# 5

# Removals and detention charges

5.1 As outlined in chapter 2, under the *Migration Act 1958* (the Act) there is an obligation to detain any unlawful non-citizen. Currently the Act only provides three mechanisms for subsequent release from detention:

- grant of a visa (either a substantive or bridging visa)
- removal from Australia, or
- deportation from Australia.

5.2 Due to the small number and specialised nature of deportations, as opposed to removals, deportation is not addressed in this report.

5.3 This chapter considers the provision under the Migration Act for release from detention for the purpose of removing a person from Australia. Issues regarding the management of voluntary and enforced removals are discussed, with an emphasis on raising transparency and oversight.

5.4 The report concludes with a consideration of the practice of charging a person for the costs of the period spent in detention.

5.5 The Committee understands that the Minister for Immigration and Citizenship is currently reviewing this policy. In June 2008 the Minister acknowledged that, 'There is a need for a review of the

detention debt regime'.[1] More recently, the Minister has advised that he is currently waiting on advice to move forward with options.[2]

## Removal of unlawful non-citizens from Australia

5.6 In 2007-08, a total of 8404 people were removed from Australia. This included 4055 monitored departures (in which the Department of Immigration and Citizenship (DIAC) monitored, but did not enforce removal), 722 voluntary returns and two criminal-related deportations.[3]

5.7 Of the total number of persons removed in 2007-08, 3625 people were enforced removals. Approximately 65 per cent of this group were removed within two weeks of their detention, a further 30 per cent were removed within two months and the remaining 5 per cent were detained for more than 60 days. Overall, approximately 85 per cent were removed within 28 days of being detained.[4]

5.8 The removal of a person, for the purposes of this report, refers to a person leaving Australia as an unlawful non-citizen or as a deportee set out under sections 198 and 200 of the Act.[5] The Act defines a deportee as a person who is facing a deportation order.[6]

5.9 The Act also sets out the terms for when mandatory removal must occur. The three main criteria are:

- at the request of an unlawful non-citizen to the Minister (section 198(1))
- a detained unlawful non-citizen who fails to apply for a substantive visa in the allotted time frame (section 198(5))
- a detained unlawful non-citizen whose application for a substantive visa has been refused and finally determined, and

1 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, 19 June 2008, p 2885.

2 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 114.

3 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 123.

4 Department of Immigration and Citizenship, supplementary submission 129f, p 25.

5 *Migration Act 1958*, ss 198, 200.

6 *Migration Act 1958*, s 5(1).

another visa application for a substantive visa has not been made (section 198(6)).[7]

5.10 Lyn O'Connell, First Assistant Secretary of the Department of Immigration and Citizenship, explained the removal requirement to the Committee:

> In terms of removal, it is an obligation under the Act to remove someone who has no lawful right to remain in Australia. So, rather than a positive decision to remove, it is in fact an obligation of the act that somebody who is unlawful must be removed effectively. The judgement around that happening is of course as to somebody who does not have a visa, so they have unlawful status; they are not pursuing any form of merit review or processing or judicial review or any other form of activity with the department.[8]

## Removal practice by the Department of Immigration and Citizenship

5.11 The majority of people that have been released from immigration detention have done so as a result of removal from Australia (see table 2.1).

5.12 DIAC manages the process of removal in a number of ways. People can be detained within an immigration detention facility and DIAC facilitates removal, or alternatively people are granted bridging visas which enables them to voluntarily arrange their own departure.[9]

5.13 DIAC informed the Committee that it is committed to ensuring that visa overstayers and bridging visa holders who are required to depart the country are able to do so from the community rather than being taken into detention for the purposes of removal:

> We use every opportunity for the client—be it a family or an individual—to return from the community. We have provisions to provide them with bridging visas so that, provided someone is making genuine departure arrangements, they can remain lawfully in the community and make those arrangements to depart. We are also now

7 Migration Series Instruction 376 (MSI 376), *Implementation of enforced departure*, para 2.1.1.

8 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

9 Department of Immigration and Citizenship, *Annual report 2006-07* (2007), p 121.

> piloting the assisted voluntary return. If someone does not actually have the means to depart, or there are some other factors in relation to their return, they may use the assisted voluntary return service under the Community Care pilot. As a last resort, where someone will not depart, having been given opportunities to, we may use detention in order to remove someone.[10]

5.14 At the October 2008 Senate Estimates hearing, Ms O'Connell stated that removals from the community were not a new policy for DIAC. She explained that DIAC would typically monitor a person's arrangements and actual departure rather than undertake an enforced removal.[11]

5.15 However, amongst those required under the Act to be removed from Australia, there will be a proportion that are reluctant and unwilling to comply with DIAC's requests.[12]

5.16 Ms O'Connell outlined the process and procedures leading up to enforced removal:

> All necessary checks are made to make sure that they have no ongoing processes and there is no prospect of any non-refoulement that will take place, in terms of meeting our international obligations, and that they have the necessary fitness to travel, having been so certified. Arrangements are put in place for that person to be removed if they have the necessary travel documentation to be returned. Then the person is booked on a flight and removed. They may or may not be escorted. That depends on the air transport requirements in terms of removing somebody involuntarily. Sometimes the air transport requirements require that we do provide escorts for some removals.[13]

5.17 DIAC's Procedures Advice Manual also sets out the criteria that must be satisfied prior to the decision being taken for an enforced removal.

---

10 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 18.

