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*In 1951 the United Nations convention for the protection of refugees came into force. The world realised the mistakes of the 1930s, when many Western nations turned their backs on Jews fleeing persecution in Germany. Collectively, we said, "Never again". I am sure that all of us involved in public life would like to think that we would have done the right thing in those circumstances and stood up for those facing the worst of circumstances, regardless of whether it was popular or unpopular.*

*What future is there for children in detention? We hear a lot about how important it is to read to our children, to ensure that they are nurtured and to ensure that they have access to resources for a much better chance at life. What future are we delivering to these children? What message will we be sending to them? How will they feel about Australia? An Australia that kept them in detention in their early years? We can only hope that they realise that it is this government that is making them unwelcome, not this nation.<sup>1</sup>*

Minister for Immigration Chris Bowen, 10 August 2006

<sup>1</sup> <http://www.chrisbowen.net/media-centre/speeches.do?newsId=2061> Accessed 4 August 2011

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## **About Liberty Victoria**

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au)

Liberty Victoria has been concerned with the welfare of asylum seekers for many years, and welcomes the opportunity to submit to the Joint Select Committee on Australia's Immigration Detention Network.

As a fundamental premise, Liberty Victoria believes that the policy of mandatory indefinite detention should be abolished. This submission operates on that basis, and also provides alternative measures and recommendations should the abolition of mandatory indefinite detention not be adopted by the Committee.

## Overview

There are numerous visible signs that the immigration detention system is not working properly. Presumably, this Committee is at least in part a response to those signs. In recent times there have been serious disturbances in detention centres, including the significant destruction of property at Villawood. Protests about processing delays, complaints concerning overcrowding and so on have all been regular features of the immigration detention system in recent years. In the months preceding this submission, lip-sewing and hunger strikes among detainees have started up again with renewed vigour. Even if these self-harm measures had never been seen before, they would not be surprising. They were, however, a constant feature of immigration detention from about 1999 to around 2003.

Three facts, as outlined below, stand out as fairly obvious explanations for the prevalence of self-harm in detention.

- **It is not illegal to seek asylum**

People held in immigration detention have not committed any offence. From their standpoint, there is no obvious reason why they should be held in prison-like conditions for months or years. Most asylum seekers are likely to understand that they may be detained for a short time on arrival in a new country. After the first few months, they are likely to begin chafing with the apparent injustice of being locked up for no decipherable reason. This is a normal, and predictable, human response.

- **Exposure to chronic uncertainty**

They are held for an indeterminate time. Unlike convicted criminals, who count the days until their release, people in immigration detention cannot be told how long it will be before they will be set free. Their frustration at uncertainty is exacerbated in circumstances where some detainees see others processed and released fairly quickly, while others wait for years. The system is completely opaque to them, and for many it must look as though they may have to remain in jail (as they see it) for life. The result is chronic uncertainty, which quickly turns to hopelessness and despair. This too is a normal, and predictable, human response;

- **Unfair & arbitrary process**

Many detainees see initial rejection of their visa application as grossly unfair. In the months or years that follow initial rejection, as their cases go through the appeal and review stages, their psychological environment is one permeated with a sense of profound injustice. One

substantial cohort of boat people in recent times are Hazaras from Afghanistan and Pakistan. Hazaras are the victims of ethnic cleansing at the hands of the Taliban: this is true not only of Hazaras from Afghanistan, but also of Hazaras who have crossed into Pakistan to live in or near Quetta. Until recently, about 95% of Hazaras have had their asylum claims accepted. In recent times, however, some independent merits reviewers have been rejecting the protection claims of nearly all Hazaras. Whether the cause of this striking anomaly is ignorance, corruption or something else, it is seen by Hazaras as grotesquely unfair. A person whose immediate family has been slaughtered in their village by the Taliban, finds it difficult to understand when she is told that she does not have a well-founded fear of persecution. A profound sense of injustice in these circumstances is a normal, and predictable, human response.

