

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

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**Submission Date: 15 August 2011**

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## **Introduction.**

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Thank you for the opportunity to contribute to this inquiry. In this submission I address those matters in the Committee's terms of reference of which I have direct experience. I will make comment on the following subject areas:

1. The determinants of asylum seekers' experience of immigration detention.
2. The mental health consequences of current forms of immigration detention.
3. Challenges and shortcomings in mental health service delivery.
4. The implementation of policy in relation to specific groups: survivors of torture and trauma; and children.
5. Refugee status resolution, security assessments and complementary protection.
6. Protests and riots in immigration detention facilities.

This submission draws on my experience of assessing many hundreds of detained and formerly detained asylum seekers over the past 14 years while working as a clinical psychologist within public mental health services and with Foundation House (the Victorian Foundation for Survivors of Torture) . In the past two years I have assessed and treated about 120 detained asylum seekers referred by detention health services. The majority of detained asylum seekers I have assessed have been detained at Maribyrnong Immigration Detention Centre (although many had previously been detained in other facilities). A colleague and I have assessed the majority of asylum seekers detained at Maribyrnong IDC over the past two years. I have also assessed asylum seekers detained on Christmas Island where I was employed as part of a trauma counselling service in 2009, and child asylum seekers detained at the Melbourne Immigration Transit Accommodation. I provide supervision to a number of clinicians

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and counsellors providing services to asylum seekers detained within the immigration detention network.

With respect to my comments on refugee status resolution procedures, these are based on my experience working as a lawyer at Victoria Legal Aid providing assistance with protection visa applications to detained asylum seekers.

Unless otherwise indicated, the information in this submission relates to adult asylum seekers in immigration detention centres whom I have directly assessed within the past two years. *Where descriptions are quantified, unless otherwise specified, they refer to this cohort.* I will make some specific remarks about the situation of children in detention facilities.

The views expressed herein are my own and are not necessarily those of the organisations at which I am employed.

## **1. The Determinants of Asylum Seekers' Experience of Immigration Detention**

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Asylum seekers' experience of detention, their reaction to being detained and its effect on them, is influenced by their mental and physical health status upon arrival; their expectations regarding immigration detention and the system of refugee status determination; the conditions of detention; their ongoing relationships with family and others; and the length of detention and status resolution. I will briefly address each of these in turn.

### **a. Mental and physical health status upon arrival**

It is not uncommon for detained asylum seekers to experience pain or physical disability related to torture, physical abuse, or war related injuries. Among the last 75 detained asylum seekers I have assessed, about 20% have pain or disability which they claim is a result of war or physical abuse. The physical problems include chronic pain, loss of use of limbs and facial injuries.

The vast majority of asylum seekers state they have not been significantly affected by psychological difficulties in the past and have never sought treatment. However many have experienced a range of traumatic experiences which make them vulnerable to developing some form of post traumatic condition. In my experience a sizable minority have experienced torture according to the strict legal definition<sup>2</sup>, and a large proportion

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<sup>2</sup> Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

have experienced some form of traumatic event including assault by authorities or non state actors, arrest and detention, death threats against themselves or their families, the recent death or disappearance of family members in traumatic circumstances, and exposure to war related violence including witnessing the death of others. Many have undergone very difficult experiences of flight and transit particularly those who have travelled by boat. Most asylum seekers are separated from their families whose living circumstances are often parlous and about whom asylum seekers often have grave concerns.

Consequently, upon arrival in Australia, most asylum seekers are anxious about their future, fear repatriation, and worry about their family's safety and well-being. Many have been made psychologically vulnerable by trauma and loss and are at risk of developing a post traumatic related mental illness. Some suffer physical health problems which may be causing significant pain or disability.

#### **b. Expectations regarding immigration detention**

Among the detained asylum seekers I have assessed in the past two years, the majority have indicated that they have either not expected to be detained upon arrival in Australia or only for a relatively brief period of a few months. No one has suggested on direct questioning that they understood they may be detained for a year or more. Some claim to have been provided during initial interviews with quite specific time frames for the completion of their status resolution and release, usually about three to four months. It is possible that whatever information was conveyed has been misunderstood, or was accurate at the time but was not qualified by the stipulation that length of detention is contingent upon the outcome of the protection application at primary and merits review stages.

It is therefore common for asylum seekers who have been detained for more than about three to six months to experience their detention as contrary to what they had prepared for.

#### **c. The conditions of detention**

The fundamental feature of immigration detention, that it is a confined environment which deprives the detainee of his or her liberty, is an immediate source of distress for some asylum seekers and becomes one with time for the majority.

During the first month of detention, most asylum seekers state that they initially felt relieved to have arrived in Australia and believed themselves to be physically safe in detention. They have often undergone a harrowing and dangerous journey, particularly

but not exclusively those who have arrived by sea, and feel relieved upon reaching their destination. They often state that they had heard that Australia is a country that respects human rights and that they expected to be treated humanely. A minority find their confinement in a detention facility unsettling from the outset. These asylum seekers tend to be those either with pre-existing mental illnesses or who have had recent experiences of persecution related imprisonment and abuse. For the latter group, detention can directly re-invoke the experience of persecution and they don't feel safe even if they recognise that Australia is committed to providing protection to refugees.

What appears to occur over time is that characteristics of detention centres which are initially tolerable, and of less consequence than the relief of having reached a place of safety, become increasingly intolerable and undermining of psychological well being. I will comment on the range of factors influencing mental health over time in Part 2. Here I will list what I have observed to be the physical and environmental features of detention which have adverse psychological effects:

*Incarceration.* The fact of the deprivation of liberty becomes increasingly oppressive with time. A majority of asylum seekers, particularly after about 6-9 months of detention and after one or more negative visa application decisions, experience detention as punitive and criminalising. Commonly they implore you to explain what offence they have committed and why they are being punished. The legal account of their predicament, that under Australian law unlawful non citizens must be detained, usually doesn't allay a growing sense that something retributive is occurring. Those in centres shared with people detained due to visa cancellation owing to serious offending point to the injustice of being categorised with them. For some asylum seekers, the extensive security related interviews, which are usually far longer than the interviews assessing refugee status, suggest to them there is a greater focus on anti-people smuggling operations, and identifying threats to public security than on assessing the need for protection. Many of those in contact with their families have increasing difficulty explaining why they are still detained and face questions from family members as to whether they have committed an offence.

The legal distinction between administrative and punitive custody is not apparent to the detained asylum seeker. Detention is often viewed as unjust, and increasingly with the passage of time, as an affront to the legitimacy of their claims - that they are being punished for asking for protection.

*A lack of worthwhile activity.* The majority of asylum seekers participate in fewer of the activities available in the detention facilities over time. Most activities are recreational, sport and games for example, which are ways to pass time but are not related to any objective or to the acquisition of any particular skill. English classes are the exception, but many don't end up attending after the first few months because the classes have

been taught at one level rather than adapted to different levels of English proficiency, and more importantly, many asylum seekers progressively lose the ability to concentrate and retain information. The reversal of sleeping and waking which many detained people experience is another reason for non attendance at English classes. Many asylum seekers, as their mental states deteriorate and concerns about their protection claims grow, come to see recreational activities as increasingly pointless.

