 5 years old, was exposed to violent riots in immigration detention and developed severe psychological distress. A psychologist who worked with Shayan in detention wrote to the Department in February 2001 expressing the opinion that ‘the failure to take any action to protect this child from further exposure is abusive on the part of the governing authorities’.<sup>20</sup>

The Badraie family were transferred to the Villawood Immigration Detention Centre in March 2001. While at Villawood, Shayan was hospitalised for a total of 86 days due to psychiatric problems.

As a result of his two years in detention, Shayan developed PTSD. After bringing a negligence action against the Commonwealth, the family was offered a settlement payment of \$400,000 as compensation for the psychological harm suffered by Shayan whilst in detention. As Shayan's lawyer, Maurice Blackburn principal Rebecca Gilsenan comments, '[t]he settlement is an acceptance of responsibility for the psychiatric injuries suffered by this child as a result of the shocking circumstances in which he was detained at Woomera then at Villawood.... His childhood was ruined by what happened to him.’<sup>21</sup>

The Badraies are now Australian citizens, and reside in Western Sydney.<sup>22</sup>



*Portrait of the Badraie family, Zahra, Shayan (13 years), Shabnam (8 years) and Saeed.*

*Photographer: Steven Siewert/Fairfax Media*

<sup>19</sup> The information in this section relies on a number of sources, including: Bernadette McSherry, 'Providing Mental Health Services and Psychiatric Care to Immigration Detainees: What the Law Requires' paper delivered at the 2005 Monash University Conference *Seeking Asylum in Australia 1995-2005*, <<http://www.safecom.org.au/monashconf05-mcsherry.htm>>; 'Refugees beat Buckley's chance', *Sydney Morning Herald* (online), <http://www.smh.com.au/articles/2008/09/26/1222217517577.html>; Maurice Blackburn press release - 3 March 2006 - 'Federal Government settles case of Child Damaged in Detention', <http://www.mauriceblackburn.com.au/news/press-releases--announcements/2006/federal-government-settles-case-of-child-damaged-in-detention.aspx>; *Shayan Badraie by his tutor Mohammad Saeed Badraie v Cth* (2005) 195 FLR 119

<sup>20</sup> Bernadette McSherry, 'Providing Mental Health Services and Psychiatric Care to Immigration Detainees: What the Law Requires' paper delivered at the 2005 Monash University Conference *Seeking Asylum in Australia 1995-2005*, <<http://www.safecom.org.au/monashconf05-mcsherry.htm>>;

<sup>21</sup> Maurice Blackburn press release - 3 March 2006 - 'Federal Government settles case of Child Damaged in Detention', <http://www.mauriceblackburn.com.au/news/press-releases--announcements/2006/federal-government-settles-case-of-child-damaged-in-detention.aspx>

<sup>22</sup> 'Refugees beat Buckley's chance', *Sydney Morning Herald* (online), <http://www.smh.com.au/articles/2008/09/26/1222217517577.html>

## Existing IDC mental health initiatives

1.11 We recognise that the Commonwealth endeavours to provide a number of key services within the detention network such as:

- Access to a standard of healthcare comparable to the healthcare provided in the rest of Australia, taking into account the diverse nature of health care required;
- Availability of referral to external health services; and
- Ongoing specialist mental health treatment as well as monitoring and regular check-ups for longer term detainees.

1.12 We also recognise that since 2005, the Government has been committed to improving staff training, IT infrastructure and mental healthcare.<sup>23</sup> The Immigration Department's 2004-05 Annual Report notes that:

‘A number of cases have challenged the adequacy of the medical and psychiatric services provided to immigration detainees... The department has responded quickly to issues raised in that judgment about the coordination and management of the provision of medical and psychiatric services.’<sup>24</sup>

1.13 Some of the steps which have been taken by the Commonwealth to address mental health issues among immigration detainees include the Detention Standards Agreement, Detention Health Framework and the Detention Health Advisory Group.

### Detention Standards Agreement and Detention Health Framework

1.14 The Detention Standards Agreement and the Detention Health Framework provide a set of guidelines for the treatment of detainees. Both documents are in line with international standards, Australian domestic laws and are sensitive to the physical, cultural and emotional needs of the detainees.

1.15 They are admirable for dealing frankly and openly with the responsibilities of the Commonwealth and IDC service providers, and for the norms and values that they propose.

1.16 There appears however, to be minimal review of compliance with this framework.<sup>25</sup> Further, neither document contains or is subject to legally enforceable rules.

### Detention Health Advisory Group (DeHAG)

1.17 The Detention Health Advisory Group (DeHAG) is an independent, expert advisory body. The group provides the Government with advice regarding the design, implementation and monitoring of healthcare. DeHAG includes a ‘Mental Health Sub-Group’, which was formed in 2007.

1.18 It is not clear however, whether DeHAG and its sub-groups are still active, as they have not published a report since 2008. Members of the Mental Health Sub-Group have recently appeared in the media criticising the Commonwealth’s policies on detainee mental health.<sup>26</sup>

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<sup>23</sup> Department of Immigration and Citizenship, ‘Detention Health Framework’ <[www.immi.gov.au/managing-australias-borders/detention/services/detention-health-framework](http://www.immi.gov.au/managing-australias-borders/detention/services/detention-health-framework)>

<sup>24</sup> Department of Immigration, Multicultural and Indigenous Affairs, ‘Judicial Decisions’, *Annual Report 2004-05*, [http://www.immi.gov.au/about/reports/annual/2004-05/judicial\\_decisions.htm](http://www.immi.gov.au/about/reports/annual/2004-05/judicial_decisions.htm)

<sup>25</sup> Refugee Action Committee, ‘The True Costs of Australia’s Mandatory Detention Policy, 2002, Canberra <[www.refugeeaction.org.inside/inside.htm](http://www.refugeeaction.org.inside/inside.htm)>

## Areas for improvement in the provision of mental health services

1.19 The current mental health crisis within IDCs suggests that the Detention Standards Agreement, the Detention Health Framework and DeHAG have not been successful in providing effective oversight of the health needs of detainees. We submit that there are a number of areas within the provision of mental health services to immigration detainees which could be improved:

- Greater regulation of IDC service providers;
- Training of IDC staff; and
- Systematic assessment of the psychological needs of detainees.

### Greater regulation of IDC service providers

1.20 As noted above, the Government has a variety of ‘agreements’, ‘standards’ and ‘frameworks’ which govern the provision of health services to immigration detainees. These documents are not legally binding, and the only real control the government has over the IDC service providers is contractual.

1.21 It is suggested that the Commonwealth create statutory instruments which outline the Department’s legal obligations in relation to ensuring compliance with minimum standards of mental healthcare. As the responsibility for compliance would reside with the Commonwealth, this would encourage the Department to take a greater interest in ensuring that contractual arrangements with IDC service providers are in line with these standards, and that they are performed as stipulated in the contract.

**Recommendation 1: That the Commonwealth Government creates a statutory instrument that outlines the Commonwealth’s rights and obligations in regard to the provision of minimum standards of healthcare within detention centres.**

### Training of IDC staff

1.22 The identification of immigration detainees experiencing mental distress can be improved by better training for IDC staff, and in particular, security personnel. The preceding discussion highlights the need for sufficient numbers of adequately trained and experienced IDC staff.

1.23 Currently, the major service provider to IDCs is the corporate group ‘Serco’.<sup>27</sup> Serco’s guards and client service officers on the Christmas Island IDC are on a fly-in, fly-out contract from the mainland.<sup>28</sup> They are paid approximately \$10,000 a month after tax. Commonly, applicants are

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<sup>26</sup> ‘Asylum centre dismissed outspoken nurse’, *The Age* (online), <<http://www.theage.com.au/national/asylum-centre-dismisses-outspoken-nurse-20110818-1j08b.html>>, ‘Mental health experts attack detention’, *The Herald Sun* (online), <<http://www.heraldsun.com.au/news/breaking-news/mental-health-experts-attack-detention/story-e6frf7jx-1226117538290>>

<sup>27</sup> Department of Immigration and Citizenship, ‘Immigration detention services preferred tenderer announced’ (Media Release, 31 March 2009) <<http://www.australian-immigration-lawyer.com/visa/immigration-compliance/immigration-detention-services-preferred-tenderer-announced/>>

<sup>28</sup> ‘Detention misery cuts both ways on Christmas Island’, *The Australian* (online), <<http://www.theaustralian.com.au/news/features/detention-misery-cuts-both-ways-on-christmas-island/story-e6frg6z6-1226093376728>>

ex-prison guards.<sup>29</sup> This calls into question the validity of claims that immigration detention is purely administrative in nature.<sup>30</sup>

- 1.24 To combat this, the Commonwealth needs to ensure that the staff employed by its service providers are adequately trained for the difficult and unique situations presented by IDCs. The current requirement of a Level II Certificate in Security Operations is the same qualification required by cash-in-transit monitors or security personnel at bars and night clubs.<sup>31</sup> The four week Level II Security Operations Certificate is often conducted by Serco in 12 days, and complemented by unofficial on-site training.<sup>32</sup>
- 1.25 This leaves security guards in IDCs insufficiently trained to deal with the situations that they are exposed to in immigration detention.<sup>33</sup> Serco encourages and enforces the teaching of various physical restraints, and ensures all staff are aware of the computer system and centre procedures,<sup>34</sup> yet fails to spend sufficient time on mental health and cultural awareness education.
- 1.26 Hence, the training provided is insufficient. To begin with, guards begin work at IDCs without knowing how to deal with riots, self-harm and other events which are common in detention.<sup>35</sup> Further, training does not address appropriate treatment of asylum seekers in a detention situation.
- 1.27 We submit that in addition to better trained security guards, all people who regularly come into contact with detainees should have sufficient knowledge of common mental health issues. Further, IDC staff should have knowledge of the asylum seekers' cultural background and an understanding of what they may have endured on their journey to Australia.
- 1.28 A comprehensive training program needs to be devised and created specifically for IDC staff members. Integral to the program should be an awareness that many detainees suffer from mental illness as a result of past traumas.
- 1.29 It is also concerning that an estimated 400 contractors in Australia do not have minimal security qualifications.<sup>36</sup> We submit that training needs to be completed before guards are put in a