All of these factors, separately and in combination, are toxic for mental health. It is little wonder that, eventually, detainees break down. When they break down they will respond in one of several ways. The most common way is to sink into profound depression, which ultimately expresses itself in self-harm. Depression is regarded as anger turned inwards. A less common response, but equally predictable, is anger directed outwards. Either way, the accumulated frustration leads detainees to damage themselves or to damage their surroundings. Self-harm and damage to property are simply a pathetic attempt to exercise what little remains of their sense of autonomy.

Most of the problems associated with the current system would be avoided or minimised if detention were no longer necessary throughout the entire processing period. In this respect, there may be an interesting lesson to be learned from the details of the arrangements recently entered with Malaysia involving an exchange of asylum seekers. As we understand the transaction which has been negotiated by Australia, asylum seekers sent from Australia to Malaysia will be detained by the Malaysian authorities for 45 days initially and will then be released into the community with work rights etc. If asylum seekers who arrive in Australia by boat were similarly held for an initial 45 days and then released into the community with work rights, a number of immediate benefits would be seen, including the:

- immediate resolution of overcrowding in detention centres;
- disappearance of mental health issues associated with prolonged, indeterminate detention;
- disappearance of difficulties which arise as a direct result of prolonged processing times;
- dramatic reduction in the cost associated with immigration detention.

A resolution of this general sort might provoke political opportunists to raise the spectre of asylum seekers disappearing into the community and forever evading the system. There are various answers to that suggestion.

First, there is an identical risk associated with asylum seekers who arrive by plane and remain in the community on bridging visas. If it has been the source of any non-trivial problems, that fact remains invisible.

Second, it is not difficult to establish a system of conditions calculated to ensure that asylum seekers released into the community remain available for the balance of their process.

Third, experience shows that, over the past 15 or 20 years, most boat people have ultimately succeeded in their asylum claims. Provided the system operates fairly, and anomalies (such as the recent changes in relation to Hazaras) are eradicated, there is very little incentive for asylum seekers to disappear.

Fourth, a system that is similar to the bail system in the criminal justice system is likely to be sufficiently effective to dispel objections of that sort.

Australia's approach to immigration detention has drawn criticism from local and international non-government organisations ('NGOs') for many years. Recent developments have caused the United Nations High Commissioner for Refugees ('UNHCR') to renew the criticisms that it made of Australia's immigration detention during the Howard years. There is apparent concern in the community that Australia's treatment of asylum seekers does not sit well with our self-image as a country. A revised approach to immigration detention would not only save the community vast amounts of money, it would also restore Australia's reputation as a country which believes that human rights matter, and which believes in the idea of a fair go for everyone.

### *Asylum seekers and refugees: determining Australia's place in the world*

Liberty Victoria regrets that the debate about asylum seekers and refugees is the subject of highly charged political discourse in Australia, often tinged with deliberate use of manipulative language and dog whistle politics — for example, that we are 'a soft target' or that we are being 'swamped by boat people' — that serve to mask the real issues in this debate. For this reason, Liberty Victoria emphasises the importance of clarifying Australia's position in relation to refugee movement in the rest of the world.

At the outset, it is pertinent to note that, whereas a refugee is someone who has had their claim for asylum evaluated and been granted refuge, an asylum seeker is someone who has a genuine fear of persecution and therefore has fled their home country, seeking protection, but whose claim has not yet been evaluated.<sup>2</sup>

## **Global context**

Liberty Victoria notes that since 2006, before the election of the Labor government at the end of 2007, Australia's share of claims for asylum steadily increased from approximately 3,500 claims to approximately 8,250 claims. However, despite this recent trend, Australia remains ranked 22<sup>nd</sup> out of 44 countries for asylum seeker claims received per capita.<sup>3</sup>

By comparison, in 2010, the UNHCR reported that Europe received 269,900 claims<sup>4</sup> and North America (the United States and Canada) received 78,700 claims,<sup>5</sup> with nations of the European Union and North America ranking in 12 of the top 15 destinations receiving asylum claims.<sup>6</sup>

## **Australia**

By contrast, from January to June 2010, 2,504 people lodged asylum claims in Australia.<sup>7</sup> This also compares to approximately 13,000 and 12,000 claims Australia received respectively in 2000 and 2001<sup>8</sup> (during the Howard government).