*Limited places for specific activities.* Some asylum seekers complain that there are limited quiet places for the purpose of study or prayer. They say that there is a lack of privacy; one's room is subject to searches, telephone conversations are in public areas and can be overheard, and there is nowhere to self administer medication out of view of others.

The extent to which open space is accessible varies between centres. At Maribyrnong IDC, many complain that the centre lacks open areas, is claustrophobic and that all that is visible of the outside world is a thin strip of sky.

*Difficulties Communicating.* Detained people without English proficiency are only able to communicate with detainees who share their language unless an interpreter is available or a bilingual detainee interprets for them. For detainees whose language is not shared by anyone in the centre, they have no opportunity for conversation and can be very isolated. Among a small number of asylum seekers, this has meant they sometimes have not been able to speak freely with anyone for weeks at a time, the opportunity only arising when an interpreter is employed for a medical or departmental appointment. Interpreters are available for formal appointments, however many asylum seekers report difficulties in accessing an interpreter when they wish to communicate with their lawyer, the department or others. Interpreters are not available for everyday interactions with Serco officers and this is inevitably a potential source of misunderstanding and tension.

*Tensions with other detainees.* It is unsurprising that if people in various states of distress and psychological ill health, who are culturally diverse and often cannot communicate with one another, are thrown together in a confined environment, some tensions will arise. Amenities such as open space, telephones, exercise equipment, kiosk food, and the internet are in limited supply, and access to these is often a source of conflict. Some asylum seekers identify these tensions as a cause of ongoing stress in the daily life of the centres. In centres with mixed populations of asylum seekers and people whose visas have been cancelled, asylum seekers sometimes report feeling intimidated by aggressive behaviour of other detainees.

Compatriots often assist one another, and friendships arise between detained people which provide an important source of social support. However many asylum seekers report that these relationships begin to fray over time and they withdraw from them.

*Relations with detention staff.* Most asylum seekers have said they have reasonable relations with Serco detention officers and many state they find staff are actively helpful and supportive. A minority have had complaints about being treated disrespectfully or have found staff unhelpful when they request something. Some of the duties of officers such as room searches and accompanying detainees for external appointments necessarily involve an assertion of control and are resented and experienced as intrusive. Some asylum seekers complain that they feel criminalised when accompanied to external appointments by up to four officers.

The attempt by the detention service provider to shift the relationship between officers and detainees (whom they now call “clients”) from one based on the penal model of control and surveillance to one of open engagement and support has, on the evidence of detained people’s report and my own observations, met with some success. I have found officers to be on the whole courteous and respectful toward detainees. It is however a difficult role to combine responsibility for security - to at times use physical force such as when effecting an involuntary removal or containing a disturbance - with maintaining an amicable and constructive relationship with detainees. In circumstances where there is overcrowding, a large number of people who have been detained for an extended period, and a high level of tension, it is very easy for some detainees to see officers as gaolers and representatives of an oppressive system, and for some officers to see detainees as manipulative trouble makers.

*Exposure to violence.* Many asylum seekers I have assessed in the past two years have witnessed assaults or acts of self harm including completed suicides and have found these experiences very disturbing. When detainees see others harm themselves it adds to their demoralisation, creates apprehension about their own mental state, and in predisposed individuals, my heighten the risk of inflicting harm on themselves. A small number have required psychological assistance as a consequence of what they have witnessed, and pre-existing problems have been further complicated.

A small number of asylum seekers whom I have assessed have been assaulted by other detainees.

**d. Relationships with family and others.** Among the most common sources of anxiety for asylum seekers is the circumstances of family members left behind and the possibility of maintaining contact with them. Some asylum seekers have lost contact with their families because there is no telecommunications to where the family is or they have been displaced to somewhere unknown. Others have regular contact. Asylum seekers often report that their families face persecution or threats, and struggle to meet basic material needs. Sometimes these difficulties are said to be the direct result of the

asylum seeker's absence. Authorities or rival groups might visit the family home in search of the asylum seeker. Material deprivation is compounded where the asylum seeker was the primary breadwinner. The asylum seeker may feel directly implicated in his family's suffering. Among the detainees assessed were those whose family members were reported to have been murdered owing to the political involvement of the asylum seeker, and whose children have died due to lack of access to medical treatment. Asylum seekers usually attempt to maintain close contact with their families but find hearing about their dire circumstances without being able to do anything to alleviate them increasingly difficult to endure.

Some asylum seekers receive support from people visiting the centre who may be relatives, ex-detainees whom they met while they were detained, or new acquaintances met during visiting times at the centre. Such relationships can provide an important source of support and morale. The abandonment of these contacts is often a sign that the asylum seeker has lost hope in their future.

#### **e. The length of detention and status resolution.**

Many thousands of asylum seekers over the past year have spent more than six months in detention, and hundreds have been detained for more than a year<sup>3</sup>. The difficulties immigration detention present for asylum seekers become more acute with time. The conditions of detention described above, which may have been tolerable in the short term, begin to weigh heavily. The detained person becomes less able to cope and begins to deteriorate psychologically, in a compromised psychological state the conditions are still less tolerable and a vicious cycle is established. The trajectory of asylum seekers' psychological well being is variable, but deterioration to various degrees is the norm. In my experience asylum seekers' mental health begins to decline between the sixth and ninth month of detention, and often following the first or second visa rejection. The deterioration is not attributable to visa rejection alone: some asylum seekers become mentally unwell while waiting for a decision, or after having received a positive decision and waiting for the completion of security checks. There is little doubt that the length of detention, its indeterminate duration, and the uncertainties associated with the process of status resolution and protection application outcome are the most potent influences on psychological well being of detained asylum seekers.

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<sup>3</sup> "As at 4 February [2011] 29 people had been in detention for seven days or less; 300, one week to a month; 1,095, one month to three months; 1,643, three months to six months; 3,111, six months to 12 months; 422, 12 months to 18 months; and 34, 18 months to two years; 25, greater than two years": Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011 (Jackie Wilson).

## 2. The Mental Health Consequences of Current Forms of Immigration Detention

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There is now incontrovertible evidence that the mental health of asylum seekers deteriorates with length of time in immigration detention<sup>4</sup>. This evidence includes research commissioned by the Department of Immigration and Citizenship<sup>5</sup> (“the Department”). The mechanisms by which length of detention affects psychological well-being have been explored<sup>6</sup>.

There is now a legacy of mental illness among refugees who were detained for extended periods from the late 1990s onwards. A sizable number of people detained during this period, who were subsequently recognised as refugees and who are now Australian citizens, continue to receive psychological treatment five or ten years after their release from detention. An important policy question is whether, since the reforms to the detention system, beginning in 2005 and gaining pace under the current government, the more adverse psychological effects of detention have been avoided.

