



Migration Amendment (Healthcare for Asylum Seekers) Bill 2012

Submission to Senate Legal and Constitutional Affairs Committee

October 2012

Prepared by Adam Fletcher with the assistance of

Henrietta de Crespigny and Kylie Pearce

The Castan Centre for Human Rights Law thanks the Committee for the opportunity to comment on the Migration Amendment (Health Care for Asylum Seekers) Bill 2012.

The Centre strongly supports the establishment of a Health Advisory Panel of experts to oversee the provision of health care to asylum seekers who are transferred to regional processing countries, including Nauru and Papua New Guinea (PNG).

This submission focusses on the importance of oversight and asylum seekers' need for a high standard of healthcare, as well as Australia's relevant international human rights obligations.

As the Explanatory Memorandum for the Bill states, asylum seekers "have by definition suffered considerable mental and physical strain" by the time they reach Australia (or Nauru or PNG), which tends to increase their need for healthcare services. Yet offshore or regional processing places them 'out of sight and out of mind,' which makes independent oversight all the more important. We believe that current oversight mechanisms are inadequate as outlined below, and this Bill presents the ideal opportunity to strengthen them.

Case for Strengthening Oversight

The Centre acknowledges the role of the existing Detention Health Advisory Group (DeHAG). However, the Department of Immigration and Citizenship (DIAC) has indicated that:

The DeHAG's work program includes site inspections of places of immigration detention, including the Northern IDC, Darwin Airport Lodge APOD, places of immigration detention on Christmas Island, Curtin IDC, Scherger IDC, Villawood IDC, Maribyrnong IDC, Melbourne ITA, Inverbrackie APOD and Adelaide ITA.¹

So far, we do not know whether DeHAG's remit will extend to regional processing centres. In addition, DeHAG seems to have published its last public report in March 2008.² The 2008 report reveals that DeHAG made only two visits to detention centres over the course of the preceding year.³ A submission from DIAC to the recent Joint Select Committee inquiry into Australia's Immigration Detention Network reveals that DeHAG contributed to a 2011 review of the Detention Health Framework,⁴ but there is otherwise little information available publicly on DeHAG's activities over the four years since its last report.

¹ See DIAC response to Question on Notice 191 from Joint Select Committee on Australia's Immigration Detention Network, 21 November 2011:

<<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=aa057ecf-4692-4ed2-ad59-f3a656b75f0e>>.

² See <<http://www.immi.gov.au/managing-australias-borders/detention/services/dehag.htm>>.

³ See *Detention Health Advisory Group: Report Against 2007-08 Work Program*, March 2008 (p 7): <<http://www.immi.gov.au/managing-australias-borders/detention/pdf/dehag-work-program-2007-08.pdf>>.

⁴ See Joint Select Committee on Australia's Immigration Detention Network, Final Report, 12 April 2012, 4.4: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_detention_cite/immigration_detention/report/index.htm>.

The present Bill proposes that the panel it creates would report to Parliament at least biannually, which would represent a significant improvement in transparency and accountability. A legislative foundation would also improve on the perceived independence of existing oversight mechanisms.

Mental health experts, including the Chair of DeHAG's Mental Health Sub-Group Dr Louise Newman, last year revealed that minimum practice standards were not being applied in (onshore) detention, and that detainees' mental health was being compromised by failure to adhere to basic standards.⁵ DeHAG also revealed to the Joint Select Committee that requests for improvements in paediatric practice on the part of International Health and Medical Services P/L (IHMS – DIAC's health services contractor) had been ignored.⁶ In light of this failure to apply appropriate standards of care, the prospect of further offshore processing clearly requires additional safeguards, such as the oversight panel proposed in the present Bill.

One of the 'Primary Outcomes' of DIAC's Detention Health Framework itself is to "ensure that quality of health services provided to people in immigration detention is assured by independent accreditation,"⁷ which would seem to support the objectives of the present Bill. The Joint Select Committee inquiry gave details of eight health service delivery audits between 2009 and 2011, but it appears only one of these was conducted by an independent body (the Royal Australian College of General Practitioners).⁸ Internal audits, while welcome, are no substitute for independent oversight. The Centre acknowledges the role of the independent Commonwealth Ombudsman, who monitors and inspects detention centres, but this role is limited to mainland facilities and is not specialised in medical care like the proposed panel.⁹

Finally, given the existing expertise and experience of DeHAG (and the almost identical proposed composition of the panel in the Bill), it seems likely that some or all of its members could serve on the new, strengthened panel, which would render the measure cost-neutral (or close to it).

⁵ See Media Release from DeHAG, the Australian College of Mental Health Nurses and the Australian Psychological Society: <http://www.psychology.org.au/Assets/Files/MR_29082011.pdf>.