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<sup>29</sup> Ibid

<sup>30</sup> Department of Immigration and Citizenship, 'Background to Immigration Detention', <<http://www.immi.gov.au/managing-australias-borders/detention/about/background.htm>>

<sup>31</sup> 'Technical Advanced Training: Certificate II in Security Operations', <<http://www.advancetraining.com.au/securitycerII.html>>

<sup>32</sup> 'Detention misery cuts both ways on Christmas Island', *The Australian* (online), <<http://www.theaustralian.com.au/news/features/detention-misery-cuts-both-ways-on-christmas-island/story-e6frg6z6-1226093376728>>

<sup>33</sup> 'Serco staff ignored attempts to negotiate', *SBS* (online), <http://www.sbs.com.au/news/article/1585480/Serco-staff-ignored-attempts-to-negotiate>

<sup>34</sup> 'Detention misery cuts both ways on Christmas Island', *The Australian*(online), <http://www.theaustralian.com.au/news/features/detention-misery-cuts-both-ways-on-christmas-island/story-e6frg6z6-1226093376728>

<sup>35</sup> Poor staff training blamed for Villawood riot, *ABC* (online), <<http://www.abc.net.au/news/stories/2011/04/22/3198546.htm?site=newcastle>>

<sup>36</sup> Ibid

position of responsibility at IDCs, differing from Serco's current rule that training must be completed within six months of beginning work.<sup>37</sup>

**Recommendation 2: That the Commonwealth Government enforces compulsory training for detention service providers before they are placed within an IDC. This training must provide skills in identifying people in mental distress and appropriate responses to acts of self-harm and suicide. The training should also include information on cultural sensitivity.**

#### Systematic assessment of psychological needs of detainees

- 1.30 It is apparent that there is a lack of adequate supervision from the Commonwealth over IDC service providers. In order to ensure the protection of asylum seekers, IDC staff need to be aware of the mental health situation and past experiences of the detainees. This will help provide a safe, secure and stable detention environment as well as providing formal standards of compliance and facilitating independent monitoring.<sup>38</sup>
- 1.31 Although IDC service providers are contractually obliged to ensure certain quotas are met with regard to mental health services, the increasing incidence of mental health issues in detention suggests these obligations are not enough. We submit that there is a need for an independent party such as an Ombudsman or Commissioner to investigate, audit and ensure compliance by service providers. Unlike DeHAG, whose reporting on detainee health issues appears to have lapsed, such a party should have mandatory public reporting requirements to ensure transparency.
- 1.32 Alternatively, an existing person or group may be used, such as by granting unlimited access to the Australian Red Cross, or giving increased powers and responsibilities to DeHAG. This oversight will ensure that individuals identified with mental health problems receive appropriate treatment, and will improve the chances that cases such as Shayan Badraie's do not occur in the future.

**Recommendation 3: That an independent group be empowered to monitor the provision of mental health services and facilities within IDCs. This group should be established by the Commonwealth, or implemented by increasing the powers of DeHAG or the Australian Red Cross.**

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<sup>37</sup> 'Detention misery cuts both ways on Christmas Island', *The Australian* (online), <<http://www.theaustralian.com.au/news/features/detention-misery-cuts-both-ways-on-christmas-island/story-e6frg6z6-1226093376728>>

<sup>38</sup> Commonwealth Ombudsman, 'Report of an own motion investigation into the Department of Immigration and Multicultural Affairs Immigration Detention Centres,' 2001, 2, 20, 26

## Part Two - Long term effects of immigration detention

### Problems caused by long-term immigration detention

2.1 Although there are many consequences of being detained in immigration detention, mental health and integration into the community are two issues of particular significance. These issues are also highly topical within the Australian community. Hence, this section focuses on long-term mental health problems and integration issues experienced by refugees upon release from detention.

#### Effects of Detention

2.1 As was noted in Part One, the most common mental health issues suffered by detainees are anxiety, depression and PTSD. These mental health issues can affect refugees long after release from the immigration detention network. Although onshore asylum seeker applicants also face mental health issues due to limited access to work and welfare services,<sup>39</sup> it is clear that long-term detention results in long-term damage to refugees.<sup>40</sup>

2.2 The severity of these issues correlates with the amount of time spent in detention.<sup>41</sup> The Federal Government's Joint Standing Committee on Foreign Affairs, Defence and Trade noted in 2001 that depression and anxiety amongst asylum seekers detained for a year or more increased noticeably in comparison to those detained at Woomera for three or four weeks.<sup>42</sup>

2.3 Studies across a number of countries have shown that refugees are approximately ten times more likely to suffer from PTSD than age-matched people in the native population.<sup>43</sup> Acts of mass violence are also thought to reflect psychological distress, as well as boredom and frustration.<sup>44</sup>

#### Well-being of individuals post-detention

2.4 Studies that have focused on the well-being of refugees following release from detention have found that many continue to show clinically significant levels of depression and PTSD as a direct result of the harm experienced in detention.<sup>45</sup> These symptoms seem to occur as a result of

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<sup>39</sup> Sinnerbrink I, Silove D, Field A, Steel Z, Manicavasagar V, 'Compounding of premigration trauma and postmigration stress in asylum seekers' (1997) 131 *Journal of Psychology* 463

<sup>40</sup> Farahnaz Sobhanian, Gregory J Boyle, Mark Bahr & Tindaro Fallo, 'Psychological status of former refugee detainees from the Woomera Detention Centre now living in the Australian community' (2006) 13 *Psychiatry, Psychology and Law* 151

<sup>41</sup> Janette P Green & Kathy Eagar, 'The health of people in Australian immigration detention centres' (2010) 192(2) *Medical Journal of Australia* 65

<sup>42</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *A Report on Visits to Immigration Detention Centres* (2001) [7.12]

<sup>43</sup> Tom Craig, Peter Mac Jajua & Nasir Warfa N, 'Mental Health Care Needs of Refugees' (2009) 8(9) *Psychiatry* 351

<sup>44</sup> Farahnaz Sobhanian, Gregory J Boyle, Mark Bahr & Tindaro Fallo, 'Psychological status of former refugee detainees from the Woomera Detention Centre now living in the Australian community' (2006) 13 *Psychiatry, Psychology and Law* 151;

<sup>45</sup> Guy J Coffey, Ida Kaplan, Robyn C Sampson & Maria Montagna Tucci, 'The meaning of mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70 *Social Science & Medicine* 2070

changes to core belief systems after spending time in detention; in particular, changes to the way individuals view themselves and the way they view justice and humanity.<sup>46</sup>

- 2.5 Such changes result in feelings of helplessness, decreased self-worth and diminished agency, which in turn lead to a reduced ability to engage with the rest of the world. Being held for extended periods in detention results in feelings of betrayal and injustice, leaving refugees with an acute sensitivity to any kind of injustice in daily life.<sup>47</sup>

### Integration issues caused by detention

- 2.6 Long-term detention also affects the ability of refugees to integrate into Australian society. Acculturation is a process that affects both the host and immigrant populations and, as such, there is merit in making the transition as smooth as possible.<sup>48</sup>

- 2.7 In leaving their home countries, refugees often feel a loss of confidence and security.<sup>49</sup> The acculturation process can in fact lead to further psychological problems.<sup>50</sup> The smoothest transition method is integration of refugees, which involves both a relationship with larger society, and the maintenance of cultural identity and characteristics.<sup>51</sup>

- 2.8 Although almost all immigrants experience culture shock when relocating, the experience can be significantly more traumatic for refugees who often already suffer from mental health problems.<sup>52</sup>

### Integration case study – Afghan refugees

- 2.9 The effect of extended immigration detention is demonstrated by a review of Australia's Afghan refugee community. In 2009-10, approximately 60 per cent of all Afghan offshore arrivals were classified as IMAs.<sup>53</sup> These offshore arrivals would most likely have been placed in immigration detention while their claims were assessed, in accordance with the Government's policy of mandatory detention.

- 2.10 The average period of detention for Afghan nationals appears to have been extensive; the waiting period for Afghan nationals was 98 days during the 2009-10 reporting period, but has since increased dramatically to 301 days in 2010-11.<sup>54</sup>

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<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Jenny Phillmore, 'Refugees, Acculturations Strategies, Stress and Integration' (2011) 40(3) *Journal of Social Policy* 575

<sup>49</sup> Ibid

<sup>50</sup> John W Berry, Uichol Kim, Thomas Minde & Doris Mok, 'Comparative studies of acculturative stress' (1987) 21 *International Migration Review* 491

<sup>51</sup> Citizenship and Immigration Canada, 'Culture shock handout'

<sup>52</sup> Jenny Phillmore, 'Refugees, Acculturations Strategies, Stress and Integration' (2011) 40(3) *Journal of Social Policy* 575

<sup>53</sup> According to DIAC, 1425 protection visas were granted to Afghan IMAs, with a further 951 Offshore Humanitarian visas granted. Adding these numbers together, approximately 59.97 per cent of these visas were granted to Afghan nationals classified as IMAs. See Department of Immigration and Citizenship, *Population Flows: Immigration Aspects 2009-10 Edition*, (2011) Department of Immigration and Citizenship <<http://www.immi.gov.au/media/publications/statistics/popflows2009-10/pop-flows-chapter2.pdf>> 30, 33.