The Department has funded research of the health status over time of a representative sample of a detained population. The research examined the medical records of a cohort of 720 detainees including asylum seekers in detention between 1 July 2005 and 30 June 2006. This research found that the proportion of detainees with mental health problems increased with time in detention, and that only 3% of people detained for less than three months had a new mental health problem, compared to 44.6% of those detained for more than two years.

In 2009 the Forum of Australian Services for Survivors of Torture and Trauma (‘FASST’) were contracted by the Department to provide psychological assistance to asylum seekers with histories of trauma who were detained on Christmas Island. Counsellors assessed more than 600 detained asylum seekers. The trauma counselling service found there to be a high frequency of severe trauma among the detainees referred to them. Many had suffered recent incarceration and torture, life threatening exposure to war related violence, or loss of family members. Some had physical injuries and disabilities due to exposure to combat. Many of the people assessed suffered post traumatic psychological states and should not have been detained in the North West Point facility if their mental health was a primary consideration. Fortunately at this time approval

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<sup>4</sup> Steel, Z., Silove, D., Brooks, R., Momartin, S., Alzuhairi, B., & Susljik, I. (2006). Impact of immigration detention and temporary protection on the mental health of refugees. *British Journal of Psychiatry*, 188, 58-64. <sup>4</sup> Thompson, M and McGorry, P, Maribymong Detention Centre Tamil Survey in Silove, D; and Steel, Z The Mental Health and Wellbeing of On Shore Asylum Seekers in Australia (1998).

<sup>5</sup> Green, P, and Eagar, K; The health of people in Australian Immigration Detention eMJA Rapid Online Publication, 14 December 2009.

<sup>6</sup> Coffey, G; Kaplan, I; Sampson, R; and Tucci, M (2010) The Meaning and Mental Health Consequences of Immigration Detention for people seeking asylum *Social Science and Medicine* 2070-2079.

rates for some of the most traumatised people – Sri Lankan Tamils and Afghan Hazara – were high and their periods in detention were usually less than six months. We did not observe the pattern of almost universal severe deterioration in mental state seen among long term detainees previously. What was noted, however, was a subgroup of highly traumatised individuals who found detention difficult from the onset, and a small number of people detained for six months or more who began to significantly deteriorate.

A colleague and I have assessed over half the asylum seekers detained at Maribyrnong IDC over the past two years. Many have been transferred from other facilities before being detained at Maribyrnong, beginning at Christmas Island and then being held at the Darwin, Perth or Villawood facilities. A sizable number have now been detained for between a year and 18 months. On the basis of both direct observation over time and histories provided by asylum seekers, there is clear evidence of deterioration in mental state commencing between six and nine months, and clearly promoted but not necessarily precipitated by negative primary or merits review protection application decisions. The course of deterioration is not distinguishable from what was observed among long term detainees detained in the period from the late 1990s to 2005 during the first years of their detention. The pattern is not one of relentless decline in mental state among everyone, there are many variations, and some detainees cope relatively well. However, the majority become demoralised, anxious and dysphoric, and at least half, after a year of detention, develop debilitating symptoms of depression, anxiety and a degree of cognitive impairment. A significant minority lose any hope for and interest in their future and experience suicidal thoughts. A small number develop psychotic symptoms and a loss of contact with reality in ways detrimental to their capacity for rational thought (this number while small is significant in the context of low prevalence rates of psychotic disorders in refugee populations).

The aetiology of psychological decline has a number of components, the influence of each varies between individuals, but there is sufficient uniformity to be able to suggest the following general set of variables.

*The conditions of detention become increasingly less tolerable over time.*

As already suggested, all the conditions which make detention a difficult place for a vulnerable person become increasingly difficult to cope with over time. The sense one is being incarcerated without just cause, the indefinite term of detention, the control exerted over the minutiae of one's life, the lack of privacy, the monotony and lack of worthwhile activities, the isolation and difficulty communicating, exposure to acts of violence, growing tensions with other detainees and with detention officers – all these circumstances undermine the asylum seeker's psychological well being over time.

### *The uncertainty associated with status resolution and time of release from detention.*

The intensity of concern about receiving protection grows with time and particularly following the first and subsequent rejections. As commented on below the refugee determination process is often perceived as opaque, unpredictable and unfair by many after their rejection. Anxieties about repatriation and consequent life threatening dangers increase. Frustration, fear and anger about the prospect of seemingly interminable detention grow. The indeterminate length of detention has the effect of making it increasingly difficult to imagine a time in the future when he or she is not detained. Pacing oneself and measuring out the remaining days and months is not possible.

### *Concern for family*

Many asylum seekers are able to have intermittent contact with their families, some cannot contact them. Those in contact often hear unsettling news about the family's parlous circumstances related to deteriorating security in their environment or material need. Some hear news of family members being killed or disappearing. Some experience disquieting doubt and guilt about their action in leaving their family having often been urged to leave by family members who may have helped organise their flight. Many profess that the point of them of seeking asylum, even more than saving their own life, was to bring their family to safety, and now that goal has been indefinitely thwarted. They have left their family unsafe and in dire material need while they live in circumstances which, however difficult, provide for physical safety and basic material needs.

### *The defeat of the goal of achieving asylum*

Many asylum seekers expected to live in the community, and if detained, only for brief periods, and to have their claims quickly resolved. Arrival in the country of asylum was to mark the end of a long struggle to find a place of safety, and the prospect of finally having the means to provide a secure future for their family. To them of course, finding "a secure future" often means not simply economic security but a means to physically survive. For men leaving wives and children, their flight was accompanied by the promise of bringing them to safety. Leaving often involves incurring a large debt, money that was to be repaid to extended family or a smuggler through working in the country of asylum. To pay for the initial costs of flight the balance of the family's property may have been sold. Extended detention represents the defeat of expectations and raises question about whether the sacrifices were worthwhile and what else could have been done. It sometimes casts doubt on the decision to leave family exposed to dangers without whatever protection and earning capacity the asylum seeker may have been able to offer. These doubts and conflicts, in the context of forced inactivity and confinement, have a corrosive affect on the asylum seeker's morale.

### *The absence of worthwhile activity*

The progressive loss of a daily routine of worthwhile activities is the typical pattern. There are few activities with a purpose available in detention facilities. English lessons and exercising are available and most asylum seekers participate in these early in their detention. These activities occupy a small part of the day and the rest of the time is spent wiling away the hours. Some detainees lose interest in English classes because they are not pitched at the right level. Only one level of English has often been all that is taught. Besides this, the reason for falling participation rates after the first few months include that detainees begin to lose the ability to concentrate and retain information and find attendance futile; they become dejected and restless and have difficulty sitting in a class room; they lose interest in most activities due to depressed mood; and they begin sleep during the day. The result is that the majority of asylum seekers after more than a year's detention do not attend classes consistently, and have no other purposeful activity in their day. Lowered mood, associated cognitive impairment, demoralisation, and sleep-wake cycle reversal erode the ability to maintain any worthwhile routine. The asylum seeker's interest in seemingly endless pursuit of distractions such as billiards, volleyball and the internet becomes desultory and daily life becomes unstructured and feckless with little demarcation between day and night and nothing distinguishing one day and the next.