⁶ See Joint Select Committee on Australia's Immigration Detention Network, Final Report, above n 4, 4.26.

⁷ See Detention Health Framework, Department of Immigration & Citizenship, 2007, 13: <<http://www.immi.gov.au/managing-australias-borders/detention/services/detention-health-framework.pdf>>.

⁸ See Joint Select Committee on Australia's Immigration Detention Network, Final Report, above n 4, 4.95-4.96.

⁹ See Inquiry into Immigration Detention in Australia: Submission by the Commonwealth and Immigration Ombudsman, August 2008: <http://www.ombudsman.gov.au/files/Joint_Standing_Committee_on_Migration_Inquiry_to_immigration_detention_in_Australia.pdf>.

Need for High Standard of Healthcare in Regional Processing Locations

The Joint Select Committee concluded in April that:

...from evidence presented to it through submissions and at hearings, and from the Committee's observations at numerous site visits, it is clear that acute mental illness is widespread across the detention network. It is equally apparent that mental health services are severely inadequate to deal with the quantum and severity of cases, and that urgent improvement is required.¹⁰

According to the *Sydney Morning Herald*, Nauru's Acting Health Secretary Dr Setareki Vatucaawaqa "has asked that female and child asylum seekers not be sent to the Pacific island, and revealed the island would be unable to cope with any mental health issues of detainees."¹¹ Dr Vatucaawaqa has also expressed concern that Nauru's hospital will not have enough beds to deal with the capacity of the processing centre (between four and 12 beds for up to 1500 people). The same report states "Nauru's clearly not in a position to assist regarding such health concerns. The island has two psychiatric care nurses, and one is studying abroad. A psychiatrist visits the island four times a year."

Given the reliance on local health services revealed in the course of the Joint Select Committee inquiry,¹² this lack of capacity is cause for concern.

It was reported in 2003 that the head psychiatrist assigned to the detention centre on Nauru under the Howard Government's 'Pacific Solution' had resigned in 2002, describing situation at the Topside and State House centres as a 'psychiatrist's nightmare.'¹³ Caroline Fleay of Curtin University has prepared an excellent overview of just how poor the conditions were on Nauru at the time, leading to incidences of diarrhoea and other gastro-intestinal diseases, skin and eye infections, and dengue fever.¹⁴

A former IHMS psychologist who appeared before the Joint Select Committee worked at the Christmas Island facility in 2010. She revealed that the situation there was little better than eight years previously (if not necessarily for the same reasons). There was no induction or orientation, she was the only psychologist for 1800 detainees, and she was only expected to provide brief counselling sessions rather than the full range of psychological services required by the detainees.¹⁵

¹⁰ See Joint Select Committee on Australia's Immigration Detention Network, Final Report, above n 4, 4.102.

¹¹ See Welch, 'Nauru has healthcare concerns,' *Sydney Morning Herald*, 24 September 2012: <<http://www.smh.com.au/opinion/political-news/nauru-has-healthcare-concerns-20120923-26f50.html#ixzz28rkDdliC>>.

¹² See Joint Select Committee on Australia's Immigration Detention Network, Final Report, above n 4, 4.76-4.90.

¹³ See 'Nauru camps "psychiatrist's nightmare": doctor,' *The 7.30 Report*, 15 May 2003: <<http://www.abc.net.au/7.30/content/2003/s855996.htm>>.

¹⁴ See Fleay, *Repeating Despair on Nauru: The Impacts of Offshore Processing on Asylum Seekers*, 12 September 2012: <<http://blogs.curtin.edu.au/human-rights-education/files/2012/09/Nauru-report-12-Sept-2012.pdf>>. See also Gordon, 'Six Days on Nauru,' *Inside Story*, 14 August 2012: <<http://inside.org.au/six-days-on-nauru>>.

¹⁵ See Joint Select Committee on Australia's Immigration Detention Network, Final Report, above n 4, 4.53-4.55.

One of the clearest trends from the psychological research on those waiting to have their asylum claims processed is that their mental condition tends to deteriorate further the longer they are kept in detention (or processing) centres.¹⁶ Given the ‘no advantage’ test proposed by the Expert Panel on Asylum Seekers – and accepted by the Government¹⁷ – uncertainty as to how long asylum seekers will remain on Nauru and Manus abounds.¹⁸ Remoteness (isolation) in itself can also exacerbate symptoms,¹⁹ in addition to making it much more difficult to provide services.²⁰ The potential for psychological harm is therefore a real concern, and the ongoing costs to the Australian community will be significant, if experience is any guide.²¹

The impact of detention is perhaps most pronounced on children. Minister Bowen has stated that children will not be exempt from the regional processing system – even unaccompanied minors – lest any exemption be exploited by people smugglers.²²