11 O'Connell L, Department of Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 22.

12 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

13 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

These criteria include confirmation of the person's identity, ensuring that the client has no outstanding litigation, court orders or other legal matters in tow and ensuring that the Commonwealth Ombudsman's Office or the United Nations High Commissioner for Refugees has not made any substantial claims against the intended removal.[14]

## Accounts of enforced removal

5.18 The inquiry received several accounts of enforced removal practices in the past, in particular regarding detention facilities at Woomera and Baxter (closed in 2003 and August 2007 respectively). There was also evidence of a continuing culture of anxiety amongst detainees with regards to removals and suggestions of some continuing poor practices.

5.19 Guy Coffey, a clinical psychologist, reported it had been the practice at Woomera and Baxter detention centres that, as part of removal procedures, a detained person would be called to a medical appointment as a pretext for their removal. This had debilitating impacts on detainees' willingness to trust medical service providers in detention centres.[15]

5.20 This practice appears to be ongoing. Sister Lorraine Phelan, a regular visitor to Villawood Immigration Detention Centre and Onshore Programs Manager for Mercy Refugee Service, explained that detainees at Villawood were 'reluctant to go to medicals because someone was picked up from a medical, and they are reluctant to go to any interview rooms for the same reason'.[16]

5.21 As recently as May 2008, there are also accounts of removals taking place in the early hours of the morning, when the detainees were disoriented and given only a few minutes notice:

> We had another removal—and this is something else we have tried to fight about—at five o'clock in the morning. They get someone out of bed, with all the officers there. The person is distressed. They have been asleep; they do not know what is going on. They are told they have got 10 minutes and then they are being deported. That is distressing for that person but it is also distressing for the other detainees. And we have

14 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), *Compliance - Removal - Removal from Australia,* para 10.

15 Coffey G, *Transcript of evidence*, 11 September 2008, p 82.

16 Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, p 32.

> had that again this week in stage 2... There was, yesterday, an Indian who had been here nearly three years and, at five o'clock, was told, 'You're being deported in 10 minutes.' [17]

5.22 Sister Phelan related this account of a planned removal:

> We had 4.30 removals. It was quite often the pattern. We asked that it not be 4.30 in the morning because psychologically the person is in a state of stupor. That is part of the reason why, because they do not have their wits about them to do anything, but they always scream out to others, 'I'm being deported,' so then it impacts on the other people around in the stages and they think the same thing is going to happen. Maybe it will happen to them; we do not know… When we have challenged that before, GSL come back to us and say, 'Those are the only flights we could get for them.' [18]

5.23 Other concerns presented include ensuring that DIAC met its obligations of notification of legal representatives and/or advocates who should receive timely advice of departmental or ministerial decisions.[19] The Asylum Seeker Resource Centre gave this account:

> On 17 August, last year [2007], the Department of Immigration attempted to remove an asylum seeker. At about four o'clock on a Friday afternoon, I received a telephone call from a distressed fiancé. She said to me, 'My fiancé is on the way to the airport.' I was completely shocked at this for a few reasons. Firstly, this man had just come out of a psychiatric hospital in the preceding days and, in the credible assessment of every doctor who had seen him, was unfit to travel. Secondly, he had a ministerial request pending; we had not received a decision about that, and there were compelling grounds for him to be considered for a humanitarian intervention.
>
> I immediately rang his case officer. I made phone calls back and forth for about the next hour, trying to ascertain where my client was and whether the removal was actually

17 Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, pp 11, 32.

18 Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, pp 11, 32.

19 The obligation for notification by the Department of Immigration and Citizenship is set out under s 66(1) of the *Migration Act 1958* which sets out the terms of notification of a decision and s 494B, 'Methods by which the Minister is to provide documents to a person'. Further instructions for DIAC delegates can be found in Procedures Advice Manual 3 (PAM 3) - *Notification - Notification requirements*, paras 33-36.

> happening—'Let's get down to the facts.' His case officer informed me, 'Yes, he's on his way to the airport; he's being removed.' At 4.15 that Friday afternoon, we received a fax that was, indeed, notification of the decision refusing this man ministerial intervention. This decision was dated 15 August 2007, two days before we finally received it. We received it on the Friday afternoon, when our client was on the way to the airport.[20]

## Fitness to travel

5.24 Under DIAC's Procedures Advice Manual, persons being removed from immigration detention to an overseas destination are required to undergo a physical health discharge assessment to ensure that they are fit to travel by aircraft.[21]

5.25 Concerns were raised regarding the fitness assessments process, and in particular the assessment management of the psychological state of those being removed.

5.26 Dermot Casey, Acting First Assistant Secretary at DIAC, outlined the process for the removal of persons that may have presented a risk of self-harm:

> All medical records are checked before a person is declared as medically fit for removal. If a person has had previous mental health issues, then they would be referred for a report, from a psychiatrist and a psychologist, to determine whether in fact that person's removal would impact negatively in any clinical sense.
>
> For all people who are being removed we do require that the medical provider provide us with 'fitness to travel' documentation. If there have been any issues in relation to the person's previous health, whether it be physical or psychological, then we ask that they also consult with somebody of the appropriate professional standing who has known the person and is able to give a clinical assessment of their fitness.[22]

---

20 Psihogios-Billington M, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, pp 62-63.

21 Department of Immigration and Citizenship, Procedures Advice Manual (PAM) 3, *Compliance – Removal - Removal from Australia*, para 35.

