



30 January 2017

Committee Secretary
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jscm@aph.gov.au

SUBMISSION TO THE JOINT STANDING COMMITTEE ON MIGRATION: INQUIRY INTO MIGRANT SETTLEMENT OUTCOMES

Background: The Humanitarian Group

1. The Humanitarian Group (formerly known as CASE for Refugees) is a not for profit organisation focused on empowering vulnerable people by providing professional and accessible migration assistance, legal advice and education based in Western Australia. We strive to do this in a way that embraces diversity and strengthens communities. We help people new to Australia from culturally and linguistically diverse backgrounds, including humanitarian visa holders, asylum seekers, refugees and people who are otherwise disadvantaged in their access to legal services and who are located in Western Australia. Since its inception in 2002, The Humanitarian Group has grown to be a primary provider of specialist legal services to the recently-arrived CALD community in Western Australia.
2. Recent legislative and policy changes, combined with large scale forced displacement of populations, have led to increased demand for our services. In 2015/16 we saw 2,885 people from 79 different countries, the majority of whom have experienced torture and trauma. This was an increase of over 500 people from the previous financial year and an almost 300% increase from the 2013-2014 financial year.¹
3. The Humanitarian Group provides specialist immigration and legal services. The Humanitarian Group assists onshore asylum seekers to claim protection (including assistance with temporary protection visas), assists permanent visa holders from humanitarian backgrounds to sponsor or propose family members for Australian visas through our Family Reunion Program and assists clients seeking administrative review through the relevant administrative tribunals and the courts. The Humanitarian Group also provides a generalist legal service to clients from CALD backgrounds. The Humanitarian Group also provides a wide range of Community Legal Education.

¹ The Humanitarian Group Annual Report, 2015-16.

[Community focused legal services for people new to Australia](#)

Introduction

4. This submission reflects the knowledge and experience of The Humanitarian Group. It primarily addresses the first item on the Committee's Terms of Reference:
 - the mix, coordination and extent of settlement services available and the effectiveness of these services in promoting better settlement outcomes for migrants.
5. In the experience of The Humanitarian Group, anti-social behaviour is not a likely outcome of settlement for any particular group of migrants nor, in our view, is it a pressing issue for new communities. However, we note that the Inquiry is giving particular consideration to anti-social behaviour.² As a result, where appropriate, focus is given to criminal law and the consequences of conviction.
6. We wish to bring to the Committee's attention, the importance of access to justice and legal education for successful settlement, and the need to take a long-term view of settlement, particularly for families of refugee backgrounds.

Criminal Offending Among Migrants

7. Australian Bureau of Statistics (ABS) figures demonstrate that migrants are less likely to be imprisoned than the Australian-born population. Across Australia, four out of five prisoners (81%) are Australian-born, while only two-thirds (66%) of the general adult population was born in Australia.³
8. Among the overseas-born prison population, the largest group are those born in New Zealand, followed by Vietnam, United Kingdom, China, Lebanon and Sudan.⁴ This suggests that media portrayals of ethnicity and crime are often inaccurate.
9. Among those born overseas, there are identifiable nationality-based differences in the type of offending that is most common. For example, the most common offence for New Zealand-born and Sudanese-born offenders is 'acts intended to cause injury', while drug offences are most common for those born in Vietnam, China and Lebanon, and sexual assault is the most common crime of offenders born in the United Kingdom.⁵ These differences arise from a complex interplay of cultural, economic and social factors, as acknowledged by the Judicial Commission of NSW:

Within some sections of the community there is a perception (sometimes fed by the media) that members of some migrant groups are more likely to resort to crime than other groups. However, research indicates that the statistics about ethnicity and crime rarely take into account social and economic variables. In other words, social disadvantage would appear to be the main influencing factor in relation to propensity to crime, not ethnicity. For example, in relation to the so called 'gang warfare' between different ethnic gangs, the then Ethnic Affairs Commission of NSW concluded that such gang conflict tends to be of a 'territorial' rather than a 'racial' nature, and that participation in such gangs tends to be no different for

² Parliament of Australia, 'New inquiry focuses on youth migrants and gangs' (Media Release, 17 November 2016).

³ Australian Bureau of Statistics, '4517.0 Prisoners in Australia, 2016' <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Country%20of%20birth~9>>

⁴ Ibid.