On Manus Island, there have been reports of a strain of malaria which can kill if left untreated for just one day.²³ The only treatments available are prophylactic antimalarial drugs such as chloroquine or quinine, which are known to cause paranoia, anxiety and depression, as well as nausea.²⁴ The World Health Organisation’s 2011 World Malaria Report reveals that PNG has the highest rate of malaria infection in the Western Pacific region (covering most of Asia), with 94% of the population at risk.²⁵ A submission by a doctors’ alliance to the HREOC inquiry into children in immigration detention in 2002 found that Manus Island was unsafe due to the risk of infection, and that the strain of malaria

¹⁶ See eg ‘Nauru camps “psychiatrist’s nightmare”: doctor,’ above n 13; also DeHAG media release, above n 5; Joint Select Committee on Australia’s Immigration Detention Network, Final Report, above n 4, 4.59; *Report of the Working Group on Arbitrary Detention: Addendum: Visit to Australia (24 May-6 June 2002)*, E/CN.4/2003/8/Add.2, 36-45; and NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS), *Submission to Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, August 2008: <<http://www.startts.org.au/ContentFiles/Startts/Documents/STARTTS%20%20immigration%20detention%20inquiry%20submission.pdf>>.

¹⁷ See *The Expert Panel on Asylum Seekers and the ‘no advantage’ principle*, DIAC, 17 September 2012: <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/pdf/fact-sheet-english.pdf>>.

¹⁸ See eg Burnside, ‘Some disquieting questions on asylum seekers,’ *The Drum Unleashed*, 17 August 2012: <<http://www.abc.net.au/unleashed/4203770.html>>.

¹⁹ See Joint Select Committee on Australia’s Immigration Detention Network, Final Report, above n 4, 4.72.

²⁰ See *AHRC Summary of Observations: Immigration detention and offshore processing on Christmas Island 2009*, Access to health and mental health care (12.5): <http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s12_5>.

²¹ See Ward, *Long-term health costs of extended mandatory detention of asylum seekers*, Milbur Consulting, October 2011: <<http://www.socialpolicyconnections.com.au/wp-content/uploads/2011/10/Ward.long-term-costs-v12Oct.2011.pdf>>.

²² See Coorey, ‘Children to be sent alone to Nauru,’ *Sydney Morning Herald*, 12 September 2012: <<http://www.smh.com.au/opinion/political-news/children-to-be-sent-alone-to-nauru-20120911-25qom.html>>.

²³ See Phelan, ‘Malaria on Manus Island: A threat to human rights,’ *ABC The Drum*, 20 August 2012: <<http://www.abc.net.au/unleashed/4209230.html>>.

²⁴ See eg Thompson et al, ‘The antimalarial drugs quinine, chloroquine and mefloquine are antagonists at 5-HT3 receptors,’ *British Journal of Pharmacology*, Vol 151(5), July 2007, 666: <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1994240>>.

²⁵ See WHO, *World Malaria Report 2011*, pp 69, 152: <http://www.who.int/malaria/world_malaria_report_2011/9789241564403_eng.pdf>.

infecting people there was resistant to the most common treatment (chloroquine).²⁶ Further, the alternative treatments available are unsuitable for pregnant women and children.

The Parliamentary Library has prepared an excellent overview of the history of children in immigration detention in Australia which sets out the numerous studies showing the prevalence of psychiatric disorders amongst this cohort and the worsening of symptoms over time – often to the point of suicidal thoughts and self-harm.²⁷ As the overview points out, reconciling this phenomenon with the ‘no advantage’ policy will present a “considerable policy challenge” for the Government. Independent oversight is needed to ensure DIAC meets this challenge.

International Human Rights Obligations

Having considered the human rights implications of immigration detention over many years, the Australian Human Rights Commission made the following recommendation in the context of its 2011 observations on Villawood Immigration Detention Centre:

An independent body should be charged with monitoring the provision of physical and mental health services in immigration detention, and adequate resources should be allocated to that body to fulfil this function.²⁸

DIAC responded that DeHAG already serves this purpose, and that its contractors conduct clinical reviews.²⁹ In the Centre’s view, an independent panel as proposed in the present Bill would be preferable, especially given DIAC’s health care performance to date and DeHAG’s inability (through no fault of its own) to ensure DIAC respects the appropriate standards.³⁰

Nauru and PNG are independent sovereign nations, but as long as the Australian Government is funding the construction, maintenance and operation of the processing centres it must take responsibility for health care services as well.

Australia’s international human rights obligations apply extraterritorially, and extend to anywhere the Australian Government exercises jurisdiction or effective control.³¹ These obligations may not be displaced by contracting out service provision to corporations such as Serco and IHMS. It is even

²⁶ See Professional Alliance for the Health of Asylum Seekers and their Children, *Submission to the HREOC Inquiry into Children in Immigration Detention*, May 2002, 2.2.5: <http://www.cpmc.edu.au/docs/hreoc_submission.pdf>.