Despite the obstacles, some asylum seekers make a concerted effort to maintain a routine by spending time privately learning English, observing prayer times, writing emails to friends and exercising regularly. After an extended period of detention, however, this tends to be the exception.

It is notable that arrangements in many prisons provide more opportunity for worthwhile activities including work of various kinds and the possibility of study through an external educational institution. Although administrative and purportedly non-punitive, in this respect conditions in immigration detention centres are inferior to that of many prisons.

### **Suicidality and Self Harm**

There were reportedly about 1100 incidents of self harm in 2010 by detained people<sup>7</sup>. During the financial year to 4 February 2011, 158 people were involved in acts of self-starvation<sup>8</sup>. From mid November 2010 until 28 February 2011 there were 107 incidents of self harm within detention facilities<sup>9</sup>. Any act of self harm or attempted or completed

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<sup>7</sup> The Age, *Concern over rising number of detainees selfharming*. p5, 30 July 2011.

<sup>8</sup> Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011 (response to Senator Cash, 11 March 2011, correction to an error of fact).

<sup>9</sup> Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011 (190, Senator Cash)

suicide has to be understood according to its individual circumstances. Some acts of self harm are largely a product of serious mental illness; others can arise from combinations of despair, hopelessness, anger and protest. Mental illness and a wish to demonstrate against a perceived injustice can co-exist. Some acts may be carefully deliberated political protest or may emerge out of guilt and despair. One sees all these factors operating among detained asylum seekers. However the prevalence of suicidality and self harm appears to be markedly elevated compared to community norms, rates in prison populations, and perhaps most pertinently, rates among asylum seekers in the community. Both the rate and the nature of self harm of detained asylum seekers is not observed among asylum seekers living on bridging visas in the community. Although comparative prevalence studies have not been undertaken, the strong impression among clinicians experienced in working with asylum seekers is that mental illness is more prevalent in the detained population. However it is unlikely that mental illness prevalence differences alone explain higher rates of self harm among detainees. Feelings of hopelessness, demoralisation and powerlessness, common among detained asylum seekers, make a significant contribution. For some, harming their body is the only way to communicate their desperation and to exert some pressure on the system. For others the act is entirely self directed, an attempt to relieve an unbearable tension often involving the infliction of pain. A further influence is the social environment. At times, particularly when the detained population contains a number of long term detainees in crowded conditions, a detention centre becomes a community of despair. Acts of self harm acquire a performative and communicative purpose within the detained community. Some asylum seekers come to hold the belief that decisions regarding release from detention and the conferral of a visa is totally arbitrary and the only way to influence it is through self harm or disruptive protest.

In summary, mental illness, feelings of hopelessness, despair and powerlessness, a need to protest against perceived injustice, and a social environment in which self harm has acquired a communicative currency, may each play a greater or lesser role in the individual instance of self harm.

*The use of seclusion as a response to suicidal detainees.*

There have been recent reports that suicidal detainees or those acting in an aggressive or disruptive way are being placed in seclusion at the Christmas Island IDC<sup>10</sup>. The use of seclusion in managing a mentally ill person is highly regulated and used sparingly in psychiatric settings. For example under the Victorian *Mental Health Act 1986* it must be used only under very specific circumstances, must be approved by the authorized psychiatrist, and the secluded person must be assessed every 15 minutes by a nurse and four hourly by a medical practitioner. A report to the chief psychiatrist must be prepared every month regarding each person held in seclusion. It was a finding of the

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<sup>10</sup> Long Term Christmas Island detainee sleeping in mock grave, *The Australian*, 11.8.2011 p 5.

Palmer Report<sup>11</sup> that “management units” employed for behavioural control had been employed in ways that were contrary to detainees’ rights and well being and that they were non-therapeutic and punitive. In the past, seclusion has not been adequately regulated, and was an entirely inappropriate response to conduct which was a consequence of distress, suicidality or mental illness. It most often exacerbated the underlying condition which gave rise to the behaviour leading to the seclusion. It is unconscionable that this practice may be reinstated.

### **The consequences of decline in mental health during detention**

A decline in psychological well being in the detained asylum seeker causes distress and suffering. Some fear they are going mad, and will not have the mental wherewithal to carry through their aim of finding asylum and bringing their family to safety. Those who are deeply affected by pre-migration trauma, do not possess the security needed to commence their recovery.

Functional debilitation accompanying a decline in mental health robs the asylum seeker of their means of coping with their situation. They less successfully occupy and distract themselves from their manifold worries. Impaired concentration and reduced energy and motivation undermines participation in classes, physical exercise and social activities. The asylum seekers’ ability to observe their faith, for many an important way of maintaining culture and identity, is reduced by impairment in concentration – it is common for anxious and depressed asylum seekers to complain that they become confused during their prayers and lose the ability to fluently recite them. Prayer becomes another frustration rather than a source of strength.

A major depressive disorder can impair attention and short term memory and introduce biases and distortions in the recollection of personal history. Anxiety disorders can reduce concentration and short term memory. Post traumatic conditions often result in an inability to accurately recollect or describe traumatic events. Suffering from a disturbed mental state, therefore, may disrupt an asylum seeker’s capacity to coherently and consistently put their claims through instructions to their lawyer and at refugee status interviews. These effects, according to the severity of the disorder, may be subtle or conspicuous. They more often compromise the asylum seeker’s ability to provide a detailed and consistent account of their experiences than render them “unfit to testify”. The mental state of the detained population has significant implications for procedural fairness in status resolution, which I believe have not been fully acknowledged. Adding to the potential for unfairness is that for the vast majority of cases in the offshore process the decision maker does not have the benefit of a psychological report describing the applicant’s mental state, even when this might be needed to understand the capacity of the applicant to present his or her claims.

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<sup>11</sup> Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, July 2005, ppixiii,xxi,57-60,89-91.

The poor mental state of many detained asylum seekers has other implications for status resolution. Asylum seekers must make difficult decisions about whether to pursue judicial review and when their options are exhausted, whether to accept voluntary repatriation. Approaching such important questions rationally and realistically is undermined by disturbed mental states which may produce rigid, inflexible and narrowly focused thinking.

Historically, the vast majority of detained asylum seekers have been found to be refugees. If the asylum seeker embarks on the challenges of settlement hampered by a mental illness, adaptation is that much more difficult and the strong ambition most refugees possess to make a success of their new life is thwarted. The effects of detention induced psychological difficulties on the ability to work and re-establish family and social life have been described<sup>12</sup>.

### 3. Challenges and Shortcomings in Mental Health Service Delivery

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Mental health services provided to detainees have been criticised in the past for being poorly coordinated, lacking the necessary expertise, and failing to implement the recommendations of expert opinion of mental health professionals external to the centres<sup>13</sup>. A much improved service is now delivered through the contracted provider, International Health and Medical Services. There is now systematic screening for mental health problems upon the reception of the detained person<sup>14</sup>, referral to external agencies for specialist mental health service intervention, torture and trauma counselling services, and an appropriate protocol for responding to suicidality. The detection of trauma history and prompt referral to a FASSTT agency is one example where practice has significantly improved – previously traumatised asylum seekers might wait months or years before a referral to a FASSTT agency was made, if one was made at all. Mental health staff employed at the facilities are in my experience skilled and dedicated while working in very difficult and often trying circumstances.