## *Immigration detention in Australia*

Australia has a long-standing policy of detaining asylum seekers who arrive by boat in immigration detention, first introduced by the Keating Labor government. Conversely, those asylum seekers who arrive by plane are not placed in immigration detention centres. The average number of persons held in immigration detention from 1997–98 to 2007–08 is 6,012,<sup>9</sup> with more than 4,000 held in immigration detention nationally at the moment.<sup>10</sup>

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<sup>2</sup> United Nations High Commissioner for Refugees, Asylum-Seekers (2011) The UN Refugee Agency < <http://www.unhcr.org/pages/49c3646c137.html> >

<sup>3</sup> United Nations High Commissioner for Human Rights, Asylum Levels and Trends in Industrialized Countries 2010: Statistical overview of asylum applications lodged in Europe and selected non-European countries (UNHCR, 2011) 15.

<sup>4</sup> Ibid, 5.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid, 9.

<sup>7</sup> GetUp!, Australia and asylum seekers: The myths and the facts (2010) 2.

<sup>8</sup> Ibid. This averages out to approximately 6,500 and 6,000 claims, respectively, when compared to the same period in 2010.

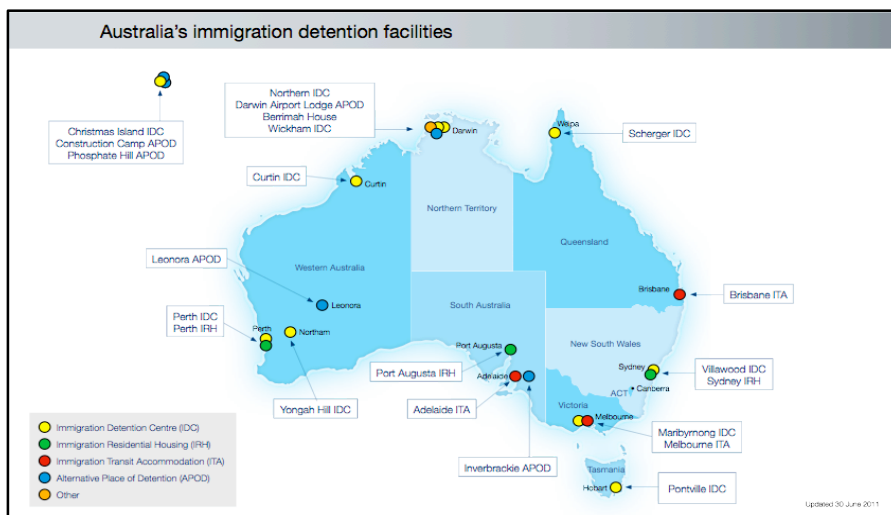
<sup>9</sup> Australian Government, Fact Sheet 82 – Immigration Detention (13 January 2010) Department of Immigration and Citizenship < <http://www.immi.gov.au/media/fact-sheets/82detention.htm> > Immigration detention statistics.

<sup>10</sup> Commonwealth Ombudsman, Australia's immigration detention values: Milestones or motherhood statements? (29 July 2011) < <http://www.ombudsman.gov.au/media-releases/show/190> >; Cf. Australian Government, Managing Australia's Borders – Statistics (undated) Department of Immigration and Citizenship < <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> > where the current immigration statistics are “temporarily unavailable” as at 6 August 2011.

Under the current regime, the Australian government operates sixteen immigration detention facilities throughout Australia,<sup>11</sup> to detain ‘unlawful non-citizens’.<sup>12</sup> Liberty Victoria is most concerned at the Australian government’s attempt to justify this by stating that:<sup>13</sup>

this requirement reflects Australia’s right to determine who is permitted to enter and remain in Australia and the conditions under which those who cannot remain may be detained and removed.

This echoes the famous rhetoric of former prime minister John Howard on the eve of the 2001 election when he said ‘[w]e will decide who comes to this country and the circumstances in which they come’.<sup>14</sup> This is the view which the current Labor government pledged to move away from when it was elected in 2007.