⁵ Ibid.

ethnic minority youth than for Australian youth. The more important influences would appear to be poverty and marginalisation.⁶

10. This statement is consistent with The Humanitarian Group's experience within our criminal law practice, namely that: (1) offending among newly arrived migrants from CALD backgrounds is particularly low; and (2) when offending does occur it is typically accompanied by economic disadvantage.

Access to Justice and Settlement

Community Legal Education

11. The Humanitarian Group is concerned that some groups of newly arrived humanitarian migrants do not receive community legal education (CLE) upon arrival. Individuals who enter through the Offshore Humanitarian Program receive some limited education on their basic rights and responsibilities in Australia as part of Humanitarian Settlement Services (HSS) as well as through pre-settlement programs conducted overseas. This training is insufficient and would benefit from significant expansion. Further, refugees who are granted Temporary or Permanent Protection Visas onshore do not receive any legal education.
12. Sometimes migrants are able to access CLE in an ad hoc way, for instance, in Adult Migrant English Program (AMEP) classes they may encounter legal principles as examples of English words and phrases. Those with a reasonably strong grasp of English may be able to access CLE provided by community legal centres for the general population. However, refugees and other CALD migrants frequently miss out. Many come from countries where the law and legal/political system is quite different to that of Australia. It ought not to be assumed that they simply absorb it by virtue of their presence here.
13. The Humanitarian Group has found migrants from CALD backgrounds often lack a basic knowledge of the law in areas such as tenancy, traffic, debt and contract, non-discrimination and employment law. This lack of knowledge makes them vulnerable to exploitation in employment and increases any sense of disconnection they may have from the legal-political system.⁷ Women are also particularly vulnerable without an understanding of family law, particularly in regards to family violence, children, divorce and child support.
14. These observations are consistent with a study in 2010 by the Australian Human Rights Commission, which found a lack of awareness of the Australian law and legal system, together with mistrust of law enforcement officials was a significant problem for the African-Australian community. The Commission found there was a clear need to improve police training and to

⁶ Judicial Commission of NSW, *Equality Before the Law Bench Book* (29 July 2016) section 3; citing S. Mukherjee, 'Ethnicity and Crime' (1999) *Trends and Issues in Crime and Criminal Justice*, No 117, Australian Institute of Criminology; S. Poynting, G. Noble, P. Tabar, 'Middle Eastern appearances: Ethnic gangs, moral panic and media framing' (2001) 34 *Australian and New Zealand Journal of Criminology* 67; Ethnic Affairs Commission of NSW, *Not a single problem: Not a single solution*, Report to the Premier & Minister for Ethnic Affairs on the recent clashes between youth in Bankstown & Marrickville, (1986) 3.

⁷ See Catherine Hemingway, 'Not Just Work: Ending the Exploitation of Refugee and Migrant Workers' (2016) WEstjustice Western Community Legal Centre.

better educate refugee and humanitarian entrants, in particular, about Australian law and the legal system.⁸

- **Settlement prospects can be improved through the provision of comprehensive community legal education programs for all migrants, especially those from refugee and CALD backgrounds.**

Community Legal Centres

15. People from refugee backgrounds who experience a legal problem are likely to rely on Community Legal Centres (CLCs), particularly during early settlement before they have taken up employment. CLCs that provide services to migrants have been affected by Commonwealth funding cuts and expect further funding reductions in the 2017/2018 financial year. The impact of this has been commented on by the community legal sector, judiciary and law societies.⁹
16. A particular consequence of the funding cuts already occurring is an increase in the number of unrepresented litigants appearing before courts.¹⁰ This presents difficulties for courts as they struggle to overcome the barrier to justice, created for disadvantaged English-speaking litigants. For those who lack English skills and knowledge of Australian law, the absence of legal representation virtually excludes them from the legal system altogether.
17. It is important that people from CALD backgrounds are not just able to access affordable legal advice but also that the assistance they receive is understandable and appropriate. Legal practitioners without training or experience working cross-culturally may take for granted that their clients understand certain concepts, when in fact they do not, making their advice confusing at best or incomprehensible at worst. The same problem arises when agencies attempt to substitute written materials of a general nature for individual advice.
 - **Settlement outcomes can be improved by increasing funding to Community Legal Centres that provide services to disadvantaged migrants.**

Access to interpreters and translations

18. The Humanitarian Group believes that that the availability of affordable professional interpreters is critical for migrants' access to justice.