22 Casey D, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

5.27 However, Mr Coffey suggested that judgements made on fitness to travel needed to be re-examined:

> [Detainees] who have been suicidal have been removed I think possibly with very deleterious consequences to their wellbeing. As with any mental health or psychological problem, the origins of the self-harm or suicidality need to be corrected, identified and treated.[23]

## Use of chemical restraints

5.28 Some anecdotal evidence was received citing the use of sedation to facilitate the removal of challenging and recalcitrant individuals. In response to questions from the Committee, an assurance was given by DIAC that this is not current policy.[24]

5.29 Regarding the use of restraints and medications in order to facilitate removal Mr Casey stated:

> Our health provider[s] have within their own company rules that medication would not be administered to somebody in order to facilitate their removal…There is no lawful capacity to administer medication to somebody without their consent in any circumstance.[25]

5.30 Mr Metcalfe advised that in the last three years he has had no knowledge of it being 'departmental or government policy that it be feasible for medication to be administered to render a person compliant for removal'.[26]

5.31 DIAC also advised that it was unable to identify any instances where a person who was subject to an enforced removal had been medicated to prevent resistance.[27] Further, DIAC policy clearly states that sedatives are not to be used to facilitate removal:

---

23 Coffey G, *Transcript of evidence,* 11 September 2008, pp 86-87.

24 Metcalfe A, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 8.

25 Casey D, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

26 Metcalfe A, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 8.

27 Department of Immigration and Citizenship, supplementary submission 129f, p 35.

> Neither the department nor security escorts are to request the prescription and/or administration of sedatives to a removee for restraint purposes.[28]

5.32 However, several independent accounts of the use of chemically induced restraints were brought to the attention of the Committee. While this Committee accepts that it is not policy and there are no verifiable instances of DIAC authorising the administration of medication for restraint and removal, there remains cause for concern.

5.33 Maria Psihogios-Billington, Principal Solicitor of the Asylum Seeker Resource Centre advised that she remained concerned about the use of chemical restraint for the purpose of removal.

> I am aware that the committee has heard evidence to the contrary, regarding the sedation of immigration detainees at the point of removal. This is not our experience, and I invite you to investigate these matters further.[29]

5.34 Linda Jaivin recounted events told to her by Morteza Poorvadi, an ex-detainee, who was detained for four years at Woomera, Port Hedland and Villawood detention centres. Ms Jaivin said that:

> Morteza has told me many things about those early-morning deportations, when they come in. There was one fellow who slashed himself with a razor to avoid deportation, and they sprayed him with coagulant rather than treat him so that they could take him and drag him off to the plane. There was another fellow, a Sudanese. They tried to keep forcing tranquillisers into him and a needle broke off in his knee. With this sort of thing you would think, under Australian law, there would be some limits—they tend to operate in some special place that should not be there really.[30]

5.35 Ms Psihogios-Billington also provided an account of an asylum seeker being sedated prior to removal to his country of origin. This removal occurred on 16 October 2007:

> He had been tortured in his country of origin, and this had been proven by a medical report. In detention, where he spent almost two years, he was diagnosed with major

28 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), *Compliance- Removal - Removal from Australia*, para 32.2.

29 Psihogios-Billington M, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, p 64.

30 Jaivin L, *Transcript of evidence*, 7 May 2008, p 29.

> depression and post-traumatic stress disorder. In detention, on several occasions he attempted to take his own life in the most heinous of ways. On the day prior to his removal, he was taken to an isolation cell. He was given suicide prevention clothing, he was handcuffed, he was helmeted and he was left alone… At 3 am that morning, he was injected with sedation. He awoke on the aeroplane.[31]

5.36 DIAC has advised that it is aware allegations are periodically made that a person has been medicated in order to facilitate removal. It assured the Committee that it takes complaints of this nature seriously and a recent complaint had been commissioned for an independent audit by an external auditor. The audit was unable to establish that medication had been used to facilitate removal. This case has now been referred to the Commonwealth Ombudsman's Office for further investigation.[32]

## Preferred removal options

5.37 There were a number of suggestions as to how the present removals process could be improved.

5.38 Kate Gauthier of A Just Australia, outlined a holistic approach currently used by the Canadian Government called a pre-removal risk assessment. The model takes into account a range of factors such as mental health, protection needs, health requirements and the situation in the country that the person is being removed to.[33]

5.39 Noel Clement of the Australian Red Cross added that, similar to the Canadian approach, it would be appropriate for Australia to offer some form of return counselling.[34]

5.40 In addition, in expansion of the voluntary departure options, Mr Clement, explained that:

> There are some people who are actually ready to return, who want to return and who it is safe to return. But their only option previously has been removal by government. So people have avoided removal

31 Psihogios-Billington M, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, p 63.

32 Department of Immigration and Citizenship, supplementary submission, 129f, p 35.

33 Gauthier K, A Just Australia, *Transcript of evidence*, 7 May 2008, p 32.

34 Clement N, Australian Red Cross, *Transcript of evidence*, 7 May 2008, pp 32-33.

because when they are removed their government is notified that they are coming. It impacts on their travel arrangements in the future.

There are a whole range of impacts of removal by government. We have found through the community care pilot that by offering people in the community the alternative of working with IOM [the International Organization for Migration] if they want to consider return, talking about what that might mean and actually letting them leave with dignity, a fair number of people have taken that course of action and have decided to do that. That option is not currently available to a lot of people in detention. The only choice for people is removal by government.[35]

## Committee comment

5.41 In relation to the accounts it has received of individual removals, the Committee considers that it is not in a position to make comprehensive recommendations on the detail of removal practices. However, the reports it has heard are disturbing.

5.42 The Committee is concerned that, in some instances at least, it would appear that inadequate notification regarding removal is being provided to a detainee's legal representative and/or advocate. This is contrary to DIAC's obligations.[36]

5.43 The Committee accepts that the use of medications to facilitate removals is in clear contravention of DIAC policy, and DIAC has provided assurances that this is not current practice. However, there are accounts from detainees and advocates that undue force is being used. The circulation of these accounts is concerning as it not only generates fear amongst people in detention but raises questions regarding current procedures and appropriate independent oversight for enforced removals.