<sup>11</sup> Australian Government, Managing Australia’s Borders – List of Operational Facilities (undated) Department of Immigration and Citizenship < <http://www.immi.gov.au/managing-australias-borders/detention/facilities/locations/> >

<sup>12</sup> Australian Government, Managing Australia’s Borders – Background to Immigration Detention (undated) < <http://www.immi.gov.au/managing-australias-borders/detention/about/background.htm> >

<sup>13</sup> Ibid.

<sup>14</sup> John Howard, Campaign speech launching coalition’s election campaign, 28 October 2001.



## **Length of time in detention, reasons for delay and the impact on the detention network**

There are currently over 4,000 people in immigration detention in Australia. As at July 2011, approximately 70% of those people had been detained for more than six months, and about 30% had been detained for more than twelve months.<sup>15</sup> Liberty deplores this state of affairs. It is unacceptable that people who have not been charged with, or convicted of, any crime are detained for such protracted periods as a matter of course, indefinitely and without any means to challenge their continued detention in a court.

### *'Non-statutory' refugee assessment process*

The primary reason for such lengthy periods of detention is the time taken to process the protection claims (and subsequent appeals and reviews) of people arriving by sea. Such people are dealt with according to the 'non-statutory' refugee assessment process. Under the refugee status assessment and independent merits review process, applicants can expect to wait 12 months from arrival to finalisation of merits review.<sup>16</sup> Most people are detained throughout the processing of their application for asylum and subsequent appeals and reviews.<sup>17</sup>

The Department of Immigration and Citizenship ('DIAC') was required to overhaul its non-statutory process following the High Court's decision in *M61 v Commonwealth*.<sup>18</sup> It has now announced the new 'protection obligation evaluation' process, which commenced in March 2011. It is beyond the scope of this submission to comment at length on the nature of this process, its fairness and its similarities with the 'refugee status assessment'. However, Liberty notes that the only substantial difference between the new and old procedures appears to be that, now, unfavourable assessments will be automatically referred to independent review.<sup>19</sup> It seems likely this will result in only a modest improvement to the speed of the process.

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<sup>15</sup> Immigration detention statistics are currently said to be 'unavailable' on the Department's website. As a result, these statistics are drawn from 'Human Rights, Refugees and Asylum Seekers', speech given by Catherine Branson QC, President of the Australian Human Rights Commission, 21 July 2011, available at:

[http://www.humanrights.gov.au/about/media/speeches/speeches\\_president/2011/20110721\\_asylum.html](http://www.humanrights.gov.au/about/media/speeches/speeches_president/2011/20110721_asylum.html).

<sup>16</sup> Department of Immigration and Citizenship, 'Changes to Refugee Status Determination: Questions and Answers', undated, available at: <http://www.immi.gov.au/visas/humanitarian/pdf/faq-changes-to-refugee-status.pdf>.

<sup>17</sup> Australian Human Rights Commission, 'Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood', May 2011, [8.1] available at:

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

<sup>18</sup> Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia [2010] HCA 41 ('M61').

<sup>19</sup> Department of Immigration and Citizenship, 'Changes to Refugee Status Determination: Questions and Answers', undated, available at: <http://www.immi.gov.au/visas/humanitarian/pdf/faq-changes-to-refugee-status.pdf>.

The most important outcome of the High Court's decision in *M61* is that asylum seekers in detention can now seek judicial review of unfavourable assessments/evaluations. It is inevitable that applications for judicial review, and the time taken to finalise these, will add to the time spent in detention by unsuccessful applicants for asylum (DIAC estimates it will add 'many months' to time spent in detention<sup>20</sup>).

Liberty considers it imperative that applicants for protection visas not be deprived of any review rights available to them under Australian law. The extent that independent review, judicial review or other aspects of due process are lengthening periods of detention merely underlines the desirability of avoiding mandatory detention of applications while their protection applications are assessed or reviewed. In the words of the Australian Human Rights Commission,

[t]he current position... wrongly conflates the period of a person's detention with resolution of their immigration status, instead of detaining a person based on the risk they pose to the Australian community.<sup>21</sup>

In particular, Liberty notes with concern the government's decision to include in its terms of reference to Professor McMillan the possibility of excluding appeals to the Federal Court from decisions of the Federal Magistrates Court.<sup>22</sup> Liberty reiterates its view that the decision to detain applicants for the duration of their review processes cannot be used as a justification for removing rights of appeal.