Despite the improvements, there are a number of outstanding shortcomings in mental health care. Throughout the history of mental health service delivery in immigration detention centres, the Department has chosen to contract a private provider rather than deploy the services of state public mental health services. A private provider

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<sup>12</sup> Coffey, G; Kaplan, I; Sampson, R; and Tucci, M (2010) The Meaning and Mental Health Consequences of Immigration Detention for people seeking asylum *Social Science and Medicine* 2070-2079.

<sup>13</sup> See eg, *S v Secretary, DIMIA* [2005] FCA 549.

<sup>14</sup> “Under DIAC’s policy on mental health screening for people in immigration detention, IHMS does initial screening within 72 hours of a person’s arrival, and a mental health assessment within a week. People in detention can request an appointment at any time, and DIAC, Serco or IHMS staff can flag concerns that a person may be in need of mental health care or treatment: Australian Human Rights Commission (2010) *Immigration Detention on Christmas Island* .

cannot offer the range of expertise available in public mental health services. There is a shortfall in access to specialist mental health care in all centres. On Christmas Island there is no psychiatrist available and limited access to specialist mental health services<sup>15</sup>. In relation to trauma counselling services, three counsellors have been available to respond to a population of over two thousand detained asylum seekers, a high proportion of whom have histories of trauma. Other facilities, both remote and metropolitan, have limited access to psychiatric care. As described below, with the exception of the metropolitan centres, trauma counselling services do not come close to meeting the need. The mental health services available at all detention facilities fall well short of the range of psychiatric, clinical psychological and multidisciplinary care available to the general community and considerably less than what can be delivered to an asylum seeker living in the community. Referrals to state services tend to occur only when the detainee has become severely mentally unwell and may require hospitalization. The threshold for the engagement of state services is therefore far higher than for someone living in the community. In some instances this has led to mentally ill detainees not receiving the treatment they require.

I believe that less reliance should be placed on private providers and that state mental health services should be more actively involved in service provision to detainees through becoming integrated into service delivery. It may be that a funded and dedicated team from within state services is required. This is a model that exists in some correctional facilities.

An important caveat needs to be added to any discussion on the adequacy of mental health care for detained people. No matter how adequate the treatment provided, the evidence is that many detainees' mental health continues to deteriorate. This is because it is the detention environment itself that is the primary cause of the deterioration and psychological and psychiatric care in this context is at best often only a partially effective treatment. It should be underscored that the typical decline in mental health over time occurs *despite* the best efforts and interventions of available mental health services.

### *Challenges for mental health staff*

Delivering a mental health service within an immigration detention centre provides some unique challenges<sup>16</sup>. Not least of these is that treatments are very often ineffective or at best palliative, assisting in slowing further deterioration. Staff work largely in isolation from the broader network of mental health services. They do not receive the supervision they would obtain in a public mental health setting. Engagement

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<sup>15</sup> See Australian Human Rights Commission (2010) *Immigration Detention on Christmas Island*. 6, 47-50

<sup>16</sup> See Coffey, G (2006) "Locked Up without Guilt or Sin": The Ethics of Mental Health Service Delivery in Immigration Detention *Psychiatry, Psychology and Law* vol 11, No 1.

with detainees can be compromised when mental health staff are thought of as belonging to the system which is holding them captive, and are therefore distrusted. Mental health staff are involved in a range of ethically complex roles such as monitoring detainees engaged in self harming forms of protest and assessing detainees for the purpose of community detention or fitness to be removed.

#### **4. The Implementation of Policy in Relation to Specific Groups: Survivors of Torture and Trauma, and Children.**

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In his “New Directions” speech of 29 July 2008 Senator Chris Evans set out the values which were to guide immigration detention policy. These values continue to have the status of policy principles. The Senator noted that “[t]he impacts on both the physical and mental health of the detainees are severe”. He asserted that a risk management approach should inform the decision to continue to detain, and where the detained person poses no risk to the community, he or she should no longer be detained. Senator Evans said that under the new policy “[t]he department will have to justify a decision to detain – not presume detention”, and that “[c]urrently, detention is too often the first option, not the last”. Seven “key immigration detention values”<sup>17</sup> were described which included both the need to maintain mandatory detention and to ensure “[d]etention in immigration detention centres is only to be used as a last resort and for the shortest practicable time”. The latter aim was therefore regarded as entirely compatible with mandatory detention and border protection. As a consequence of this approach a number of further policies were enunciated which provide for the release of vulnerable individuals into the community.

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<sup>17</sup> The Government’s seven key immigration detention values are:

1. Mandatory detention is an essential component of strong border control.
2. To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
  - a. all unauthorised arrivals, for management of health, identity and security risks to the community
  - b. unlawful non-citizens who present unacceptable risks to the community and
  - c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).
4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6. People in detention will be treated fairly and reasonably within the law.
7. Conditions of detention will ensure the inherent dignity of the human person.

## ***Survivors of Torture and Trauma***

In early 2009 the Department adopted a policy toward detained people who are survivors of torture and trauma which was promulgated in the document, “Identification and Support of People in Immigration Detention who are Survivors of Torture and Trauma”. The stated objective of this new policy is to identify detained people with histories of torture and trauma as early as possible; to ensure they receive assistance from appropriate services expeditiously; and to place them in the community following consideration of health, character and security, and where this is not possible, in the least restrictive form of detention possible. The document acknowledges that immigration can “exacerbate any vulnerabilities” associated with torture and trauma experiences, and states emphatically that:

*“Continued accommodation of survivors of torture and trauma in an immigration detention centre is only to occur as a measure of absolute last resort where risk to the Australian community is considered unacceptable”<sup>18</sup>*

The mechanisms through which the risk management approach was to be implemented are described in a further set of policy documents. Pursuant to s 197AB of the *Migration Act 1958* the Minister can exercise a power in the public interest to place an unlawful non-citizen into detention in the community. A Procedural Advice Manual<sup>19</sup> sets the Minister’s guidelines in relation to exercising his “residence determination” power. The guidelines state that the Minister will make a residence determination when he considers “it to be in the public interest to do so, having regard to the Government’s Key Immigration Detention Values”.

In a number of detention facilities the policy objectives in relation to the early identification of people who have experienced trauma have been successfully implemented. This is a singular achievement considering the extent this aspect of care was neglected previously. With regard to the purpose of such identification – to connect the detained person with appropriate services and to move them into the community wherever possible, this has met with less success. At Maribyrnong IDC, our experience is that prompt referral to Foundation House is made upon identification of trauma history which usually occurs soon after the asylum seeker is placed in the centre. At Maribyrnong there have never been more than about 50 people with experiences which require referral, and there are often fewer than this. At the Curtin, Darwin and Christmas Island detention facilities the numbers of people who could be appropriately referred are overwhelming in relation to available services. On Christmas Island a team of three trauma counsellors have provided a service to a detained population on the

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<sup>18</sup> “Identification and Support of People in Immigration Detention who are Survivors of Torture and Trauma (version 1, 3 April 2010, p 3.