<sup>54</sup> Department of Immigration and Citizenship, *Question 8 – The Department of Immigration and Citizenship's answers to questions on notice*, 16 August 2011, Parliament of Australia Joint Select Committee on

- 2.11 These extended periods of detention appear to have affected the long-term integration success of the Afghan community into Australian society. According to the Department of Immigration, Afghan refugees have the worst health outcomes, poorest English skills and other educational qualifications, lowest employment rate and highest dependence on government assistance than any other surveyed ethnic group.<sup>55</sup> Considering the success rate of Afghan IMAs applying for Protection visas was 90.5 per cent in 2009-10,<sup>56</sup> this is an alarming outcome for people in need of support.
- 2.12 Although separate factors may also contribute to these negative findings, it should be noted that Iranian and Iraqi nationals, who are members of the top five nationalities applying for refugee status determination requests,<sup>57</sup> also experience some of the worst physical and mental health outcomes, and are the unhappiest of all ethnic groups.<sup>58</sup>
- 2.13 From this, we submit that the traumatic effect of detention on any individual plays a key, if not major role, on that person's ability to properly function and integrate within the Australian community. As IMAs from the top five countries applying for Protection visas have a success rate of 88.9 per cent,<sup>59</sup> the present system of immigration detention appears to do little more than punish genuine refugees who arrive by boat.

### Reducing the effects of long-term detention

- 2.14 We submit that the best means of reducing mental health and integration issues is to minimise the use of immigration detention. However, in the event that mandatory immigration detention continues, we suggest the following changes to help ease tensions within the community regarding integration of humanitarian migrants:
- Faster relocation of high priority detainees;
  - Better access to education for detainees; and
  - Increased access to recreational activities in detention.

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Australia's Immigration Detention Network

<<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=01520135-03f3-490d-a6f3-90409b7880cf>>

<sup>55</sup> Department of Immigration and Citizenship, *Settlement Outcomes of New Arrivals – Report of findings: Study for Department of Immigration and Citizenship* (April 2011) Department of Immigration and Citizenship <[http://www.immi.gov.au/media/publications/research/\\_pdf/settlement-outcomes-new-arrivals.pdf](http://www.immi.gov.au/media/publications/research/_pdf/settlement-outcomes-new-arrivals.pdf)> 59-60

<sup>56</sup> Department of Immigration and Citizenship, *Population Flows: Immigration Aspects 2009-10 Edition*, (2011) Department of Immigration and Citizenship <<http://www.immi.gov.au/media/publications/statistics/popflows2009-10/pop-flows-chapter2.pdf>> 33

<sup>57</sup> Ibid

<sup>58</sup> Department of Immigration and Citizenship, *Settlement Outcomes of New Arrivals – Report of findings: Study for Department of Immigration and Citizenship* (April 2011) Department of Immigration and Citizenship <[http://www.immi.gov.au/media/publications/research/\\_pdf/settlement-outcomes-new-arrivals.pdf](http://www.immi.gov.au/media/publications/research/_pdf/settlement-outcomes-new-arrivals.pdf)> 59-60

<sup>59</sup> Department of Immigration and Citizenship, *Population Flows: Immigration Aspects 2009-10 Edition*, (2011) Department of Immigration and Citizenship <<http://www.immi.gov.au/media/publications/statistics/popflows2009-10/pop-flows-chapter2.pdf>> 33



## Faster Relocation of High Priority Detainees

- 2.15 Many of the mental health issues experienced by detainees can be significantly reduced by removing asylum seekers from detention centres.<sup>60</sup> In a study of 150 former refugees from the Woomera Detention Centre, it was found that the mental health of refugees improved significantly after their release into the community.<sup>61</sup> The study found that there was a reduction of suicidal ideation, lower levels of depression, anxiety, PTSD and panic, higher satisfaction with quality of life, and less tension and anger.<sup>62</sup> These studies illustrate the advantages of removing asylum seekers from detention centres as quickly as possible.
- 2.16 We submit that high priority detainees, including children, families, the mentally and physically ill and long-term detainees, should be relocated into community detention or other alternative places of detention in order to prevent the formation, or exacerbation, of mental health problems. Although we acknowledge existing efforts by the Federal Government to remove children from detention centres,<sup>63</sup> and the difficulties and costs of implementing this recommendation, we emphasise that this solution will likely have the most significant and positive outcome.

**Recommendation 4: That shorter processing times be introduced to minimise the escalation of mental health issues and to improve integration and the employability of refugees.**

## Education

- 2.17 The Hon. Julia Gillard, Prime Minister, notes in the foreword to the *Education Revolution 2008-2009* Budget that education is crucial for driving productivity growth, empowering individuals and helping overcome disadvantage.<sup>64</sup> Individuals in immigration detention, many of whom are genuine refugees,<sup>65</sup> are generally less well educated than domestic students.<sup>66</sup> As a result, detainees require additional assistance and flexibility in order to help them improve their educational outcomes and overcome the disadvantages they have faced throughout their lives.
- 2.18 While this submission acknowledges that the Commonwealth presently provides some form of education for detainees, including schooling for children,<sup>67</sup> there are flaws that must be addressed and improved if mandatory detention continues in Australia. It must also be acknowledged that immigration detention itself constrains education, particularly language

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<sup>60</sup> Farahnaz Sobhanian, Gregory J Boyle, Mark Bahr & Tindaro Fallo, 'Psychological status of former refugee detainees from the Woomera Detention Centre now living in the Australian community' (2006) 13 *Psychiatry, Psychology and Law* 151

<sup>61</sup> Ibid

<sup>62</sup> Ibid

<sup>63</sup> Hon Chris Bowen MP, 'Moving asylum seeker children into the community' (Media Release, 1 March 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb159599.htm>>

<sup>64</sup> Commonwealth, *Budget – Education Revolution 2008-09* (13 May 2008) <[http://www.budget.gov.au/2008-09/content/ministerial\\_statements/download/Education.pdf](http://www.budget.gov.au/2008-09/content/ministerial_statements/download/Education.pdf)>

<sup>65</sup> Department of Immigration and Citizenship, *Population Flows: Immigration Aspects 2009-10 Edition*, (2011) Department of Immigration and Citizenship <<http://www.immi.gov.au/media/publications/statistics/popflows2009-10/pop-flows-chapter2.pdf>> 33.

<sup>66</sup> Maya Cranitch, 'Developing language and literacy skills to support refugee students in the transition from primary to secondary school' (2010) 33 *Australian Journal of Language and Literacy* 255

<sup>67</sup> Janet Phillips, Catherine Lorimer, 'Children in Detention' (E-Brief, online only, Parliamentary Library, Parliament of Australia, 2005) <<http://www.aph.gov.au/library/intguide/sp/Childrendetention.htm>>

learning, due to the lack of exposure to the domestic community and concerns over future residency in Australia.<sup>68</sup>

### *Education of minors in detention*

2.19 One criticism of the existing system concerns the educational programs available to 16 and 17-year-olds in certain detention accommodation, such as the Darwin Airport Lodge and Asti Motel. The Australian Human Rights Commission (AHRC) reports that children in these facilities are unable to attend external schools, and have access to only one hour of English class per day.<sup>69</sup> Further, programs have allegedly not been provided for 16 and 17-year-old asylum seekers at all, because there is no legal requirement to do so.<sup>70</sup>

2.20 The authors of this submission strongly disapprove of this situation, and submit that all minors in detention be given proper access to external education. If this requires detainees to be relocated from remote detention to more urban areas in order to obtain this benefit, then this must be done. These external schools should also be adequately funded so that detainees can receive additional support with specific programs, such as peer support and buddy systems, to help them integrate into a schooling system that are likely to be unfamiliar with.<sup>71</sup>

2.21 As well as improving educational and integration outcomes, external education also allows asylum seekers to socialise outside the detention environment,<sup>72</sup> which may help mitigate the mental health problems caused by detention. Further, the presence of detainees in domestic schools is also advantageous to the domestic population who can obtain an improved appreciation of cultural diversity.<sup>73</sup>

**Recommendation 5: That all minors in detention be given external education opportunities. Schools should be provided with adequate resources provided to cater for the needs of asylum seekers.**

### *Expansion of indoor spaces*

2.22 A number of immigration detention centres have been criticised for providing insufficient indoor space to run educational programs.<sup>74</sup> The AHRC, while noting improvements, has criticised the inadequate educational resources available in Christmas Island's Construction

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<sup>68</sup> Frank van Tubergen, 'Determinants of second language proficiency among refugees in the Netherlands' (December 2010) 89 *Social Forces* 515, 519

<sup>69</sup> Australian Human Rights Commission, 2010 – *Immigration detention in Darwin* (2010) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_darwin.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.pdf)>

<sup>70</sup> Jane Bardon, 'Asylum teens 'not required' to attend school', ABC News (online), 17 September 2010 <<http://www.abc.net.au/news/2010-09-17/asylum-teens-not-required-to-attend-school/2263766>>

<sup>71</sup> Kirk, J, Cassity, E, 'Minimum standards for quality education for refugee youth' (March 2007) 26 *Youth Studies Australia* 50, 55

<sup>72</sup> Australian Human Rights Commission, 2011 – *Immigration detention in Leonora* (2011) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_leonora.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2011_leonora.pdf)>

<sup>73</sup> Angharad Reakes, 'The education of asylum seekers: some case studies' (May 2007) 77 *Research in Education* 92

<sup>74</sup> Australian Human Rights Commission, 2010 – *Immigration detention in Darwin* (2010) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_darwin.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.pdf)>

Camp and Phosphate Hill,<sup>75</sup> which breaches the Department's own Immigration Detention Guidelines.<sup>76</sup>

- 2.23 We submit that these educational spaces could also be used for recreational activities. From research undertaken, it appears that there is also inadequate space available in a number of detention centres for proper recreational programs to be run. In several reports undertaken by the AHRC, the detention facilities on Christmas Island, Leonora and Darwin were all criticised for the limited opportunities for detainees to engage in meaningful recreational activities both indoors and outdoors.<sup>77</sup>
- 2.24 Of most concern are the AHRC's observations of Villawood IDC from 21-25 February 2011.<sup>78</sup> The Blaxland compound was cited as having a highly restrictive, 'prison-like nature' in which detainees had limited to outdoor areas due to poor infrastructure. These issues are likely to have contributed to the riots that occurred at Villawood IDC in late April 2011.<sup>79</sup>
- 2.25 Although we acknowledge that DIAC and Serco have begun to address a number of issues pertaining to recreational activities, including kindergarten programs for children on Christmas Island<sup>80</sup> and redevelopment of Villawood's Blaxland compound,<sup>81</sup> we submit that adequate room for recreational activities and education, both indoor and outdoor, be given higher priority and funding in order to prevent further unrest from occurring.