### **Need for quality assurance in Refugee Status Assessment (RSA) & Independent Merits Review (IMR) decisions**

It is well known that there are a few decision makers who do not take into account the claims and fears of applicants when determining their status as refugees. The most infamous of these decision makers are [redacted] and [redacted]. While most decision makers have been finding Afghan Hazara applicants to be refugees in around 85-90% of cases, [redacted] have *refused* around nine in ten Hazara applicants.

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<sup>20</sup> Department of Immigration and Citizenship, 'Changes to Refugee Status Determination: Questions and Answers', undated, available at: <http://www.immi.gov.au/visas/humanitarian/pdf/faq-changes-to-refugee-status.pdf>.

<sup>21</sup> Australian Human Rights Commission, 'Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood', May 2011, [8.1], available at: [http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html).

<sup>22</sup> Chris Bowen MP, 'McMillan Review: Terms of Reference', 7 January 2011, available at: <http://www.minister.immi.gov.au/media/media-releases/pdf/mcmillan-review-terms-of-reference.pdf>.

RSA and IMR decisions are often sloppy and riddled with errors, such as text from one decision being copied and pasted into another decision without changing relevant details such as names, dates and places.

It is *imperative* that a system of quality control be implemented to oversee the RSA and IMR decision-making processes. At present, the process is inconsistent and arbitrary, and unduly subject to the personal whims and fancies of the individual reviewer. This should not be so.

Liberty Victoria calls for a staunch review of decision-making practices in the detention networks. It is also of vital importance that accurate, representative and fair country information be used in RSA and IMR assessments. Highly selective and discriminatory use of country information is currently having a deleterious effect on the wellbeing of asylum seekers in the detention network.

The more faulty decisions that are handed down, the longer the detention process will be, and the more crowded and overburdened the detention network will become. This must be remedied as a matter of urgency.

### *Delays in security clearances*

An additional concern for Liberty is the manifest delay associated with the security clearance process. The Ombudsman has commented that, even where DIAC targets for processing speed are met, ‘delays of many months in obtaining security clearances, particularly for Tamils, has made less meaningful the achievement of the target time’. The Ombudsman further remarks that where complaints about processing time have been received by his office, these are ‘rarely’ attributable to the assessment process.<sup>23</sup>

Distressingly, delays in finalising security clearances, which are performed by ASIO outside the refugee assessment process, have meant that numerous applicants for asylum have been kept in detention despite having been assessed as refugees.<sup>24</sup> This is of deep concern to Liberty. Liberty

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<sup>23</sup> Commonwealth Ombudsman, ‘Christmas Island immigration detention facilities: Report on the Commonwealth and Immigration Ombudsman’s oversight of immigration processes on Christmas Island October 2008 to September 2010’, February 2011, [2.11], available at: [http://www.ombudsman.gov.au/files/christmas\\_island\\_immigration\\_detention\\_facilities\\_report.pdf](http://www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf).

<sup>24</sup> Commonwealth Ombudsman, ‘Christmas Island immigration detention facilities: Report on the Commonwealth and Immigration Ombudsman’s oversight of immigration processes on Christmas Island October 2008 to September 2010’, February 2011, Recommendation 2, available at: [http://www.ombudsman.gov.au/files/christmas\\_island\\_immigration\\_detention\\_facilities\\_report.pdf](http://www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf), ‘Human Rights, Refugees and Asylum Seekers’, speech given by Catherine Branson QC, President of the Australian Human Rights Commission, 21 July 2011, available at: [http://www.humanrights.gov.au/about/media/speeches/speeches\\_president/2011/20110721\\_asylum.html](http://www.humanrights.gov.au/about/media/speeches/speeches_president/2011/20110721_asylum.html).

endorses the recommendation of the Ombudsman that, at the very least, people who have been found to be refugees should not be detained until the completion of their security checks.<sup>25</sup>