5.44 The Committee also acknowledges that many policies and procedures have changed since the closure of the Woomera, Baxter and Port Hedland detention facilities. However, enforced removals are potentially one of most challenging and emotionally distressing

35 Clement N, Australian Red Cross, *Transcript of evidence*, 7 May 2008, p 9.

36 The obligation for notification by the Department of Immigration and Citizenship is set out under s 66(1) of the *Migration Act 1958* which sets out the terms of Notification of decision and section 494B, Methods by which the Minister is to provide documents to a person. Further instructions for DIAC delegates can be found in Procedures Advice Manual 3 (PAM 3) *Notification - Notification requirements*, paras 33-36.

aspects of immigration detention management. They are also an area of high public sensitivity. For example, ABC Television's *Four Corners* program recently screened alarming footage of a naked Cornelia Rau being physically restrained and medicated against her will during her removal from Baxter Immigration Detention Centre.[37]

5.45 It is essential that the removals process meets the highest standards of accountability, and can stand up to the most rigorous level of scrutiny.

5.46 The Committee has not received sufficient information to recommend a best practice model. Accordingly, it recommends wider consultation with professionals and advocacy groups working in the detention field with an aim to improving current practices and procedures and introducing greater compassion and oversight into the system.

### Recommendation 15

5.47 **The Committee recommends that where enforced removal from Australia is imminent, the Department of Immigration and Citizenship provide prior notification of seven days to the person in detention and to the legal representative or advocate of that person.**

37 Australian Broadcasting Corporation, *Four Corners*, 'The guards' story', viewed on 15 September 2008.

### Recommendation 16

5.48 **The Committee recommends that the Australian Government consult with professionals and advocacy groups in the immigration detention field to improve guidelines for the process of removal of persons from Australia. The guidelines should give particular focus to:**

- **greater options for voluntary removal from immigration detention**
- **increased liaison with a detainee's legal representative or advocate**
- **counselling for the detainee to assist with repatriation**
- **a pre-removal risk assessment that includes factors such as mental health, protection needs and health requirements**
- **appropriate procedures for enforced removals that minimise trauma**
- **adequate training and counselling for officers involved in enforced removals**
- **appropriate independent oversight at the time of enforced removals, and**
- **criteria for the use of escorting officers for repatriation travel.**

5.49 The Committee also considers that the Australian Government could improve monitoring and follow-up of persons who have been returned to their countries of origin. Improved information would provide feedback on removal practices from the persons they have most impact on and strengthen the integrity of our immigration processes by providing evidence on what proportion of clients may or may not be returned to danger and persecution. Where ex-detainees are experiencing danger or persecution for reasons outside of those Australia recognises through the Refugee Convention, this information may also inform the development of a complementary protection framework, which has been raised by the Minister for Immigration and Citizenship.

**Recommendation 17**

**The Committee recommends that the Australian Government instigate mechanisms for monitoring and follow-up of persons who have claimed asylum and subsequently been removed from Australia.**

## Detention charges

5.50 Under the Act a non-citizen who is detained is liable to pay the Commonwealth the costs of his or her immigration detention.[38] An individual begins to accumulate a debt with the Commonwealth as soon as they are placed in detention.[39]

5.51 At the time of its introduction in 1992, the intent of the amendment was to ensure that all unlawful non-citizens would bear the primary responsibility for the expenditure associated with their detention. Specifically, section 209 of the Act was introduced to 'minimise the costs to the Australian community of the detention, maintenance and removal or deportations of unlawful non-citizens'.[40]

5.52 As at June 2008, the charge for an individual to be held in immigration detention was $125.40 per day. This daily charge applies to immigration detention centres, residential centres and community detention.[41] Spouses and dependent children are also liable for charges, with the parent or guardian being liable for the costs of a dependent child.[42]

5.53 Under current policy, costs of detention are only recovered once the period of detention has ended and total costs are calculable. The exceptions are if a person in detention chooses to pay these costs (partly or in full) before release or, valuables have been seized and applied towards the payment of the incurred costs.[43]

38 *Migration Act 1958*, s 209.

39 Dastyari, A, *The liability of immigration detainees for the cost of their detention* (2007), Castan Centre for Human Rights Law, p 6.

40 Migration Reform Bill 1992, Explanatory Memorandum, 59, p 11.

41 Kamand S et al, *The immigration kit* (2008), 8th ed, Federation Press, p 166.

42 *Migration Act* 1958, s 211.

43 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), *Liability to pay detention and removal costs*, para 16.

5.54 Table 5.1 sets out the approximate detention debt a person could accumulate based on the length of time held in detention.

Table 5.1 Projected costs accumulated by person in immigration detention

| Time in immigration detention | Approximate charge |
|---|---|
| 1 day | $125.40 |
| 1 month | $3762 |
| 3 months | $11 286 |
| 6 months | $22 572 |
| 1 year | $45 144 |
| 5 years | $225 720 |

*Note: Projected costs are indicative only and based on a daily charge of $125.40 per day billed per the criteria set out in paragraph 6.6.*

5.55 As an example, the Refugee Action Committee reported the case of an accumulated debt for a family held in detention:

> After six years in a detention centre and another three years living as a refugee in Melbourne, Hossein (family name withheld), an Iranian refugee, has been advised by the Department of Immigration and Citizenship that he owes an amount of $200 000 which represents the cost of keeping his wife, daughter and son locked up in the Curtin Detention Centre in Western Australia for three years.[44]