**Recommendation 6: That adequate indoor areas for education and recreational activities be provided in all parts of the immigration detention network.**

*More support and flexibility within educational programs*

- 2.26 Existing English language support systems in Australia have been criticised for their inflexibility and inability to properly cater for the social, emotional and cognitive needs of refugee youth.<sup>82</sup> Successful resettlement of refugees depends on the individual's well-being,<sup>83</sup> and satisfaction with one's education is an important element.

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<sup>75</sup> Australian Human Rights Commission, 2010 – *Immigration detention on Christmas Island* (2010) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.pdf)>

<sup>76</sup> Immigration Detention Guidelines, note 126, section 4.6, 7.2

<sup>77</sup> Australian Human Rights Commission, 2010 – *Immigration detention on Christmas Island* (2010) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.pdf)>; Australian Human Rights Commission, 2011 – *Immigration detention in Leonora* (2011) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_leonora.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2011_leonora.pdf)>; Australian Human Rights Commission, 2010 – *Immigration detention in Darwin* (2010) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_darwin.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.pdf)>

<sup>78</sup> Australian Human Rights Commission, 2010 – *Immigration detention at Villawood* (2011) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.pdf)>

<sup>79</sup> For example, see Debbi Guest, Lanai Vasek, 'Guards retreat as detainees set Villawood alight', *The Australian* (online) 21 April 2011 <<http://www.theaustralian.com.au/national-affairs/guards-retreat-as-detainees-set-villawood-alight/story-fn59niix-1226042447127>>

<sup>80</sup> Australian Human Rights Commission, 2010 – *Immigration detention on Christmas Island* (2010) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.pdf)>

<sup>81</sup> Australian Human Rights Commission, 2010 – *Immigration detention at Villawood* (2011) <[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.pdf)>

<sup>82</sup> Tania Ferfolja, Margaret Vickers, 'Supporting refugee students in school education in Greater Western Sydney' (June 2010) 51 *Critical Studies in Education* 149

<sup>83</sup> Ignacio Correa-Velez, Sandra Gifford, Adrian Barnett, 'Longing to belong: Social inclusion and wellbeing among youth with refugee backgrounds in the first three years in Melbourne, Australia' (2010) 71 *Social Science & Medicine* 1399

2.27 It appears that existing education programs within immigration detention are in need of improvement. Several anecdotal reports have recorded detainees' complaints about the inadequate number of English classes and the level of instruction provided within the available classes.<sup>84</sup> In addition, depression, anxiety and other distractions within immigration detention have hindered the ability of detainees to properly participate in existing activities.<sup>85</sup>

2.28 For example, teenage boys housed in the Darwin Airport Motel experienced ongoing boredom in detention, which lead to instances of self-harm, exacerbated by poorly structured educational programs.<sup>86</sup>

**Recommendation 7: That the Commonwealth Government introduce more holistic education programs into the immigration detention network, offering teaching flexibility in conjunction with other support services so that all detainees can benefit from the programs offered.**

**Recommendation 8: That the Commonwealth Government provide more appropriate educational programs to be made available to both detainees with more advanced educational backgrounds and to those who require additional assistance.**

### Recreation

2.29 Recreation promotes good health and well-being as well as social inclusion, which is beneficial for all refugees and significantly so for young people.<sup>87</sup> We refer the Committee to our discussion above from 2.23 to 2.25 and direct the Committee to Recommendation 6.

2.30 More specifically, some of the benefits listed in the 2007 report from the Centre for Multicultural Youth Issues include:

- Building trust;
- Facilitating settlement;
- Therapeutic benefit;
- Diversion strategy;
- Promotion of health and well-being, including physical health; and
- Building community understanding.<sup>88</sup>

2.31 Trust is a major issue for many refugees and sport gives them the opportunity to come into regular contact with adult role models. This can be instrumental in improving the development and health of asylum seekers.<sup>89</sup> There is often an element of marginality for refugees upon

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<sup>84</sup> See Australian Human Rights Commission, above n 20; Pamela Curr, 'Next stop, the Darwin Airport Motel: home to 150 asylum seeker teens', *Crikey* (online), 13 September 2011

<<http://www.crikey.com.au/2010/09/13/next-stop-the-darwin-airport-motel-home-to-150-asylum-seeker-teens/>>

<sup>85</sup> Australian Human Rights Commission, 2010 – Immigration detention at Villawood (2011)

<[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.pdf)>

<sup>86</sup> Pamela Curr, 'Next stop, the Darwin Airport Motel: home to 150 asylum seeker teens', *Crikey* (online), 13 September 2011 <<http://www.crikey.com.au/2010/09/13/next-stop-the-darwin-airport-motel-home-to-150-asylum-seeker-teens/>>

<sup>87</sup> Louise Olliff, 'Playing for the future: sport and recreation, and young refugees' (2008) 192 *Teacher* 52.

<sup>88</sup> *Ibid*

<sup>89</sup> Meridith A Whitley & Daniel Gould, 'Psychological Development in Refugee Children and Youth through the Personal-Social Responsibility Model' (2011) 1(3) *Journal of Sport Psychology in Action* 118

release but sport is seen by many young refugees as a ‘universal language’.<sup>90</sup> It also provides refugees with an opportunity to demonstrate competence when they are struggling in other areas such as language or education.<sup>91</sup>

### *Requirements for a successful recreation program*

2.32 There is currently a limited availability of sports and recreation programs that cater specifically for people with refugee backgrounds, due to language barriers and financial issues.<sup>92</sup> We submit that there are three necessary preconditions that characterise successful recreational activities:

- ‘The development of initiative, voluntary engagement in the activity, and creation and maintenance of a mastery climate (context),
- An environment where the youths are surrounded by compassionate adult mentors and a supportive group (external assets), and
- The edification of important life skills that will be helpful in other domains (internal assets).’<sup>93</sup>

2.33 In the United States, a Refugee Sport Club (RSC) has been created as a non-profit organisation with the aim of providing fun for young refugees, developing relationships and aiding integration by teaching them a variety of different American sports.<sup>94</sup> The program also has a 10-15 minute period of self-directed activity at the start used as counselling time where staff can talk informally to children and ends with a self-evaluation of the day.<sup>95</sup>

2.34 As well as being beneficial for refugees, it was also found that the program was a good educational tool for staff in terms of learning about diversity and globalisation issues.<sup>96</sup> This may also help acculturation issues by reducing racism and discrimination.

**Recommendation 9: That the Government increase funding for NGOs to help implement programs such as the Refugee Sport Club, which would be beneficial for refugees both in detention and in the community, or in the alternative;**

**Recommendation 10: That coaches be employed in detention centres on a casual basis to teach a range of sports and act as mentors. Equipment should be provided to encourage self-directed sports and games.**

2.35 As stated above, refugees often experience feelings of helplessness and diminished agency. Often these feelings can be attributed to a feeling of failure as a protector and provider for their family.<sup>97</sup> This is enhanced by the restriction of being confined and a loss of independence.

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<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> Refugee Council of Victoria, *Sport*, <http://www.refugeecouncil.org.au/settlement/sport.php> at 15 September 2011

<sup>93</sup> Meridith A Whitley & Daniel Gould, ‘Psychological Development in Refugee Children and Youth through the Personal-Social Responsibility Model’ (2011) 1(3) *Journal of Sport Psychology in Action* 118.

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Guy J Coffey, Ida Kaplan, Robyn C Sampson & Maria Montagna Tucci, ‘The meaning of mental health consequences of long-term immigration detention for people seeking asylum’ (2010) 70 *Social Science & Medicine* 2070

**Recommendation 11: That asylum seekers in detention be given access to more excursions to increase feelings of autonomy, reduction of mental health issues and aid integration.**

2.36 Although this will not eradicate all the problems faced by detainees, we submit that these recommendations will go some way to improving the well-being of these individuals should they continue to be detained over an extended period.

## Part Three - Children in the immigration detention network

### Introduction

- 3.1 Children, due to their immaturity and age, are recognised as vulnerable members of society and in need of special care, humanitarian assistance and legal protection. Nonetheless, all children are currently detained in immigration detention facilities until personally approved by the Minister for Immigration for release into community detention<sup>98</sup>. Unaccompanied minors, that is, children who travel to Australia without a parent or guardian, are particularly vulnerable to the problems associated with immigration detention outlined in the preceding sections.
- 3.2 In October 2010, the Minister for Immigration announced that ‘significant numbers of children and vulnerable family groups’ would be moved out of immigration detention and into community-based accommodation<sup>99</sup>. At the time this announcement was made, 742 children were held in APODS and 10 were held in Community Detention. As of June 2011 there are 414 unaccompanied minors in detention.<sup>100</sup>
- 3.3 ChilOut reports that of 568 children approved for release into Community Detention, 309 have been released, 217 are due for imminent release and 132 have left the detention system after being granted permanent visas<sup>101</sup>. We commend the Government on this initiative, but note that as of June 2011 there are still 456 children in high or low security detention facilities.