⁸ Australian Human Rights Commission, *In our own words – African Australians: A Review of Human Rights and Social Inclusion* (June 2010) 28-30.

⁹ National Association of Community Legal Centres, 'MYEFO fails to halt funding cliff for Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services' http://www.naclc.org.au/cb_pages/news/MediaReleaseMYEFOfailstohaltfundingcliffforCommunityLegalCentresandAboriginalandTorresStraitIslander.php

Community Law Australia, 'Strong Legal profession support for Community Legal Centres in face of funding cliff' <http://www.communitylawaustralia.org.au/media-release-strong-legal-profession-support-for-community-legal-centres-in-face-of-funding-cliff/>

Alexandra Beech, 'Election 2016: Legal Aid funding should be an election issue, Law Council of Australia says' <http://www.abc.net.au/news/2016-06-02/legal-aid-funding-should-be-election-issue-says-law-council/7468924>

¹⁰ Penny Timms, 'Legal Aid Matters: Lack of government funding 'destroying lives', Law Council says', <http://www.abc.net.au/news/2016-05-16/law-council-of-australia-launches-legal-aid-matters-campaign/7417094>

19. The Humanitarian Group routinely accesses interpreters where necessary to enable clients to understand their legal advice but this is not the situation in all community legal centres. The failure to provide interpreters may be due to restraints on funding that prohibit paying for interpreters or a lack of understanding of the importance of using professional and competent interpreters when working with non-English speaking clients. In our experience, staff in government departments and agencies vary in their level of competency and comfort in working with interpreters, so that policies encouraging the use of interpreters are often ignored.
 20. Similarly, the problems identified above in relation to CLE are exacerbated when community legal centres and government websites do not have vital information and forms available in other languages.
 21. The Humanitarian Group is aware of a number of examples where clients have received poor outcomes in the justice system due to lack of access to interpreting:
 - Clients have reported not understanding the consequences of guilty pleas and therefore pleaded guilty because they believe they were advised, regardless of actual guilt, that this was the best course. As will be discussed below, this is particularly problematic when visa cancellation is a potential outcome of a conviction.
 - Clients have reported being unable to access parole periods because rehabilitation courses that were compulsory before parole could be considered were only available in English.
 - Clients have been through an entire trial process with no understanding of the processes or role of the court and in some instances do not even understand the offences of which they have been convicted.
 - In civil areas, such as family law or employment law, clients may have spent considerable time not accessing legal services because they relied on the information given to them by a person or business that took advantage of their weak English skills or cultural background and did not make them aware of their legal rights. They were unable to access general legal services due to a lack of translated materials or interpreting services.
- **Settlement outcomes in all legal areas would be improved by consistent, competent interpreting services.**

A Long Term View of Settlement

22. Australia has a proud tradition of resettling refugees and other forced migrants through our Offshore Humanitarian Program and ensuring the protection of Convention refugees through the provision of Protection Visas. The recipients of these programs – often families – have suffered persecution, torture, gross violations of human rights, and often further trauma in refugee camps or en route to Australia. The Humanitarian Group is concerned that recent amendments to the *Migration Act 1958* (Cth) are inconsistent with this long-held practice and jeopardise the wellbeing of families from refugee backgrounds whose members experience the criminal justice system.
23. On 11 December 2014, the passage of the Migration Amendment (Character and General Visa Cancellation) Bill 2014 inserted s 501(3A) into the *Migration Act 1958*, requiring the mandatory cancellation of visas in certain circumstances. At the same time, the length of sentences required to trigger a discretionary visa cancellation was also effectively shortened to a series of sentences

amounting together to 12 months or more.¹¹ According to the Commonwealth Ombudsman, the number of visas cancelled has risen exponentially since the amendment from 76 in 2013-14 to 983 in 2015-16.¹²

24. The Humanitarian Group has assisted young men from refugee backgrounds whose permanent humanitarian visas have been cancelled after receiving suspended sentences for criminal behaviour. Typically, these are not crimes that would be considered particularly serious by the community. The low bar of total sentences that equal a total of 12 months imprisonment (including sentences that are suspended) means that this measure is not experienced by only the most serious offenders. In many cases, the cancellations are revoked. However, by that time the person has typically spent many months in immigration detention. Detention seriously impairs their education, employment, and relationships, creating even greater challenges for them and their families, upon release.