<sup>19</sup> Ministerial Guidelines, Residence Determination Powers, PAM3, 3.1.1.

Island that exceeded 2400 between mid 2010 and February 2011. Similarly at Curtin, Darwin and Scherger about three counsellors have provided trauma counselling for large populations. Besides the difficulties inherent in delivering trauma counselling to detained people, the ratio of asylum seekers to available counsellors mean the service can only be delivered to a small portion of people who require it.

The progress made in early identification of traumatized asylum seekers was a precondition to achieving the objective of moving these people rapidly into the community. With the recent exception of families and children, rapid community placement has not happened. For reasons that require explanation, over the past two years, the vast majority of the very large number of asylum seekers who have been identified early in their period of detention as suffering from histories of trauma and often quite severe post traumatic sequelae of their experiences, have not been placed in the community through residence determination or the conferral of a bridging visa. What has typically happened in my experience is that asylum seekers have their traumatic histories identified earlier in their detention; in some centres at least they will then be referred for counselling to a torture and trauma counselling service; but that referral for consideration for residence determination does not occur for many months, sometimes not for a year to eighteen months. Many traumatised asylum seekers arrive at Maribyrnong IDC having been detained in other facilities, usually Christmas Island and Darwin for over a year, having not been referred for community detention. In Melbourne, once referral has occurred, placement in the community often takes six months or more. On Christmas Island I am informed that referral for residence determination is sometimes made by Departmental case managers but community detention, which would could only be effected by transfer to the mainland, has rarely occurred.

Exactly why there has been such a chasm between stated policy and practice in relation to community detention requires investigation. It appears, based on what is observable and on discussions with Departmental officers, that the criteria for consideration for community placement does not accord to stated policy at all. Instead, consideration is based on guidelines with a number of criteria including whether the person has been detained for an extended period, and whether their mental health has deteriorated. A history of trauma in itself has been insufficient to trigger consideration for community detention. This approach to the Minister's residence determination power is entirely inconsistent with a risk management approach where the onus lies with the Department to demonstrate why detention in a detention facility is necessary. In effect what this approach does, perversely, is make the criteria for granting of residence determination the consequences which the policy was designed to avoid.

## **Children.**

The imperative to ensure arrangements are made for the humane care of child asylum seekers has many sources in law including international convention obligations<sup>20</sup>, guardianship law for unaccompanied minors<sup>21</sup>, and state child welfare and protection legislation. One of the current government's "key immigration detention values" is that "children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre". Section 4AA(1) of the *Migration Act* establishes that:

The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

Section 4AA(2) provides that the principle is not intended to extend to residence determination arrangements.

This principle has been contravened by the detaining of large numbers of children in alternative places of detention. From mid 2009 numerous children have been detained under these arrangements in facilities such as the Alternative Place of Detention on Phosphate Hill, Christmas Island, and then on mainland facilities such as the Melbourne Immigration Transit Accommodation (MITA). As at 14 January 2011 there were 1040 children in detention facilities and 25 children in residence determination<sup>22</sup>. Human rights obligations, guardianship responsibilities in relation to unaccompanied minors, and the Section 4AA principle have all been contravened by these arrangements. In 2005, Parliament introduced the principle of avoiding the detention of children except in the community out of belated recognition that immigration detention causes them serious harm. The current government's approach of avoiding the placement of children in immigration detention centres, but holding them in other facilities would appear to neither comply with the law governing these children nor succeed in avoiding harm. Informed opinion has never considered it the case that harm to children could be avoided by detaining them in less prison like facilities than the detention centres. Incarceration and the deprivation of liberty for extended periods, the absence of normal social life and educational opportunities for children who may be traumatised and without family is likely to cause distress and among some will cause significant harm. The evidence is that many children in the past two years have become despairing and withdrawn, and a considerable number have developed psychological disorders<sup>23</sup>. Self harm which often occurs with the awareness or direct observation of other children regularly occurs. In just over three months from mid November 2010, there were 10 incidents of self harm at the

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<sup>20</sup> For example, the Convention on the Rights of the Child.

<sup>21</sup> *Immigration (Guardianship of Children) Act 1946*.

<sup>22</sup> Community and Detention Services Division, DIAC - As at 14 January 2011.

<sup>23</sup> The Victorian Foundation for Survivors of Torture over the past 18 months have had extensive experience with children detained at the Melbourne Immigration Transit Accommodation.

MITA<sup>24</sup> which as at January 2011 held 129 unaccompanied children<sup>25</sup>. The presence of parents is obviously protective, but detention facilities often do not afford the opportunity for normal domestic life and parents if themselves affected by extended detention become unable to provide for their children as they otherwise would.

The announcement by the Minister for Immigration and Citizenship, Chris Bowen, on 18 October 2010 that a majority of detained children would be moved into community detention by mid 2011 has been from a humanitarian and mental health perspective, one of the most important immigration detention policy developments in recent times, and one, contrary to many prior policy commitments, which has been acted upon. By early July 2011, 62% of children had been moved in community detention<sup>26</sup>.

## 5. Refugee Status Resolution, Security Assessments and Complementary Protection.

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### *Refugee Status resolution*

I will not comment here on the quality of the decision making in the offshore non-statutory process, but I will focus on how it is experienced by detained asylum seekers. The timeliness of an administrative decision is integral to its fairness. In the context of protection applications, this was acknowledged by Parliament when in 2005 it inserted sections 65A and 414A into the *Migration Act* requiring the Department and Refugee Review Tribunal to make decisions on receipt of an application within 90 days. The resolution of some offshore applications has been subject to very long delays to the considerable confusion and frustration of the applicants. For example, some asylum seekers have waited between six months and a year after a primary refusal before being notified of when their review will be. Merits review decisions have been received as long as 14 months after initial detention. This is a very large departure from what Parliament considered reasonable for onshore applicants. An Estimates hearing heard that the mean time for completion of IMR decisions was 17 weeks from the time of application for the period October 2008 to 28 February 2011.<sup>27</sup> There would seem to be considerable variation in processing times however. Besides prolonging detention, protracted status resolution causes loss of confidence in the process. Some asylum seekers feel they have been forgotten about or overlooked.

Adding to uncertainty about what is transpiring with applications is the apparently parsimonious contact some asylum seekers appear to have with their migration agents.