### Recent policy

- 3.4 In 2004 the Human Rights Equal Opportunity Commission published ‘A Last Resort: National Inquiry into Children in Immigration Detention’, which made significant findings and recommendations regarding the detention of children in Australia. We draw to the Committee’s attention this previous publication of recommendations that sought to address and amend the failure of Australia’s policy of mandatory detention to protect the rights of children.
- 3.5 In 2008 the Government signaled its recommitment to addressing immigration issues via seven key immigration values.<sup>102</sup> Of relevance to this submission, immigration value two states that children and where possible, their families, will not be detained in IDCs. Further, then Minister for Immigration, the Hon. Chris Evans, stated that ‘the values commit us to detention as a last resort; to detention for the shortest practicable period; to the rejection of indefinite or otherwise arbitrary detention.’

**Recommendation 12: That the Commonwealth Government reaffirms its commitment to keeping children out of immigration detention centres and ensures the prompt removal of all children from detention.**

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<sup>98</sup> Gautier, K et al, ‘No Place for Children: Immigration Detention on Christmas Island,’ ChilOut Report June 2011, p34

<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> The Hon. Chris Bowen, Minister for Immigration, ‘New Directions in Detention – Restoring Integrity to Australia’s Immigration System’ (June 2008)

<<http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>> accessed 1 September 2011

## Alternative places of detention (APODs)

- 3.6 A report by ChilOut in June 2011 identified three features common to IDCs and APODs:
- They are not “in the community”;
  - Children are imprisoned within immigration detention facilities, with fences and guards; and
  - Detainees are only able to leave under the supervision of a guard<sup>103</sup>.
- 3.7 In 2005 the Migration Act was amended to affirm that a minor, in principle, should only be detained as a measure of last resort<sup>104</sup>. We submit however, that the use of APODs does not successfully meet the requirements set out by CROC.

## Community Detention

- 3.8 The Minister for Immigration has the power to determine what is a place of detention under s197AB of the Migration Act. This allows for a system of ‘community detention’ that recognises the rights of asylum seekers to freedom of movement within a defined location.<sup>105</sup> Children within community detention are immigration detainees in a legal sense, however are not subject to physical supervision. We acknowledge that as of June 2011, 160 unaccompanied minors have been transferred into community detention<sup>106</sup> and commend the Government on this policy.
- 3.9 We understand that some members of the community believe that increasing the number of asylum seekers in community detention will inadvertently increase rates of absconding. We note however, that between 2005 and October 2007, less than 1% of the total 244 people in community detention absconded<sup>107</sup>. Concerns about rates of absconding will be discussed in further detail in Part Four – International approaches to immigration detention.

## Application of CROC

- 3.10 The Court in *Teoh*<sup>108</sup> acknowledged that, ‘ratification of a convention is a positive statement ... that the executive government and its agencies will act in accordance with the Convention.’
- 3.11 The operation of CROC in Australian law is crucial to determining the current and future rights of children in detention. The Full Court of the Family Court held that UNCROC is an ‘international instrument’ pursuant to s47(1) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOC Act).<sup>109</sup> It follows that, under s11(1)(k) of the HREOC Act, the Commission can inform the government of action required for Australia to meet its obligations under CROC.

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<sup>103</sup> Gautier, K et al, ‘No Place for Children: Immigration Detention on Christmas Island,’ ChilOut Report June 2011, p34

<sup>104</sup> *Migration Act 1958 (Cth)*, S4AA

<sup>105</sup> International Detention Coalition, Position on Children in Detention, ‘Evidence concerning the impacts of immigration detention on children’, October 2007

<sup>106</sup> Gautier, K et al, ‘No Place for Children: Immigration Detention on Christmas Island,’ ChilOut Report June 2011, p34

<sup>107</sup> Ibid

<sup>108</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) (1995) 128 ALR 353 as per Mason CJ and Deane J

<sup>109</sup> *B & B* [2003] 30 Fam LR 181, 249-250



3.12 The question remains open as to whether or not CROC has been incorporated into the Family Law Act<sup>110</sup>.

**Recommendation 13: That the Commonwealth Parliament issue a declaration that CROC is an international instrument pursuant to the HREOC Act. The declaration should also state that CROC is incorporated into Australian domestic law.**

3.13 The High Court ruling in the case study of B & B<sup>111</sup> below highlights the shortcomings of domestic judicial provisions for children, and the importance of the operation of CROC in directing the recognition of children's rights in Australia's legal system.

#### Case study three – B and B

B and B were two boys, aged 12 and 14 years old, who sought orders from the Family Court that the Minister for Immigration release them from an immigration detention centre, on the grounds that their ongoing detention was detrimental to their health and wellbeing<sup>112</sup>.

On appeal to the High Court, the key question was whether or not the Family Court had the power to make orders to release children from detention, or to make orders for the protection of such children whilst in detention<sup>113</sup>.

The High Court upheld the Government's argument that the Family Court had no jurisdiction in Commonwealth matters of immigration detention, stating that, 'the Family Court has no jurisdiction to make such an order. Nor has it any jurisdiction to make orders concerning the welfare of children who are held in immigration detention'<sup>114</sup>.

As a result, there is no legal mandate to enforce relevant State child protection legislation in cases concerning children seeking asylum<sup>115</sup>.

Following the ruling, the applicants made a submission to the Human Rights Commission ('HRC').

The HRC found that Australia was in breach of Article 9(1) of the ICCPR and Article 37(b) of CROC. HRECO stated that, 'the Minister's failure to exercise his power under section 417 [of the Migration Act] meant that detention was not used a last resort. Under the current regime put in place by the Migration Act, detention is the 'first resort' for every child.'<sup>116</sup>

3.14 The case of B and B highlights the need for an independent body to monitor immigration detention. We acknowledge that in March 2010 the Australian Red Cross was empowered to

<sup>110</sup> *B & B Minister for Immigration and Multicultural Affairs and Indigenous Affairs: Can International Treaties Release Children From Detention Centres?* p269

<sup>111</sup> *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451,

<sup>112</sup> Ibid

<sup>113</sup> Nicholes, Sally and Ruddle, Lara. B and B and Minister for Immigration and Multicultural Affairs : can international treaties release children from immigration detention centres? [online]. *Melbourne Journal of International Law*; 5 (1) June 2004: 256-279

<sup>114</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20

<sup>115</sup> Gautier, K et al, 'No Place for Children: Immigration Detention on Christmas Island,' ChilOut Report June 2011, p34

<sup>116</sup> HRECO, *Report of an Inquiry into a Complaint by Mr Mohammed Badraie on behalf of his Son Shayan Regarding Acts or Practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, (2002) Report No 25, [14.7]

provide independent scrutiny to ensure the fair and reasonable treatment of detainees<sup>117</sup>. The agreement between the Australian Red Cross and the Government provides for essential ongoing monitoring of the welfare of child detainees and is commended by the authors of this submission.

- 3.15 We submit however, that this process of independent monitoring should be strengthened by empowering the Australian Red Cross to more closely monitor detention standards. We direct the Committee to Recommendation Three.

## Guardianship

- 3.16 The defining feature of unaccompanied minors is that they lack the support that a parent or guardian would provide. This is of particular concern due to the high level of emotional and practical support that a child claiming refugee status generally requires. As such, unaccompanied minors within the Australian detention network are considered an especially vulnerable group in need of a higher degree of care.

- 3.17 Australia's current immigration policy, outlined in the Immigration (Guardianship of Children) Act<sup>118</sup> (IGOC) assigns the position of legal guardian of all unaccompanied non-citizen children to the Minister for Immigration and Citizenship.

- 3.18 This choice of legislatively assigned guardian raises a number of issues which call into question the appropriateness and effectiveness of the role. There are significant concerns regarding the conflicts that may arise where interests of guardianship and politician are opposing. This section will outline these conflicts, exploring why they are pertinent to the process experienced by unaccompanied minors and suggest alternatives to the current guardianship policy.

## Conflicts of Interest

- 3.19 As the legal guardian of all unaccompanied non-citizen children the Minister has 'the same rights, powers, duties, obligations and liabilities as a natural guardian of the child.'<sup>119</sup> The Minister maintains this guardianship until the child turns 18 years and is considered an adult, or until the child leaves the country without intention to return<sup>120</sup>.

- 3.20 The role of guardian requires a broad duty of care, and as a signatory to the CROC, Australia has a particular commitment to uphold this duty. The IGOC Act allows the Minister to delegate his responsibilities and powers, in a bid to provide effective and accessible forms of guardianship to the children in question<sup>121</sup>. As a result, the everyday needs of unaccompanied non-citizen children are provided for by organizations to which the Minister has delegated his/her duties.

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<sup>117</sup> Bowen, C (Minister for Immigration) 2010, *Australian Red Cross to Monitor Immigration Detention*, 16 March 2010, viewed 20 August 2011, Department of Immigration and Citizenship <<http://www.minister.immi.gov.au/media/media-releases/2010/ce10022.htm>> at 15 September 2011

<sup>118</sup> *Immigration (Guardianship of Children ) Act 1946 (Cth) s6*

<sup>119</sup> *Ibid*

<sup>120</sup> *Ibid*

<sup>121</sup> *Ibid* s4

- 3.21 An issue that is of significant importance is the lack of independent legal assistance and support given to non-citizen children claiming refugee status. Guardianship is said to encompass all responsibilities relating to ‘the defence, protection and guarding of the child, or his/her property, from danger, harm or loss that may ensue from without.’<sup>122</sup> From this description, it is apparent that the role, where required, may necessitate that the guardian commences legal proceeding on the child’s behalf.<sup>123</sup> In the case of unaccompanied minors this is of particular significance due to the legal proceedings, such as tribunal hearings, that are required to process claims for refugee status.
- 3.22 It is here that the conflict in the Minister’s duty becomes apparent. As a key player in the decision making process regarding the awarding of refugee status, it is unclear whether the Minister also has an obligation to provide independent legal assistance to the unaccompanied minor. It has been suggested that the Minister cannot directly provide legal assistance due to the Minister’s decision making role, and that any such assistance under the authority of the Minister is in conflict with the process.
- 3.23 We submit that unaccompanied minors are disadvantaged during legal proceedings if they are not provided with independent legal advice and the support of a legal guardian. This is due to various factors including difficulties with language and an inability to talk about certain events due to trauma. We acknowledge that the Migration Act requires minors to be provided with a guardian, however note that should the guardian choose not to be present, the hearing is postponed and the process is delayed further<sup>124</sup>. We submit that it should be mandatory for unaccompanied minors to be provided with legal advice through a well-informed guardian, who is required to be present during the hearing, to make the process more effective and ‘child-friendly’.