5.56 The Forum of Australian Services for Survivors of Torture and Trauma (FASST) also advised that:

> Detention debts can be very considerable. In the year ended 30 June 2007, one family was advised that their debt was more than $340 000.[45]

5.57 Appendix G provides an example of a 2008 debt notification letter and invoice sent by DIAC to a former detainee.

5.58 The Act provides the Commonwealth with specific powers to recover any outstanding debt.[46] These powers include restraining dealings with property, preventing a bank or financial institution from processing any transactions in any account held by the debtor, attaching the debt to specific forms of income of the debtor and

44 Refugee Action Committee website, viewed on 6 November 2008 at http://www.refugeeaction.org/rac/newsletter.html.

45 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

46 *Migration Act 1958*, s 215.

entering a premise in order to seize and sell valuables belonging to the debtor.[47]

5.59 Where debt recovery is pursued, a payment plan is commonly negotiated with the ex-detainee. FASST gave the example of one ex-detainee with a detention debt and repayment arrangement to the Commonwealth that would take him over 80 years to repay.[48]

## Debt waiver and write-off

5.60 In practice, recovery of many detention debts is not pursued but is waived or written-off. When a debt is written off, this means that a decision is made not to pursue recovery of the debt. At some time in the future, the Commonwealth may choose to execute debt recovery. When a detention debt is waived, the debt is extinguished.

5.61 Table 5.2 sets out the numbers of persons whose debts were waived or written off between 2004-05 and 2007-08.

Table 5.2 Waiver and write-off of detention debts

| | 2004–05 | 2005–06 | 2006–07 | 2007–08 |
|---|---|---|---|---|
| Debt waived | $332 786 | $1 668 901 | $616 111 | $3 417 007 |
| (no of persons whose debt was waived) | (19) | (324) | (10) | (142) |
| Debt written off | $38 071 639 | $46 714 236 | $28 910 699 | $19 253 883 |
| (no of persons whose debt was written off) | (738) | (4528) | (3571) | (1743) |

*Source: Department of Immigration and Citizenship, supplementary submission 129c, p 2.*

5.62 In the financial year ending 2008, nearly $3.5 million of detention debt was waived for 142 former detainees. Write-offs were much more commonly employed, however. For the same period just over $19.2 million was written off for 1743 individuals formerly in detention (see table 5.2). In the last four financial years, 495 individual debts amounting to over $6 million were waived. For the same period 10 580 individual debts were written off, amounting to just under $133 million.[49]

47 Mitchell K & Dastyari A, 'Paying their debt to society: Billing asylum seekers for their time in detention', *Castan Centre for Human Rights Law Newsletter*, April 2007, p 13.

48 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

49 Department of Immigration and Citizenship, supplementary submission 129c, p 2.

5.63 DIAC have advised that detention debt liability is written off for ex-detainees that have been granted humanitarian and refugee visas or from those persons detained unlawfully.

> [DIAC] recognises the Refugee Convention of 1951 not to penalise asylum seekers, including those holding visas such as Temporary Protection, Protection or Special Global Humanitarian. In these instances, the department records the debt but does not issue an invoice or pursue the debt. These debts are written off. [50]

5.64 Detention debts may be written-off under sections 47(1)(b) and (c) of the *Financial Management and Accountability Act 1997* (FMA Act) which allows the approval of non-recovery of debts where DIAC is satisfied that the debts are not legally recoverable, or are uneconomical to pursue.

5.65 The Minister of Finance is the only person authorised to waive a debt under section 34 of the FMA Act. The Minister has an unfettered discretion to consider each request for a waiver on a case by case basis.[51]

5.66 Waivers are generally approved in circumstances where the Commonwealth considers it has a moral rather than legal obligation to extinguish a debt.[52] They are generally applied when it is considered that repayment of the debt 'would cause or exacerbate ongoing financial hardship'.[53]

5.67 Concerns were raised regarding a lack of transparency in the debt waiver and write-off process. The authors of Law Institute of Victoria, Liberty Victoria and The Justice Project stated:

> Currently, persons eventually granted visas must either accept the liability, or rely on debt write-off or debt waiver procedures to escape liability. The joint authors consider that these procedures operate in an arbitrary manner, without the

---

50 Department of Immigration and Citizenship, Questions taken on notice, Budget Estimates Hearing, *Senate Hansard*, 21-22 May 2007.

51 Migration Series Instructions 377: *Visa applicants with debts to the Commonwealth*, para 4.0.7.

52 Migration Series Instructions 377: *Visa applicants with debts to the Commonwealth*, para 4.0.7.

53 Department of Finance and Deregulation website, viewed 3 November 2008 at http://www.finance.gov.au/financial-framework/discretionary-compensation/debt-waiver.html.

> procedural safeguards ordinarily afforded to persons by way of the rule of law.[54]

5.68 The example of a debt notification letter in Appendix G provides no reference to a person's options for applying for debt waiver or write-off.

## Accumulation and management of detention debt

5.69 In the last four financial years, a total of 17 355 detainees have been invoiced with detention debts amounting to a sum of $170 143 787 or over $170 million (see table 5.3). In that time period, there has been a significant negative trend in the number of persons detained since 2004 (see figure C1, Appendix C). Consequently, the total debt being invoiced each year has also reduced.

5.70 The total amount of debt recovered since 2004 has remained disproportionately low, between one and four per cent of the total debts incurred. The increase over time in the percentage recovered is potentially due to the accumulating numbers of ex-detainees attempting to repay their detention debt.