Of even greater concern is the plight of those who have been found to be refugees, but who have received a negative security assessment. There are approximately 20 such individuals in Australia, including at least one family with children, who cannot be returned to their country of origin, but whom the government will not release.<sup>26</sup> These people are faced with the prospect of indefinite detention until a ‘solution’ is found, in a situation similar to the facts in *Al-Kateb v Godwin*. Liberty is appalled at the spectre of the true meaning of indefinite detention,<sup>27</sup> and strongly endorses the view of Catherine Branson QC, President of the Australian Human Rights Commission, that consideration be given immediately to less restrictive accommodation in these cases.<sup>28</sup>

### *Processing freeze on applicants from Sri Lanka and Afghanistan*

On 9 April 2010, the Australian government announced a suspension of the processing of new asylum applications from Sri Lanka and Afghanistan.<sup>29</sup> The suspension would initially be for a three-month period for Sri Lankan applicants, and for a six-month period for Afghan applicants, with the possibility of extension.

The government justified this decision by stating that the changing or evolving conditions in both countries meant it was likely that those in need of protection at the date the announcement was made may not require any protection in a few months time.

The processing freeze was widely condemned as breaching several of Australia’s obligations under international law.<sup>30</sup> The freeze on Sri Lankan and Afghan applicants was said to amount to discrimination, and the effect of the freeze was said to hold Sri Lankan and Afghan asylum seekers in arbitrary detention. Moreover, the idea of waiting to see whether the country conditions in Sri

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<sup>25</sup> Commonwealth Ombudsman, ‘Christmas Island immigration detention facilities: Report on the Commonwealth and Immigration Ombudsman’s oversight of immigration processes on Christmas Island October 2008 to September 2010’, February 2011, Recommendation 2, available at: [http://www.ombudsman.gov.au/files/christmas\\_island\\_immigration\\_detention\\_facilities\\_report.pdf](http://www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf) Recommendation 2 (p 8).

<sup>26</sup> ‘Human Rights, Refugees and Asylum Seekers’, speech given by Catherine Branson QC, President of the Australian Human Rights Commission, 21 July 2011, available at: [http://www.humanrights.gov.au/about/media/speeches/speeches\\_president/2011/20110721\\_asylum.html](http://www.humanrights.gov.au/about/media/speeches/speeches_president/2011/20110721_asylum.html).

<sup>27</sup> Such as in *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>28</sup> ‘Human Rights, Refugees and Asylum Seekers’, speech given by Catherine Branson QC, President of the Australian Human Rights Commission, 21 July 2011, available at: [http://www.humanrights.gov.au/about/media/speeches/speeches\\_president/2011/20110721\\_asylum.html](http://www.humanrights.gov.au/about/media/speeches/speeches_president/2011/20110721_asylum.html).

<sup>29</sup> Stephen Smith, “Changes to Australia’s immigration processing system”, <http://www.foreignminister.gov.au/releases/2010/fa-100409.html>

<sup>30</sup> Refugee Council of Australia, “Joint Statement”, [http://www.refugeecouncil.org.au/resources/statements/100505\\_JS\\_Suspension\\_of\\_processing.pdf](http://www.refugeecouncil.org.au/resources/statements/100505_JS_Suspension_of_processing.pdf)

Lanka and Afghanistan would improve before processing an application was considered completely inconsistent with assessing each application on its own merits.

The suspension for Sri Lankan applicants was lifted on 6 July 2010.<sup>31</sup> The suspension for Afghani applicants was lifted on 30 September 2010.<sup>32</sup>

The following section will focus on the impact of the processing suspension on the length of time detainees were held in the detention network, and the impact on the detention network generally.

### **Impact of processing suspension on length of time in detention**

In 2010, the Australian Human Rights Commission issued a report on immigration detention on Christmas Island. The Commission found that 184 Sri Lankans and 1,210 Afghans (including 19 accompanied children and 2 accompanied minors) were subject to the suspension, which resulted in their prolonged detention.<sup>33</sup> Some Afghans were detained for a full six months before their applications even commenced being processed.