**Recommendation 14: That unaccompanied minors be provided with independent legal advice and that their legal guardian be well-informed and physically present during tribunal hearings.**

#### **Suggested reforms to guardianship**

- 3.24 Given the inherent conflict of interest in the role of the Minister as legal guardian and decision maker, we submit that it would be preferable to remove the Minister as the designated guardian for unaccompanied minors. There are however, different suggestions, as to who should replace the Minister. One of the major campaigns run by the Asylum Seeker Resource Centre, based in Melbourne, proposes an Independent Commissioner for Children and Young People. This position would be a community based position held by an individual outside of the Government<sup>125</sup>.
- 3.25 A similar proposal is suggested by Save the Children, who suggest a National Children’s Commissioner to ‘provide national leadership and monitor and advocate for the wellbeing of

<sup>122</sup> *Wedd v Wedd* [1948] SASR 104

<sup>123</sup> Julie Taylor, *Guardianship of Child Asylum Seekers*(2006) 34(1) *Federal Law Review* 185, 190

<sup>124</sup> *The Migration Act 1958* (Cth)

<sup>125</sup> Asylum Seeker Resource Centre, *End Mandatory Detention* (2011)

<<http://www.asrc.org.au/campaigns/1-end-mandatory-detention/>> at 2 September 2011

children and young people'.<sup>126</sup> This alternative would create a Commissioner who represents the interests of all children in Australia, which would be consistent with the objective of s8 of the IGO Act which stipulates that despite the Act, laws applying to children who are Australian citizens should be equally applied to non-citizen children<sup>127</sup>.

- 3.26 Another alternative cited in the 'A last resort?' publication, credited to the Refugee Council of Australia, proposes to keep the guardian within the Government, but reassign guardianship to the Minister for Children and Youth Affairs<sup>128</sup>. The Minister for Children and Youth Affairs would then be able to utilise the Department of Family and Community Services to better enable the integration and support of children<sup>129</sup>. This alternative recognises the need for guardians to have adequate resources to make sure that appropriate attention is given to each child.<sup>130</sup>
- 3.27 The proposal also suggests that the Department should fund a panel of individuals who each have responsibility for particular unaccompanied minors. The panel would be composed of members from a chosen community organization so that individuals chosen have the requisite interests, skills and experience. In this way, it could be ensured that the child receives consistent, individual care and support throughout the process.<sup>131</sup>

**Recommendation 15: That the Minister for Immigration is removed as the legal guardian of unaccompanied non-citizen children, and replaced by the Minister for Children and Youth Affairs, or an Independent Children's Commissioner.**

- 3.28 Regardless of which proposal for guardianship is adopted, the role of the guardian should be legislated, preferably in the IGO Act. This should make it clear that unaccompanied minors are entitled to legal assistance and that it is a condition of guardianship that the guardian provides independent legal advice.

**Recommendation 16: That the obligations and duties of the legal guardian of unaccompanied non-citizen children, including in relation to the provision of independent legal advice, be legislatively protected in the IGO Act.**

## Offshore processing

- 3.29 The current conflict over the Federal Government's proposed Malaysia Transfer Agreement raises concerns about the offshore processing of unaccompanied minors. In delivering its judgment, the High Court held that the Minister for Immigration, as the children's guardian, was not legally able to remove the children from Australia without written consent, in accordance with the IGO Act.<sup>132</sup>

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<sup>126</sup> Policy, Research and Advocacy Department, National Children's commissioner: Our Position, March 2010 Save the Children <http://www.savethechildren.org.au/resources/position-papers/national-childrens-commissioner.html>

<sup>127</sup> Immigration (Guardianship of Children) Act 1946 (Cth) s 8

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> "Court's tough conditions on minister a victory for unaccompanied minors" *The Australian* (Sydney) 1 September 2011

- 3.30 As the High Court recognised, offshore processing involving unaccompanied children is particularly concerning. We submit that as long as the Minister is legal guardian while simultaneously instigating offshore processing centres, the Minister is not fulfilling his/her duty to act in the best interests of the child. Offshore processing also raises broader concerns about the violation of children's rights, such as those expressed by Richard Towle, regional head of the UNHRC<sup>133</sup>.
- 3.31 Further, it is concerning that pre-transfer assessments made under a policy of offshore processing are conducted by Immigration Department staff, rather than child protection experts.<sup>134</sup>
- 3.32 We submit that when considering any future offshore processing, the Government should ensure that the transfer is in the best interests of the child and that the transfer does not breach any international and domestic human rights standards. It is suggested that asylum seekers should only be transferred to countries with an equivalent commitment to human rights as Australia.

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<sup>133</sup> 'Court's tough conditions on minister a victory for unaccompanied minors' *The Australian* (Sydney) 1 September 2011

<sup>134</sup> Paul Maley, 'Canberra overrules UN on vetting kids for Malaysia' *The Australian*, (Sydney/Surry Hills), 26 August 2011

## Part Four – International approaches to immigration detention

### Introduction

4.1 The 2008 Joint Senate Committee report, 'Immigration Detention in Australia' made recommendations on changes to detention policy which drew on international approaches to detention and assessing asylum claims. This section will likewise draw upon models adopted overseas to make recommendations on how the immigration detention network can be improved to reduce the overall cost of the detention network, achieve better public health outcomes, and provide sufficient security to the Australian public.

4.2 We suggest that:

- Mandatory detention is not a deterrent;<sup>135</sup>
- Mandatory detention is costly in financial terms and health;
- Mandatory detention does not comply with human rights obligations;
- Community detention is cost effective;
- Community detention is less harmful to those seeking asylum; and
- Community detention is consistent with international obligations.

4.3 The benefits for the Australian community in adopting community based assessment models include reduced costs in the short term through reduced capital expenditure on the detention network, and treatment of asylum seekers in line with Australia's cultural values and international obligations. Community based assessment models will not affect the security or safety of the Australian community, as can be seen by the adoption of similar models internationally.

4.4 We therefore submit that mandatory detention should be abolished. In the instance that detention is not abolished, we suggest that detention during processing of protection applications should only be used as a last resort.

**Recommendation 17: That mandatory detention be abolished and that the detention of asylum seekers is used only as a last resort.**

### Legislative framework

4.5 In Australia asylum seekers are dealt with under the *Migration Act 1958*. The Migration Act governs entry and exit of all persons into Australia. Current legislation fails to address the clear difference between regular entrants and asylum seekers – that asylum seekers are seeking safety and protection.

4.6 In Canada asylum seekers are dealt with under the *Immigration and Refugee Protection Act (IRPA)*. This allows the Canadian legislation to specifically address the needs of asylum seekers rather than using the same legal framework which governs the entry and exit of other non-

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<sup>135</sup> 'There are Alternatives' (Report, International Detention Coalition (IDC), May 2011) 11. 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, State- less Persons and Other Migrants' (Report, UNHCR, 2011)

citizens. The Canadian legislation contains a pre-ambule with a clear statement that the purpose of the Act is to extend protection and refuge to those who need it.<sup>136</sup>

- 4.7 Establishment of a separate Act to address the Commonwealth's obligations to asylum seekers will also allow for a separate section to address the needs of asylum seekers and Australia's obligations and approach to refugee issues.

### Indefinite detention

- 4.8 The Migration Act currently allows for indefinite administrative detention. Indefinite detention is dangerous to the health of asylum seekers and potentially in breach of international obligations. In the United Kingdom there is a presumption against mandatory detention of asylum seekers and indefinite detention is illegal. Australia should adopt legislation which clearly distinguishes between persons who have been found to fail the character test and asylum seekers. Persons seeking asylum in Australia should not be subject to indefinite detention. Any new Act, or amendment to the current *Migration Act*, should specifically interdict the use of indefinite, non-reviewable detention in the case of asylum seekers.

**Recommendation 18: That a new Refugee Act be enacted to clearly state Australia's approach to asylum seekers. Alternatively, that the current Migration Act be amended to clearly set out Australia's obligations and approach to asylum seekers. Indefinite detention of asylum seekers should be prohibited under any new Act or removed from the Migration Act.**

### The EU Reception Conditions Directive

- 4.9 The EU has established a Directive on Reception Conditions for provision of services to migrants and asylum seekers in open and closed detention and reception centres.<sup>137</sup> The guiding principle is the harmonisation of conditions in reception and detention facilities throughout Europe.
- 4.10 While the intention of the EU Directive is to regularise internal processes and standards amongst member nations, there would be significant benefits in the establishment of a similar legal framework for the operation of facilities used during the processing of asylum seekers in Australia. Such a framework should be implemented to establish minimum standards for detention facilities and community based residential facilities in Australia.
- 4.11 As noted in preceding sections, private providers, whether private enterprises or NGOs, should be required to adhere to clear and objective standards for the provision of facilities and clear systems of accountability could be established. Adopted into legislation, a framework similar to the EU Directive, would provide greater clarity on the requirements of detention for the department, commercial providers, detainees and the public.
- 4.12 A clear and publicly available framework for the operation of detention centres or community facilities would improve public confidence in the effective functioning of community based processing. Further, such a framework would clearly demonstrate a commitment to transparency and adherence to international standards.