Table 5.3 Comparisons of debt invoiced and breakdown of debt collected

| | 2004–05 | 2005–06 | 2006–07 | 2007–08 |
|---|---|---|---|---|
| Detainees subjected to charges for time in detention | 5542 | 5306 | 4101 | 2386 |
| Debt invoiced for the year | $65 346 414 | $50 509 909 | $30 999 374 | $23 288 090 |
| Debt recovered onshore | $1 197 785 | $928 368 | $776 921 | $736 616 |
| Debt recovered offshore | $56 210 | $160 437 | $126 078 | $134 214 |
| Percentage recovered | 1.9% | 1.8% | 2.5% | 3.2% |

*Source: Department of Immigration and Citizenship, supplementary submission 129c, pp 1–2.*

54 Law Institute of Victoria, Liberty Victoria and The Justice Project, submission 127, p 20.

5.71 Since 2004-05, less than 2.5 per cent of the detention debt invoiced has been recovered. In 2007-08, as outlined in table 5.3, only $870 000 of $23 million of incurred debt was recovered. Figures are not available for the annual administrative cost of assessing which debts will be written-off or waived or for the costs of debt recovery for DIAC and the Department of Finance and Administration.

5.72 The Minister for Immigration and Citizenship has said that:

> It seems that the cost of administering the scheme to raise the debt either outweighs or is close to a break-even point in terms of the money brought in. It does seem to be a crazy situation to run a system to raise debt when it costs us as much to raise the debt as it does to generate income from it.[55]

5.73 The Commonwealth Ombudsman has also called for the application of detention debts to be reviewed, recommending that 'consideration should be given to the fact that most debts are either written off or are waived'.[56]

## Criticisms of detention charges

5.74 The Committee heard a range of criticisms about the practice of applying charges to persons in detention. There was consensus of opinion condemning the policy as punitive and discriminatory. Labor for Refugees (NSW) described it as 'intentionally punitive, unjust and inhumane'.[57]

5.75 The concerns raised related not only to compounded trauma for the person in detention, but also to the flow-on effect for families and dependants and the ability of people to progress their lives following detention.

5.76 For example, the Office of Multicultural Interests Western Australia called for the abolition of the requirement for detainees to repay the costs of their detention. The Office called for all existing debt to be waived and highlighted concerns about the lack of precedent for such a policy and questioned its validity in regards to Australia's international obligations.[58]

---

55 Senator the Hon C Evans Minister for Immigration and Citizenship *Senate Hansard,* 19 June 2008, p 2885.

56 Commonwealth Ombudsman, submission 126, p 16.

57 Labor for Refugees (NSW), submission 55, p 6.

58 Office of Multicultural Interests Western Australia, submission 106, p 22.

5.77 Similar concerns were also raised in a joint submission from the Law Institute of Victoria, Liberty Victoria and The Justice Project. They questioned the position of Australia in regards to the United Nations Convention on the Status of Refugees stating that:

> Under [article] 14 of the Universal Declaration of Human Rights, 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. To this end, Australia has signed and ratified the 1951 UN Convention on the Status of Refugees (the Convention) and its protocol, signifying its intention to provide protection to those seeking asylum in Australia.[59]

5.78 Paul Power, Chief Executive Officer of the Refugee Council of Australia (RCOA), also questioned the principle of applying charges for immigration detention:

> It's really akin to [the] United Nations High Commissioner for Refugees charging refugees for the time they spend in refugee camps. There is a real question of natural justice involved.

5.79 The detention debt policy was described by David Manne of the Refugee and Immigration Legal Centre in Melbourne, as being 'manifestly harsh and unjust', with no peer worldwide.[60] Similar views were expressed by Amnesty International Australia.[61]

5.80 In his appearance before the Committee, Julian Burnside QC stated:

> We charge [people in detention] by the day for the cost of their own detention. In connection with a case which challenged the validity of that section [of the Act], the Department and I against them, carried out some research which showed that we are the only country in the world which charges innocent people the cost of incarcerating them. It is not a distinction that is deserving of much merit.[62]

59 Law Institute of Victoria, Liberty Victoria and The Justice Project, submission 127, p 21.

60 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 14.

61 Thom G, Amnesty International Australia, *Transcript of evidence*, 7 May 2008, p 41.

62 Burnside J, Liberty Victoria, *Transcript of evidence*, 11 September 2008, p 49.

### Comparison with other forms of detention in Australia

5.81 Azadeh Dastyari of the Castan Centre for Human Rights Law has argued that charging for immigration detention is a punishment that cannot be justified and finds no corollary in other forms of detention in Australia:

> Citizens and non-citizens who are detained as punishment for crimes are not made liable for the cost of their detention… Other detainees subjected to 'administrative detention' such as individuals suffering from mental health issues who are detained pursuant to the *Mental Health Act 1983* are not required to reimburse the Commonwealth for the cost of the deprivation to their liberty. Nor are detainees detained for quarantine reasons pursuant to the *Quarantine Act 1908* (Cth), required to pay for their segregation from the Australian community. Detention of non-citizens pursuant to the *Migration Act 1958* remains the only form of detention in Australia that requires the detained to pay for their own detention.[63]

5.82 The Office of Multicultural Interests Western Australia confirmed this analysis, explaining that immigration detainees are the only group in the Australian community who were charged for their detention; by comparison, detainees in prisons, psychiatric hospitals and quarantine are not.[64]

## The impact of detention debt on ex-detainees

5.83 Concerns were raised regarding the impact of detention debt on ex-detainees, in particular the burden on mental wellbeing, the ability to repay the debt, and the restrictions a debt could place on options for returning to Australia on a substantive visa. The Refugee Action Committee in Canberra note that :

> Policy [relating to detention charges] stands as a barrier towards refugees fully integrating into the community, and continues to put significant pressure – both emotionally and

63 Dastyari, A, *The liability of immigration detainees for the cost of their detention* (2007), Castan Centre for Human Rights Law, p 15.