²⁷ See FlagPost: Children in Immigration Detention, Australian Parliamentary Library, 20 August 2012: <<http://parliamentflagpost.blogspot.com.au/2012/08/children-in-immigration-detention.html>>.

²⁸ See AHRC, *Summary of observations from visit to immigration detention facilities at Villawood*, 2011, Recommendation 9: <http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html#partc>.

²⁹ See DIAC, *Response to the Australian Human Rights Commission Statement on Immigration Detention in Villawood*, May 2011: <http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood_response.pdf>.

³⁰ See Joint Select Committee on Australia’s Immigration Detention Network, Final Report, above n 4, 3.85.

³¹ See eg Human Rights Committee, General Comment 31 CCPR/C/21/Rev.1/Add.13 of 26 May 2004, paragraph 10. The position as regards ICESCR is less clear, but some extraterritorial application is still likely – see eg Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights,’ *Human Rights Law Review* (2011) Vol 11(1), 1.

more concerning that the contract to run the Nauru centre has been awarded to Transfield, an engineering firm with little experience in asylum seeker processing or detention management.³²

The Centre acknowledges that Australia's contracts with these corporations include some protections. However The Joint Select Committee inquiry revealed that DIAC's contract with IHMS "does not contain an abatement system to penalise the company for underperformance."³³ In addition, references to the 'Key Immigration Detention Values' only mention detention conditions in the broadest of terms. In particular, Value 7 provides that "[c]onditions of detention will ensure the inherent dignity of the human person."

The obligation to treat detainees with dignity in article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) may be relevant in this context, as may the prohibition on arbitrary detention in article 9. However, there is some doubt as to whether the asylum seekers taken to Nauru and PNG will be 'detained.' Nauruan authorities have requested that, despite a planned curfew, asylum seekers be free to move about the islands and send children to school.³⁴ The Explanatory Memorandum to the present Bill refers to offshore detention, but the relevant Memoranda of Understanding (MOU) between Australia, Nauru and PNG omit all mention of detention, preferring the term 'transferees' to 'detainees.'³⁵

Arguably, the 'transferees' may still be considered detainees according to jurisprudence of the UN Human Rights Committee, depending on the nature of restrictions placed on them in practice.³⁶

In any case, the MOU with Nauru requires both parties (Australia and Nauru) to "ensure that Transferees will be treated with dignity and respect and that relevant human rights standards are met." The MOU between Australia and PNG contains an identical clause.³⁷

Even if the transferees are not deemed to be detainees, there are several other relevant human rights obligations which Australia must consider, including:

- the right to life in article 6 of the ICCPR (the risk of death from malaria on Manus Island – particularly for pregnant women and children who cannot take the indicated prophylaxis – is real);³⁸

³² See Engineering giant wins Nauru centre contract, Sydney Morning Herald, 16 September 2012: <<http://www.smh.com.au/national/engineering-giant-wins-nauru-centre-contract-20120915-25zcu.html>>.

³³ See Joint Select Committee on Australia's Immigration Detention Network, Final Report, above n 4, 4.15. This refers to the 2009 contract with IHMS, but there is no indication the later versions of the contract have introduced such a clause.

³⁴ See eg Schubert, 'Nauru demands rights, freedom for asylum seekers,' *Sydney Morning Herald*, 19 August 2012: <<http://www.smh.com.au/opinion/political-news/nauru-demands-rights-freedom-for-asylum-seekers-20120818-24fjk.html>>.

³⁵ See <<http://www.minister.immi.gov.au/media/media-releases/pdf/australia-nauru-mou-regional-processing.pdf>> (Nauru) and <<http://www.minister.immi.gov.au/media/media-releases/pdf/mou-between-png-australia-regional-processing.pdf>> (PNG).

³⁶ See *Submission for General Discussion on Article 9*, Castan Centre Submission to UN Human Rights Committee, 28 September 2012: <<http://www2.ohchr.org/english/bodies/hrc/docs/discussionDay2012/CastanCentre.pdf>>.

³⁷ See paragraphs 12 and 15 respectively.

³⁸ See Phelan, above n 23.

- the right to enjoyment of the highest attainable standard of physical and mental health in article 12 of the International Covenant on Economic, Social and Cultural Rights (this article requires Australia to ensure the availability of medical care to all),³⁹ and
- specific obligations to provide health care to women and children in article 12 of the Convention on the Elimination of All Forms of Discrimination against Women and article 24 of the Convention on the Rights of the Child respectively.

In view of the relatively weak and vague nature of protections built into contracts between the Australian Government and service providers, an oversight panel such as that established by the present Bill would be invaluable to ensure these obligations are respected.

³⁹ See article 12(2)(d).