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<sup>136</sup> John Mendue, Arja Keski-Nummi and Kate Gauthier, 'A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers.' (Report, Centre for Policy Development, 2011) 19

<sup>137</sup> European Union Reception Conditions Directive 2003/9/CE (22/01/2003)

**Recommendation 19: That statutory regulations guiding the implementation and running of detention facilities or community based accommodation be created. This legislation should enshrine a clear minimum standard for processing facilities.**

## Establishment of a continuum of programs for processing asylum claims

### Present context

- 4.13 The current mandatory detention policy states that all unlawful non-citizens arriving in the migration zone must be detained. At present however, 76% of asylum claimants arrive by aeroplane and hold visas at the time of arrival – they are not therefore detained and remain in the community while their asylum claims are assessed.<sup>138</sup> This is most frequently justified on the basis that these asylum seekers already have provided proof of identity. The result is that only irregular maritime arrivals are mandatorily detained.
- 4.14 The 2008 report, 'The New Directions in Detention Policy' made recommendations that once an applicant's health and character tests were processed, the claimant should be released into the community.<sup>139</sup> We support these recommendations as the most cost effective, humane and effective means of processing asylum claims. We submit that these measures should be expanded and implemented urgently.

### Alternatives to detention

- 4.15 Australia, along with Malta, is one of only two countries in the world which uses mandatory detention. This is so even though other OECD nations have a far higher ratio of asylum seekers than Australia. In 2010 Australia received 8,250 asylum claims. This contrasts significantly with countries such as Sweden which received 31,800 asylum applications in the same year and France which receive 47,480 applications. This equates to 0.4 applications per 1,000 inhabitants in Australia compared with 0.8 per 1,000 in France or 3.4 per 1,000 in Sweden.<sup>140</sup>
- 4.16 Alternative models to mandatory detention do exist and function successfully in a number of countries around the world. The UK, Argentina, and NZ act on the basis that mandatory detention is not necessary, either based on a presumption against mandatory detention or giving discretion to decision makers not to detain.<sup>141</sup>
- 4.17 DIAC states that IDCs are not exclusively used to house detainees and that a variety of accommodation types are used including 'community detention, immigration residential housing, immigration transit accommodation and foster care arrangements (for unaccompanied minors).'<sup>142</sup>

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<sup>138</sup> John Mendue, Arja Keski-Nummi and Kate Gauthier, 'A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers.' (Report, Centre for Policy Development, 2011) 19

<sup>139</sup> DIAC, 'Fact Sheet 82 – Immigration Detention' (13 January 2010)

<<http://www.immi.gov.au/media/fact-sheets/82detention.htm>>

<sup>140</sup> UNHCR, 'Asylum Levels and Trends in Industrialized Countries 2010', (UNHCR, 2011) 201.

<sup>141</sup> 'There are Alternatives' (Report, International Detention Coalition (IDC), May 2011) 11. 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (Report, UNHCR, 2011)

<sup>142</sup> DIAC, 'Fact Sheet 82 – Immigration Detention' (13 January 2010)

<<http://www.immi.gov.au/media/fact-sheets/82detention.htm>>



- 4.18 Many of these facilities are locked secure facilities in which asylum seekers are detained. They do not allow for community release or access. Further, many of these detention facilities are designed as temporary accommodation and clearly inadequate or inappropriate as medium or long term accommodation options required during processing asylum claims.
- 4.19 Sweden receives a significantly larger number of asylum seekers than Australia but does not resort to mandatory detention – detention is used only as a final resort in cases of involuntary deportation<sup>143</sup> The Swedish system is referred to as 'exemplary' and has excellent outcomes among its asylum seeker population. Sweden provides rented accommodation for asylum seekers for the time it takes to process their asylum claim.<sup>144</sup>

**Recommendation 20: That asylum seekers be released into open community facilities. The Government should also invest in new sources of community accommodation to allow asylum seekers to remain in the community for the duration of the processing of their asylum claim. Accommodation should preferably be individual to avoid problems associated with larger reception centres.**

#### **A risk based approach**

- 4.20 The most efficient means to assess asylum seekers is through adoption of a graduated scheme that takes into account a variety of factors in determining what form of accommodation is appropriate to the claimant's needs and the potential needs of each individual.
- 4.21 Following any detention required for initial health and character checks, with a maximum 30 day period allowable, authorities should conduct a risk based assessment of each individual for release into community facilities. This should include a review of any support required by the individual for placement in the community.
- 4.22 As part of the risk assessment DIAC could implement measures through individual undertakings to ensure asylum seekers in the community adhere to any conditions of their release. Such measures could include supervision while on community release, reporting, or bail / bond measures discussed below.
- 4.23 Bail or bond systems function effectively in Canada where asylum claimants are released to community facilities on the basis of an agreement with Immigration authorities. Programs of this nature have been successful in a number of countries including Canada, the UK, Japan, the United States and Latvia and have very high compliance rates<sup>145</sup> Bail or bond systems are just one measure which could be introduced among asylum claimants in the community to encourage participation.

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<sup>143</sup> 'There are Alternatives' (Report, International Detention Coalition (IDC), May 2011) 11. 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (Report, UNHCR, 2011) 35

<sup>144</sup> STEPS consulting, 'The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states' (Report, STEPS consulting, December 2007), 149

<sup>145</sup> In Canada this figures stands at 91.6% compliance for Fiscal Year ('FY') 2002-2003, cited in Ophelia Field, 'Alternatives to Detention' (Policy Research Report, UNHCR, April 2006), 26 & DIAC, 'Community Care Pilot and Status Resolution Trial' (Report, DIAC, 2009)

<<http://idcoalition.org/wp-content/uploads/2009/06/ccpmarch-2009.doc>>, 3

**Recommendation 21: That IMAs be detained for a maximum of 30 days for health and security checks. This maximum length of detention should be inserted into legislation.**

**Recommendation 22: That systems be implemented to adopt a continuum of community based programs for accommodation of asylum seekers during the assessment process. Existing community release options should also be expanded and extended.**

### Support to facilitate integration

- 4.24 Asylum seekers in the community should be provided access to basic support services including a stipend for living expenses, access to necessary medical care, legal services and work rights as well as accommodation.<sup>146</sup> Provision of these services will reduce the risk of non-compliance with any conditions of community release. The cost of these services is likely to be significantly lower than the costs of detention in high security facilities.
- 4.25 Further, international studies have shown that asylum seekers are more likely to comply with the asylum process, including refusal and voluntary return, where they believe the assessment process has been fair and equitable.<sup>147</sup>

**Recommendation 23: That asylum seekers in the community be provided with a basic stipend to cover food and living expenses, work rights, legal advice and health while awaiting an outcome on their protection claim.**

### Cost of immigration detention

- 4.26 The original logic behind introducing mandatory detention was to save money on the expense of assessing refugees claims while asylum seekers remained in the community and to facilitate refugee processing.<sup>148</sup> This original logic is however, no longer applicable since the present detention network is a significant public expense. 'Next year (2011/12) the Government will spend close to \$800 million in asylum seeker interception, detention and related costs. This is about \$90,000 for every asylum seeker who comes to Australia.'<sup>149</sup> The most significant component of this cost is the maintenance and construction of high security facilities such as the IDC at Christmas Island.

### Reduced cost of Community Detention

- 4.27 Construction and maintenance of high security offshore facilities is extremely expensive. The cost of operating such facilities – especially in remote locations – is high; in 2007 it was stated that the cost of detention per person per day at Christmas Island is \$2,895. This was compared with Villawood in Sydney at \$190 per detainee per day.<sup>150</sup>

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<sup>146</sup> See recommendation 8, Joint Standing Committee on Migration, 'Immigration detention in Australia: Community-based alternatives to detention' (2009), xxiii

<sup>147</sup> Field, above, 25, Alice 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, (Policy Research Series, UNHCR, 2011), 84

<sup>148</sup> Commonwealth, Parliamentary Debates, House of Representatives, 5 May 1992, 2370 (Minister for Immigration, Local Government and Ethnic Affairs, the Hon. Gerry Hand MP).

<sup>149</sup> Menadue, above 33

<sup>150</sup> Senate Estimates (2007), Legal and Constitutional Affairs Committee, Hansard 21 May 2007, 121

- 4.28 Processing of asylum claims in the community is significantly cheaper than processing claims in high security facilities. The 'exemplary' Swedish system based entirely on community placement is estimated to cost \$44 per day per asylum seeker.<sup>151</sup> A UN study estimated costs of community based programs as being as little as \$7-\$39 per day. Similar costs were shown for programs in Canada and the US.<sup>152</sup> This is a significant saving compared to the costs at Villawood and a fraction of the cost of detention on Christmas Island.
- 4.29 Further, the remoteness of locations such as Christmas Island significantly increases the costs associated with staffing and provision of essential medical services. Along with the increase in cost there is often also a reduction in the range and quality of services provided.
- 4.30 In addition, the second 2009 report of the Joint Standing Committee on Migration stated that community based alternatives would provide cheaper arrangement for refugee assessments in Australia.<sup>153</sup>

**Recommendation 24: That the Australian immigration detention network move towards a community based detention system. This will significantly reduce costs. Savings should be used to improve support services for asylum seekers being processed in the community.**

### Promotion of National Security

- 4.31 National security is a pertinent issue which some commentators use as the principal reason for the initiation of the current mandatory detention system. It is argued that by detaining asylum seekers until their asylum claims can be processed, the security of Australia is best protected. We submit however, that the process of determining an asylum seeker's identity and running background checks does not need to be conducted while the person is in custody. Identity checks should be carried out with due diligence, but confining the asylum seeker in detention until such a process is complete has adverse effects on their physical and psychological health, and furthermore is not necessary to protect Australia's security.
- 4.32 There is no evidence that Australia's security has ever been threatened by the arrival of boat people on its shores. Even at the height of the September 11 climate of suspicion, when arguments were made that the arrival of asylum seekers could be a 'pipeline for terrorists', the Director-General of ASIO conceded that not a single unauthorised boat arrival had been found to be a genuine security risk. With this in mind, this section will analyse the approach taken by other nations and will show that a state's security can be maintained while avoiding mandatory detention.