64 Office of Multicultural Interests Western Australia, submission 106, p 22.

> financially - on those people who have already experienced so much trauma and uncertainty in their lives.[65]

5.84 A 2008 Commonwealth Ombudsman report into detention debt administration indicated that the added burden of having a large debt caused high levels of stress to people that had formerly spent a period of time in detention. The report stated:

> Complaints to the Ombudsman's office indicate that the size of some debts causes stress, anxiety and financial hardship to many individuals who are now living lawfully in the Australian community as well as those who have left Australia.[66]

## Mental health

5.85 The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) saw that detention debts further strained a person's ability to put both their past and experience in immigration detention behind them:

> The consequences for people who have not paid or not arranged to repay the debt may be very profound… FASSTT agencies often see the serious impact of detention debt on their clients. The policy reinforces and prolongs emotions such as shame and guilt which are common effects of torture and trauma, and impedes the recovery of survivors.
>
> FASSTT believes that the detention debt policy should be abolished. At the very least, detention debts should not be raised against people who have been granted visas on humanitarian grounds.[67]

5.86 Studies have indicated that the stress imposed by a significant debt, particularly as a charge for a detention experience that may have been traumatic, frightening or isolating, impedes recovery for people trying to start new lives in Australia:

> The deterioration in the mental health of detainees continues to affect individuals after they have been released from

65 Refugee Action Committee website, viewed on 6 November 2008 at http://www.refugeeaction.org/rac/newsletter.html.

66 The Commonwealth Ombudsman, *Administration of detention debt waiver and write-off* (2008), p 2.

67 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

> immigration detention facilities. Trauma from time spent in immigration detention contributes to ongoing risks of depression, post traumatic stress disorder and mental-health related disability. Liability for the cost of immigration detention may exacerbate already existing mental health issues which can be attributed to immigration detention.[68]

5.87 The Office of Multicultural Interests Western Australia also strongly asserted that a detention debt exacerbated mental health problems related to immigration detention:

> Mandatory detention has been strongly linked with a rapid deterioration in mental health, including depression and posttraumatic stress disorder, and significantly increased suicide rates. The burden of a large detention debt, such as one WA case where a former detainee has a $345,000 debt, places individuals under extreme financial and emotional pressure and has the potential to exacerbate mental health issues developed in detention. The imposition of this debt could therefore be considered to be inconsistent with the right to health under the Covenant on Economic, Social and Cultural Rights.[69]

5.88 Many of those former detainees with histories of torture and trauma may well be found to be owed protection under Australia's international obligations and therefore, according to Australian Government policy, may not be pursued for detention costs. Nevertheless, debts can still have detrimental impacts on people who are found to be refugees. The Minister for Immigration and Citizenship has commented:

> I had to deal recently with an instance of a man who had been found to be a refugee but had been prevented from sponsoring and being reunited with his family because of the debt.[70]

5.89 While it is policy for those granted refugee and humanitarian visas to have their debts written off, it is understood that an invoice is sent following release from detention and a waiver or write-off is then considered. This may contribute to the stress of ex-detainees and their

68 Dastyari, A, *The liability of immigration detainees for the cost of their detention* (2007), Castan Centre for Human Rights Law, p 17.

69 Office of Multicultural Interests Western Australia, submission 106, p 22.

70 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard,* 19 June 2008, p 2885.

families who do not know if they will be liable for their detention debt.

## Financial hardship

5.90 While DIAC policy is not to pursue recovery of debt where this would leave a person 'destitute', the Committee also heard evidence that financial hardship is experienced by many ex-detainees due to detention debts.

5.91 Labor for Refugees (NSW) made the observation that people coming out of immigration detention will usually have a limited earning capacity due to the time they have spent in detention, the need to acquire Australian qualifications or meet skills recognition requirements, and for many the debilitating impact of mental health problems. [71] As National Legal Aid pointed out, many of those released on bridging visas will have no earning capacity at all due to the restrictions on work rights as part of their visa conditions. Bill Georgiannis, a solicitor for Legal Aid NSW, told the Committee how a client was released from detention on a bridging visa without work rights and subsequently notified of his accumulated detention debt:

> [Our client] received a letter from the department's debt recovery area seeking repayment in the vicinity of $50,000 or to make appropriate arrangements to repay by instalments. I wrote a letter to [the Department] saying he has been released with no permission to work, so obviously he has no capacity to repay. The letter that came back said, 'We understand that you need to make arrangements as soon as you are able.' The impact on my client was that I got a telephone call saying, 'What do they want from me? They have released me with no permission to work. I am not allowed to work. I am slowly going crazy because I have nothing to do and then they send me this bill.'[72]

5.92 It is apparent from the concerns raised formally and informally with the Committee that detention debts are a source of substantial anxiety to ex-detainees, and may impede the capacity of the ex-detainee to establish a productive life, either in Australia or elsewhere, following a period of detention. The financial hardship imposed by a detention

71 Labor for Refugees (NSW), submission 55, p 6.

72 Georgiannis B, Legal Aid NSW, *Transcript of evidence*, 24 October 2008, p 23.

debt also extends beyond the ex-detainee to the spouse and children in the family.

## Ability to return to Australia

5.93 One argument advanced is that for the most part detention charges are incidental, given that most people released from immigration detention are removed from the country and are under no obligation to pay debts to the Australian Commonwealth once they are residing offshore.