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<sup>24</sup> Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011, Additional Estimates (190, Senator Cash)

<sup>25</sup> *Community and Detention Services Division, DIAC - As at 14 January 2011*

<sup>26</sup> Minister for Immigration and Citizenship media release, 29 June 2011, at <http://www.minister.immi.gov.au/media/cb/2011/cb167699.htm>

<sup>27</sup> Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011, (296, Senator Cash)

What the actual amount of contact is I can't comment upon, but many asylum seekers who are waiting for a decision or for a merits review hearing have said they have not had contact with their agent for months. Agents are often interstate and communication can only occur by telephone via an interpreter. Some asylum seekers state that they are told of a negative protection decision by an officer in the detention centre, and some time later they will have a brief telephone conversation with their agent which leaves them none the wiser as to why their claims were rejected. Again, it is possible that in many of these instances the reasons for the decision were clearly if briefly stated, but the asylum seeker has forgotten those reasons, or didn't understand them in the first place. Most are unable to read the decision record and some have told me it was read to them by a detained compatriot with some English. The upshot is that many have a minimal comprehension of why their application has been unsuccessful. The absence of information foments alternative theories about what has gone wrong; they include such notions as the bias of a particular decision maker involving a dislike of outspoken asylum seekers or those who are too quiescent or too educated; too much or not enough advocacy by supporters; the provision of false information by compatriots to the Department - and the theories extend to more fanciful ideas still such as the direct intervention of a foreign national government in the asylum seeker's case.

#### *Security Assessments.*

Many asylum seekers regard security assessments with trepidation owing to how they were treated by the security apparatus of their national governments. One man told me with surprise and relief, that the ASIO officers "did not once raise their hand". The lengthy interviews by the AFP and ASIO and the time taken to finalise the assessment influence the views some asylum seekers have of the status resolution process. AFP interviews often take 10 hours, sometimes more. ASIO interviews typically take a few hours. Offshore primary and merits review interviews vary from 45 minutes to 3 hours. Some asylum seekers, particularly those unhappy with how their protection application interviews were conducted, feel more emphasis has been placed on interrogating them regarding people smuggling operators and security related issues, than thoroughly assessing their need for asylum. Having sought protection from persecution, sometimes even crimes against humanity, they feel they are suspected of criminality.

However, the aspect of the security assessment which causes most grievance is the length of time taken in some instances to complete an assessment, and among the small number of asylum seekers whose assessment was adverse, the withholding of reasons for that finding. I will address each of these issues in turn. As at 21 February 2011, about 900 detained asylum seekers who had been found to be refugees were waiting for a security clearance<sup>28</sup>. Some asylum seekers continue to wait for finalization of security

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<sup>28</sup> Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011, Additional Estimates (Garry Fleming).

assessments 20 months after a finding that they are refugees<sup>29</sup>. Of those whom I've assessed in this category, their mental health has declined precipitously, they have been perplexed about what the security concerns could be, and they have developed various unrealistic, conspiratorial ideas about what is occurring. The writer does not pretend to have any understanding of what is entailed in making a thorough security assessment. A few common sense observations can be made however. Firstly, whether due to resource shortages or other reasons, the delay in finalising security assessments is unacceptable. It is compounding mental health difficulties and obstructing people who have demonstrated their need for asylum from beginning to put their experiences of persecution behind them and starting their new life. Often they are held in detention while security checks are finalised for periods which are comparable to custodial sentences for serious crimes. If the time taken to complete a security assessment reflects the rigour with which they are conducted, it raises the question of why the means by which an asylum seeker arrives in Australia determines the thoroughness by which security is investigated. Having represented many asylum seekers who arrive with a Student or Visitor's visa from countries such as Iran and Pakistan, it is striking how comparatively slight the investigation is of their histories prior to coming to Australia and living in the community. Many were not interviewed at an embassy about security related issues at all. Visas are often granted within a few months. Having lodged protection claims after their arrival, they appear then to be assessed through the same thorough and sometimes lengthy processes as their detained compatriots. The relevant point here is that they are living in the community while the thorough assessment is conducted. It is difficult to imagine why this group prima facie pose a different level of potential risk than their compatriots who remain in detention while their assessments are completed.

For Australian citizens and permanent residents, s 37(2) of the *Australian Security and Intelligence Organisation Act 1979* (the 'ASIO Act') provides that any adverse security assessment shall be accompanied by a statement of the grounds for the assessment, and that statement:

- (a) shall contain all information that has been relied on by the Organisation in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security...

Section 54(1) of the ASIO Act grants a right to have adverse security assessments reviewed at the Administrative Appeals Tribunal. However the effect of s 36(b) of the ASIO Act is to deny procedural fairness (qualified as it is by the Director-General's

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<sup>29</sup> As at 4 February 2011, 9 people had been detained for more than 18 months who had been found to be refugees: Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011, (103, Senator Hanson-Young)

power) and a right of review to people who are not citizens or permanent visa holders<sup>30</sup>. Consequently this leaves adverse security assessed asylum seekers completely ignorant of the grounds for the assessment. The result of an adverse security assessment for an asylum seeker who has been found to be a refugee could not be more grave: they are denied protection which they would otherwise be owed, and they are denied their liberty for an indefinite, possibly interminable period. In these circumstances to deprive the asylum seeker procedural fairness to the extent compatible with national security, should be considered unconscionable and contrary to the administration of justice. There would appear to be no sound jurisprudential or practical reason why an asylum seeker (and other people who hold temporary visas or are unlawful non-citizens) should not be accorded the same access to procedural fairness in relation to security assessments as a permanent resident. National security cannot be the basis for withholding procedural fairness rights from asylum seekers. Regardless of the residency status of a person subject to an adverse security assessment, the Courts have held that despite the importance of according an applicant procedural fairness for the rule of law, this right must yield to the extent that the public interest in national security requires<sup>31</sup>.

### *Complementary protection*

Until the Migration Amendment (Complementary Protection) Bill 2009 becomes law, onshore protection applicants continue to rely on requests under section 417 of the *Migration Act* to have non-refugee convention grounds for a visa considered. One of the objectives of the Bill is:

to establish a fair, transparent and robust system for considering complementary protection claims that will both enhance the integrity of Australia's arrangements for meeting its non-refoulement obligations and better reflect our longstanding commitment to protecting those at risk of the most serious forms of human rights abuses<sup>32</sup>.

The process in place for consideration of non-refoulement obligations for offshore protection applicants is the "International Treaties Obligation Assessment". This process, unlike requests made for the Minister's intervention under s 417 has no publicly available guidelines associated with it and the way it is conducted is opaque. It is incongruous that this form of assessment of non convention claims was introduced when the limitations of the s 417 approach were acknowledged through the proposed reforms in the Complementary Protection Bill. The offshore assessment is less transparent than the existing onshore process and its coverage appears to be narrower

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<sup>30</sup> A person who holds a special purpose visa or special category visa also possesses the rights conferred by ss 54(1) and 37(2): s 36(b)(iii).

<sup>31</sup> See discussion in *Sagar v O'Sullivan* [2011] FCA 192

<sup>32</sup> Migration Amendment(Complementary Protection) Bill 2009, Explanatory Memorandum.

insofar as the Ministerial Guidelines on Ministerial Powers<sup>33</sup> have regard to “[t]he public interest [which] may be served through the Australian Government responding with care and compassion where an individual’s situation involves unique or exceptional circumstances”<sup>34</sup>. There is reason to be concerned that offshore applicants whose circumstances fall within the range of non-refoulement and compassionate “unique or exceptional” circumstances set out in the ministerial guidelines may nonetheless be repatriated. There have been offshore failed asylum seekers who if assessed under the onshore statutory system would fall squarely within the ministerial guidelines. It appears however that the Minister has rarely if ever intervened on the basis of a recommendation consequent upon an International Treaties Obligation Assessment.