### Health and identity checks

- 4.33 Under the current Australian system all asylum seekers arriving by boat are placed in mandatory detention, where their asylum claims and identity checks are processed. This process rarely takes less than three months to complete. We submit that this should not be the case, and that asylum seekers should be housed in the community.

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<sup>151</sup> Dr Susan Banki and Professor Ilan Katz, 'Resolving Immigration Status, Part 2: Comparative Case Studies', (Research Report for DIAC, Social Policy Research Centre, 2009), 41

<sup>152</sup> Dr Susan Banki and Professor Ilan Katz, 'Resolving immigration status Part 1: Review of the International Literature', (Research Report for DIAC, Social Policy Research Centre, 2009), 7

<sup>153</sup> Joint Standing Committee on Migration, above

- 4.34 In Germany, the system in place sees asylum seekers placed in community based detention upon arrival, where identity, health and security checks are all conducted<sup>154</sup>. The fact that Denmark manages to conduct most of its identity, security and health checks in the context of an open reception centre demonstrates that this can be done without serious breaches to national security or threats to society<sup>155</sup>. This process gives asylum seekers greater access to medical and psychological assistance, an opportunity to establish links with the community and enables them to maintain family connections; all of which are not possible under mandatory detention<sup>156</sup>.
- 4.35 We suggest that immigration detention should only occur if an asylum seeker's claim is denied and they are waiting for deportation; mandatory detention at this stage would prevent possible absconding which may occur following a failed application. In Sweden it is possible to keep asylum seekers in detention in order to investigate their identity, though only if there is reason to believe that the person will go into hiding in order to avoid deportation.<sup>157</sup>

### Rate of absconding

- 4.36 A key concern with community based detention is that some asylum seekers may abuse the increased freedom given to them and abscond whilst their asylum claim is being processed.
- 4.37 In Sweden, asylum seekers are housed in community detention whilst their asylum claims are processed.<sup>158</sup> They are allowed freedom of movement within the town where the centre is situated, and must report back to the detention centre each night. We acknowledge that stringent reporting measures are essential to ensure that asylum seekers comply with the asylum process, while also allowing them to move about in the community. This allows them to take advantage of recreational facilities and establish ties with the community, both of which are vital for mental rehabilitation. Other benefits of this system will be elaborated on below.
- 4.38 It should be ensured that the reporting system should not become so arduous that the purpose of giving an asylum seeker relative freedom of movement is defeated. Such a reporting system should be implemented along the lines of the system operating in Finland, where a reporting system must not restrict the rights of an individual more than is reasonably necessary<sup>159</sup>.
- 4.39 While critics believe a system of community detention will lead to high absconding rates, evidence shows this is not the case. In Sweden, absconding rates are virtually non-existent, as is in the case in Finland. Germany reports a non-compliance rate of less than 4 per cent<sup>160</sup>. These low rates of absconding are attributed to the belief of many asylum seekers that their claims will be successful and as a result, there is no reason to abscond. We submit that the provision of adequate reception assistance, even in a very open system, can effectively raise the rate of procedural compliance.

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<sup>154</sup> Peter Stapleton, Overview of Germany's Asylum System, *Jesuit Social Justice Centre*, February 2003.

<sup>155</sup> EU Directorate-General for Internal Policies, Report on Refugees, December 2007

<sup>156</sup> Peter Stapleton, Overview of Germany's Asylum System, *Jesuit Social Justice Centre*, February 2003.

<sup>157</sup> Ingrid Skavhaug, Reception of Asylum Seekers in Sweden, ENARO (European Network of Asylum Reception Organisations), April 2005

<sup>158</sup> *Ibid*

<sup>159</sup> Aliens Act 1991 (Finland) s45

<sup>160</sup> Ophelia Field, Alternatives to Detention of Asylum Seekers and Refugees, United Nations High Commissioner for Refugees, April 2006

- 4.40 It should be noted that some countries that operate a community-based detention system, such as Bulgaria and Greece, have a substantially higher rate of non-compliance and absconding (above 10%). These countries are not however, an end destination, and asylum seekers are hence reluctant to wait months in detention for their claim to be processed when they have no intention of remaining in that country. The majority of asylum seekers who abscond from detention centres in non-destination countries later apply for asylum in other countries which are considered an end destination; these countries include Germany, Switzerland and Spain<sup>161</sup>.
- 4.41 As mentioned earlier, the rate of absconding in countries considered an end destination is significantly lower than the rate of absconding in ‘transit countries’. It should be remembered therefore, that the rate of absconding into the community is exceedingly low, as most absconding occurs as asylum seekers seek to reach their ultimate destination. As Australia is an end destination country, we submit that community base detention would lead to almost non-existent rates of absconding.

### Community security

- 4.42 In addition to fears about high rates of absconding, critics of community detention suggest that the system would lead to a spike in crime rates. These claims are wholly unfounded.
- 4.43 Asylum seekers are generally desperate to portray a positive image to the community and to detention officers, and hence are extremely unlikely to be involved in any crime. A recent report by the Israeli Parliament’s Research Centre showed that, in areas across Europe where there has been a high influx of African asylum seekers, crime rates have not increased as a result. The report also showed that native citizens are 4.5 times more likely to commit a crime than these African asylum seekers.<sup>162</sup>
- 4.44 Any opportunistic or desperate crime can also be deterred by the provision of social security payments while an asylum seeker’s application is being processed. In Germany, adults are provided with a monthly allowance of 41 Euros, as well as basic necessities free of charge.<sup>163</sup> Sweden also provides a healthy allowance as well as heavily subsidising medical treatment. The provision of social security payments alleviates any concerns of theft which may arrive through destitution.

### Improved outcomes through community release

- 4.45 The benefits of community based-detention are significantly greater than the benefits of mandatory detention. As outlined in the preceding sections of the submission, it is clear that mandatory detention has an adverse impact on detainees, both physically, psychologically and in terms of fracturing family relationships. This section will demonstrate that the use of community-based detention improves the outcomes for asylum seekers.

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<sup>161</sup> Ibid

<sup>162</sup> Migrant Rights, ‘New report debunks common myth about asylum seekers and crime in Israel’ (2011) <<http://www.migrant-rights.org/2010/10/16/new-report-debunks-common-myth-about-asylum-seekers-and-crime-in-israel/>> accessed 1 September 2011

<sup>163</sup> Peter Stapleton, Overview of Germany’s Asylum System, *Jesuit Social Justice Centre*, February 2003

## Health

- 4.46 The principle benefit of community based detention is that asylum seekers are not confined within a prison-style establishment, but rather have relative freedom of movement. This has a number of benefits.
- 4.47 Many asylum seekers arrive in Australia in a fragile psychological state. Community detention allows these persons to seek treatment, both medical and psychological, in the community. Asylum seekers can actively seek out treatment in the community or due to the open nature of community detention, healthcare practitioners can have far greater access to affected individuals than if they were in mandatory detention. The practices in use in Sweden and Germany allow for medical and psychological treatment to be subsidized, which is of considerable benefit to the health of detainees.
- 4.48 Allowing asylum seekers relative freedom of movement, rather than being confined in a prison, also has a beneficial impact on their health. Community based detention enables asylum seekers to remain in contact with family and friends who are in the same centre, which is crucially important in the early period of detention. Studies in Sweden have found that if isolation can be avoided in the formative detention period, an asylum seeker has a significantly lower chance of developing mental illness.<sup>164</sup>

## Integration into the community

- 4.49 Mandatory detention ultimately fragments an asylum seeker's identification with the community they are repatriated into, whereas community detention allows asylum seekers to foster links with the community as soon as they arrive in the country.
- 4.50 Sweden's detention system allows for significant interaction between asylum seekers and the community. By encouraging strong connections with the municipality and society of Sweden, this increases an asylum seeker's identification with that community. This is achieved through various activities run by the centre, such as language and history classes. Different businesses are permitted to speak to asylum seekers (through a translator if necessary), and can teach asylum seekers skills relevant to each industry.<sup>165</sup>
- 4.51 Sweden also has a policy which ensures asylum seekers have access to public services (schools or health centres), and allows asylum seekers the possibility of working in the community if they have waited in detention for four months without a result of their claim<sup>166</sup>. These measures encourage early integration into the community and avoid the problems related to social exclusion found in mandatory detention.

## Education

- 4.52 In a community based detention system, there is a far greater scope for the education of asylum seekers. In Sweden, during the waiting period all asylum seekers are required to take part in

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<sup>164</sup> EU Directorate-General for Internal Policies, Report on Refugees, December 2007

<sup>165</sup> Ingrid Skavhaug, Reception of Asylum Seekers in Sweden, ENARO (European Network of Asylum Reception Organisations), April 2005

<sup>166</sup> EU Directorate-General for Internal Policies, Report on Refugees, December 2007

some form of organized activity<sup>167</sup>. Such activities may include learning Swedish or English, using computers, sewing, carpentry, practical training or helping fellow countrymen to settle in.

- 4.53 Further, community-based detention allows children to receive education and schooling which is vital to their development and mental health. Sweden ensures detention centres have their own schools and kindergartens, whilst also giving parents the option of placing children in the schools in the community. This progressive initiative is crucial in continuing a child's education and development, and also serves to better equip the child and the parent to integration into that community.

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<sup>167</sup> Ingrid Skavhaug, Reception of Asylum Seekers in Sweden, ENARO (European Network of Asylum Reception Organisations), April 2005

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