5.94 However, the Committee received evidence that detention charges could have impacts on persons removed from Australia where they had connections to this country. As the Commonwealth Ombudsman identified in his submission to the inquiry, accumulated debt may impede a person's legitimate entry into Australia in the future.[73] This is because DIAC can refuse to grant a visa to a person who holds a debt against the Commonwealth.[74]

5.95 National Legal Aid advised the Committee that debts could prejudice offshore applications for visas:

> With [ex-detainees] who are not found to be refugees but can make an offshore application or even an onshore application after ministerial intervention, the department will insist on that person making appropriate repayment or arrangements to make the repayments, which adds another level of difficulty to the visa application process, whether it be offshore or onshore.[75]

5.96 Similarly, the Edmund Rice Centre also expressed concern about records held on the Movement Alert List (MAL)[76] and said that:

---

73 Commonwealth Ombudsman, submission 126, p 15.

74 Under the public interest criteria (PIC 4004) set out in schedule 4 to the Migration Regulations, a person with a debt to the Commonwealth cannot be granted many types of visas. In order to satisfy this criterion the person must pay the debt in full, make arrangements for repayments or have the debt waived by the Australian Government.

75 Georgiannis B, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 23.

76 The Movement Alert List, administered by the Department of Immigration and Citizenship, is a computer database that stores details about people and travel documents of immigration concern to Australia. In addition, MAL is automatically checked when applications for visas are made on behalf of travellers by travel agents/airlines using the Department's Electronic Travel Authority System. Information obtained from Department of Immigration and Citizenship website, viewed on 26 November 2008 at http://www.immi.gov.au/media/fact-sheets/77mal.htm.

> Those who are deported also have the debt registered against their names, and it becomes sufficient reason to refuse them any other type of visa to Australia.[77]

5.97 The Castan Centre for Human Rights Law views detention debts as punitive, adding an insurmountable barrier on the individual or family ever legitimately returning to Australia:

> The debt may prevent an individual from being able to re-enter Australia should they leave and then wish to return. In the case of individuals wishing to obtain another form of immigration visa such as a permanent spouse visa, the debt may be used to prevent the visa being granted to them.[78]

5.98 The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) stated:

> They can be refused a visa and/or be prevented from entering Australia. Families may be split if a person who has left owing a detention debt is refused permission to re-enter.[79]

5.99 Jessie Taylor of the Law Institute of Victoria told the Committee of a man removed to the United Kingdom in September 2008 after nine years in detention:

> He was handed a bill for $512 000 which will bar him from returning to Australia to see his wife, her ailing parents and his children and grandchildren. He is in an abject state in the United Kingdom at the moment, having lived in Australia since 1982.[80]

## Committee comment

5.100 The Committee is aware that the Commonwealth Ombudsman has also called for a review of DIAC detention debt administration and specifically the use of a debt waiver for unlawful detention.[81]

---

77 Edmund Rice Centre, submission 53, p 3.

78 Mitchell K and Dastyari A, 'Paying their debt to society: Billing asylum seekers for their time in detention.' *Castan Centre for Human Rights Law Newsletter*, April 2007, p 13.

79 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

80 Taylor J, Law Institute of Victoria, *Transcript of evidence*, 11 September 2008, p 60.

81 Commonwealth Ombudsman, submission 126, p 16.

5.101 The Committee further notes that the Minister has indicated that there is 'a need for a review of the detention debt regime'[82] and he is currently waiting on advice to move forward with options.[83]

5.102 The Committee anticipates that the findings and recommendations of this report will assist in reviewing and reforming detention debt practices. In particular, the Committee urges any review to question the policy rationale, appropriateness and impact of current detention debt practices.

5.103 Australia appears to be the only country to apply costs for immigration detention. The practice of applying detention charges would not appear to provide any substantial revenue or contribute in any way to offsetting the costs of the detention policy. Further, it is likely that the administrative costs outweigh or are approximately equal to debts recovered.

5.104 The Committee notes the conclusions reached by the Senate Legal and Constitutional References Committee in its 2006 report on the administration and operation of the *Migration Act 1958*:

> The evidence clearly indicates that the imposition of detention costs is an extremely harsh policy and one that is likely to cause significant hardship to a large number of people. The imposition of a blanket policy without regard to individual circumstances is inherently unreasonable and may be so punitive in some cases as to effectively amount to a fine. The Committee agrees that it is a serious injustice to charge people for the cost of detention. This is particularly so in the case of unauthorised arrivals, many of whom have spent months and years in detention … the committee therefore recommends that it be abolished and all existing debts be waived.[84]

5.105 Similarly the Committee questions the justification for this policy, and finds the impact of this policy to be punitive and without effective purpose. It is the Committee's conclusion that:

---

82 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, 19 June 2008, p 2885.

83 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 114.

84 Senate Legal and Constitutional Affairs Committee, *Administration and operation of the Migration Act 1958* (2006), Parliament of the Commonwealth of Australia, p 207.

- the practice of charging for periods of immigration detention should be abolished
- all existing debts (including those who have entered into arrangements to repay debts) and all write-offs should be extinguished, effective immediately
- the movements alert list should be amended to reflect these changes
- legislation to this effect should be introduced as a priority, and
- every attempt should be made to notify all existing and ex-detainees with debts of the changes.

### Recommendation 18

**The Committee recommends that, as a priority, the Australian Government introduce legislation to repeal the liability of immigration detention costs.**

**The Committee further recommends that the Minister for Finance and Deregulation make the determination to waive existing detention debts for all current and former detainees, effective immediately, and that all reasonable efforts be made to advise existing debtors of this decision.**

Michael Danby MP
December 2008