## 6. Protests and riots at immigration detention facilities.

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I do not have first hand experience in directly witnessing or investigating riots or mass protests, so my comments in this section are brief. Unlawful conduct by detained asylum seekers attracts a lot of attention but involves a small proportion of the detained population. Nonetheless there have been many incidents affecting the welfare of people in detention and the order of the facilities. In the financial year to 28 February 2011 there were 3431 “reportable incidents” in the detention network, 850 of which involved “an incident or event which critically affects the good order and security of the facility or where there is serious injury or a threat to life”<sup>35</sup>. I have assessed many people who have been implicated in protests during which property has been destroyed. A point that perhaps shouldn’t need to be made, but must be owing to the current climate of debate, is that the act of property destruction or threatening conduct is almost invariably a product of the asylum seeker’s immediate circumstances. Those asylum seekers who were involved in illegal conduct while detained and who I have provided psychological treatment to following their release have been law abiding members of the community and have shown no propensity for acts of destructiveness or violence. The psychological reactions to protracted detention have been described: the levels of anxiety, frustration, despair, and confusion; the widely held belief that status resolution is arbitrary and unfair; the indefinite term of detention which provides nothing tangible to wait for; the inevitable tensions that emerge when a large number

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<sup>33</sup> Procedural Advice Manual 3, as at 1 July 2011.

<sup>34</sup> Ibid.

<sup>35</sup> Senate Legal and Constitutional Affairs Legislation Committee, 21 February 2011, (195, Senator Cash).

An incident is defined under the Detention Services Contract as an activity which threatens, harms or impacts, or has the potential to threaten, harm or impact upon:

- (i) the welfare of people in immigration detention;
- (ii) the good order, safety or security of a Facility or place of Alternative Detention;
- (iii) the success of escort/transfer/removal activities; or
- (iv) immigration processing.

of predominately young men from diverse cultures are confined in crowded conditions under the control of officers with whom they often cannot communicate – these dimensions of the situation probably explain much of the disturbance and unlawful conduct that some asylum seekers have engaged in. Once it commences unlawful conduct appears to gain some momentum through the dynamics that will operate among an isolated and information deprived group of people. Pressures are brought to bear for non participants to become involved in protest. A combination of a distrust of and ignorance about processes of status resolution, and misinformation and misperception of cause and effect, lead some asylum seekers to believe that unlawful conduct is the only way to be released from detention. A number of asylum seekers who have resisted becoming involved in any kind of protest have said to me that those who are disruptive fare better in their status resolution.

## **7. Conclusions and recommendations.**

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The promise of the New Directions in Detention statement has not been fulfilled. The values set out in the statement have informed policy, but in large measure have not guided practice. The consequence has been protracted detention for thousands of asylum seekers. This submission describes the psychological consequences of current practice of detaining asylum seekers for extended periods. Knowledge gained over the past 20 years in relation to the psychological consequences of immigration detention should have made what we have witnessed in the past two years highly predictable.

If the government's intent remains in the "New Directions" statement's words to "implement values that seek to emphasise a risk-based approach to detention and prompt resolution of cases rather than punishment" then the reasons for the chasm between policy and policy need to be identified. A major contribution to the problem is that precisely what constitutes a risk management approach has not been articulated, and in its absence, completion of status resolution, including the finalization of ASIO security assessments, has been the only basis upon which the vast majority of detained asylum seekers have been released from detention. Virtually the entire detained asylum seeker population since the New Directions statement have remained in immigration detention facilities until granted a visa. The failure to move traumatised asylum seekers out of detention centres has occurred despite the early identification of their traumatic history and the frequent presence of post traumatic psychological sequelae of that history; contrary to repeated recommendations by mental health clinicians and trauma counsellors that continued detention is causing harm; and notwithstanding explicit government policy that expeditious placement in the community must occur whenever possible. Until recently, the vast majority of children arriving by boat have been detained in detention facilities despite the statutory principle that the detention of

children should be a last resort, and explicit policy to the same effect, and without regard to, in the case of unaccompanied minors, the Minister's guardianship responsibilities. The transfer of the majority of children detained in detention facilities into community detention over the past 9 months has been a belated but laudable implementation of policy. The ability to move children and their families at short notice into community accommodation demonstrates that this is something which is possible to do for the detained adult population of asylum seekers. The barriers to doing so have been volitional and political rather than practical.

This submission concludes with the following recommendations.

1. A risk management approach to immigration detention should be enshrined in legislation and the means by which the principle is to be implemented should be precisely set out in regulations and policy guidelines. The level of restriction placed on an asylum seeker whose arrival is unauthorised should be strictly evidence based and informed by the following:
  - a. The frequency with which historically asylum seekers and refugees of particular categories have posed a substantial risk to the Australian community.
  - b. The outcome of an initial identity and security screen.
  - c. A presumption that in the vast majority of cases monitoring in the community will be sufficient to protect the Australian community. Reporting requirements should be set at a level commensurate with any adverse security information. Asylum seekers should not be detained while security assessments are completed unless the presumption that they can safely reside in the community is rebutted by evidence.
  - d. The results of ongoing identity and security assessments should influence the level of monitoring required.
2. When detention is deemed necessary for security reasons, this decision should be judicially reviewable.
3. Asylum seekers should be granted bridging visas with work rights while they wait for the resolution of their status.
4. If, contrary to (3), residence determination is to be the main mechanism for placing asylum seekers in the community, the process for conferring it needs to be streamlined. The "expanded program"<sup>36</sup> which has enabled children to be placed into community detention relatively expeditiously in the past 9 months demonstrates that the process can be made more efficient. The Minister's power to grant residence determination should be able to be delegated. The current program for adult asylum seekers completely fails to implement a risk

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<sup>36</sup> Children and their families have been placed in community detention by means of an expedited process, the so-called "expanded program" which has not applied to single adults.

management approach, or to avoid the protracted detention of vulnerable people for whom detention is required by policy to be a last resort.

5. Mental health services and trauma counselling services need to be better resourced to meet the needs of large populations of detained asylum seekers. State public mental health services should be integrated into service delivery within detention centres. In providing for the mental health needs of vulnerable asylum seekers, it should be acknowledged that generally, and increasingly with time in detention, it is not possible to adequately treat mentally ill people while they remain detained.
6. The protection claims of all asylum seekers should be considered according to the statutory framework of the *Migration Act*.
7. If (6) is not implemented, resources should be in place for “offshore” status resolution to ensure that the statutory time frame for onshore processing of 90 days is adhered to.
8. The consideration of complementary and humanitarian grounds for granting a visa for asylum seekers in the offshore process should not be less transparent and narrower in scope than what operates under the statutory regime.
9. The ASIO Act should be amended in order that non-permanent residents including asylum seekers are provided with the same procedural fairness and rights to review upon receiving an adverse security assessment as permanent residents and citizens.

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