Intersection of immigration and criminal law

25. Sentencing laws in Western Australia (comparably with other states and territories) have no capacity for sentencing to take into account the impact of a sentence on a person's visa or the likelihood of deportation. While deportation *may be* a mitigating factor raiseable during sentencing¹³, a judge may not tailor a sentence to prevent section 501 applying.¹⁴ This follows the established principle that 'the prospect of deportation is not a relevant matter or consideration by a sentencing Judge, in that it is the product of an entirely separate legislative policy area of the regulation of society'.¹⁵ The position has also been defended on the basis that taking the prospect of the applicant's deportation into consideration has the potential to 'produce a regime under which visitors or non-permanent residents [are] sentenced more leniently than Australians who [have] committed the same kind of offence [which...] cannot be a proper result in the administration of justice'.¹⁶
26. As a result, non-citizens, regardless of the amount of time they have spent in Australia or the level of connection they have with the Australian community, face what is effectively a double-sentence – one from the criminal law and another through migration law.

Indefinite detention for people of refugee background

27. The Australian Law Reform Commission has expressed concern that the exclusion of the duty to afford procedural fairness in the most serious character cancellation cases may not be proportionate, 'given the gravity of the consequences for those affected by the relevant

¹¹ *Migration Act 1958* (Cth) s 501(6),(7)

¹² Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958* (December 2016) 3.1.

¹³ Whether or not a person is deported is an executive decision: *Chu Shao Hung v The Queen* [1953] HCA 33; (1953) 87 CLR 575, 583 - 584. In other cases, the prospect of deportation has been held to be an irrelevant sentencing factor: *Dauphin v The Queen* [2002] WASCA 104 [22]. In *Ponniiah v R* [2011] WASCA 105 his honour stated "In my opinion, the prospect of deportation is not a mitigating factor".

¹⁴ *Auckram v Allen and Another* [2016] WASC 107; *Dauphin v The Queen* [2002] WASCA 2014; *Furber v The Queen* [2008] WASCA 233

¹⁵ *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311, Street CJ (with whom the other members of the Court were in agreement)

¹⁶ McPherson JA explained in *R v Simard* [2001] QCA 531 at [6]

decision'.¹⁷ The Humanitarian Group concurs, but notes that the prospect of visa cancellation for refugees is far more serious than for other migrants.

28. Australia does not deport or remove people in relation to whom Australia has *non-refoulement* obligations pursuant to international treaties that we have ratified.¹⁸ As a result, refugees and those qualifying for complementary protection, whose visas have been cancelled, face the prospect of indefinite detention.¹⁹

29. Indefinite detention is an unsustainable and disproportionate means of balancing the need for community protection with *non-refoulement* obligations. It is also arbitrary and illegal under international human rights law.²⁰ From the perspective of individuals and families from refugee backgrounds, the prospect of young people being indefinitely detained or deported if they encounter the criminal justice system, even after living many years in Australia, sends a message of exclusion, rather than inclusion. It therefore carries a tendency to alienate those who may already be struggling in this way.

- **Settlement outcomes would be improved by taking a longer term view of settlement, supporting families from refugee backgrounds whose young people become involved in crime and removing the risk of visa cancellation for all but the most serious crimes.**

Conclusion

Given the extremely serious consequences of indefinite detention or deportation for non-citizens if they are caught up in criminal behaviour, it is vital that new migrants, especially those from refugee and CALD backgrounds are all able to access community legal education and legal assistance. At present, this is frequently not the case. Similarly it is important that settlement programs take a long-term view of settlement, prioritising economic integration and social inclusion.

Please do not hesitate to contact us should you require any additional information.

Yours sincerely

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¹⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 29 (2016) 14.47.

¹⁸ Minister for Immigration and Border Protection, Direction No 65 – Migration Act 1958 – Direction under section 499 Visa refusal and cancellation under s 501 and revocation of mandatory cancellation of a visa under s 501CA, para 10.1 (2).

¹⁹ *Ibid*, para 10.1(6).

²⁰ See for example Human Rights Committee, *Views: Communication No 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (19 April 2016); Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 1.