The suspension was also said to contribute to the prolonged detention of 76 asylum seekers (including 32 children) in detention facilities in Lenora.<sup>34</sup>

It is the view of Liberty Victoria that prolonged detention has a significant impact on mental health. The effects of immigration detention on mental health are discussed elsewhere in this submission. The psychological harm induced by indefinite detention of asylum seekers is profound. Suspending the processing of applications only adds to the level of uncertainty and distress experienced by asylum seekers.

It is recalled that in 2008, in a speech entitled *New Directions for Detention – Restoring Integrity to Australia’s Immigration System*, the Minister stated that the retention of the mandatory detention policy was for the purpose of health, identity and security checks.<sup>35</sup> By the Australian government’s own standards, an applicant’s country of origin is not legitimate basis for prolonging detention.

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<sup>31</sup> DIAC, “Sri Lankan situation improving”, [http://www.newsroom.immi.gov.au/media\\_releases/825](http://www.newsroom.immi.gov.au/media_releases/825)

<sup>32</sup> DIAC, “Suspension of processing of Afghan asylum seeker claims to be lifted”, <http://www.minister.immi.gov.au/media/cb/2010/cb155332.htm>

<sup>33</sup> Australian Human Rights Commission, 2010 Immigration Detention on Christmas Island, [http://humanrights.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.html#Heading314](http://humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.html#Heading314), p 15

<sup>34</sup> Australian Human Rights Commission, 2011 Immigration Detention in Lenora, [http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_leonora.pdf](http://www.humanrights.gov.au/human_rights/immigration/idc2011_leonora.pdf), p 6. The statistics cited do not state whether the children were accompanied or unaccompanied.

<sup>35</sup> Chris Bowen, “New Directions in Detention – Restoring Integrity to Australia’s Immigration System”, <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

## **Impact of suspension on detention network**

During the suspension period, the numbers of Sri Lankan and Afghan asylum seekers continued to rise. Liberty Victoria believes that this is inconsistent with any argument suggesting that the suspension acted as a deterrent. As the capacity of Christmas Island and mainland detention centres were already overstretched, a Royal Australian Air Force base at Curtin, Western Australia was prepared in order to accept detainees.<sup>36</sup>

On Christmas Island, the Australian Human Rights Commission found that the suspension contributed to a significant backlog in processing applications. The suspension also meant that an increased number of asylum seekers remained in detention, which contributed to overcrowding and a deterioration of conditions.<sup>37</sup>

The strain placed on the immigration detention network as a result of the length of detention was obvious and catastrophic. As at February 2011, there were 2,757 people detained on Christmas Island, a facility designed to accommodate 500 people.<sup>38</sup> This is clearly unsustainable. Even absent of such overcrowding, protracted detention self-evidently increases tensions and notoriously increases the risk of mental illness, self-harm and suicide. Liberty urges the government to do all it can to ensure that, if mandatory detention is considered necessary, a conclusion which Liberty opposes, the time spent by applicants in detention be kept to an absolute minimum.

## *Proposed alternative to processing framework*

Liberty Victoria proposes a new framework for the processing of applicants for a protection visa.

The Refugee Status Assessment process should remain substantially the same, but with the same requirements of procedural fairness as apply to most administrative decisions, rather than the restricted ‘procedural fairness’ grounds enshrined in the Migration Act. Application of procedural fairness would mean that:

- where a negative assessment is made, the applicant should have recourse to an Australian court

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<sup>36</sup> DIAC, “Numbers rise as Curtin readies”, [http://www.newsroom.immi.gov.au/media\\_releases/808](http://www.newsroom.immi.gov.au/media_releases/808)

<sup>37</sup> Australian Human Rights Commission, 2010 Immigration Detention on Christmas Island, [http://humanrights.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.html#Heading314](http://humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.html#Heading314), p 15

<sup>38</sup> Commonwealth Ombudsman, ‘Christmas Island overloaded’, Media Release, 2 February 2011, available at: <http://www.ombudsman.gov.au/media-releases/show/161>.

- courts should retain their powers of judicial review, on grounds reflecting ordinary administrative law principles rather than the restricted grounds enshrined in the Migration Act
- where a court identifies a jurisdictional error, it should retain the power to remit the applicant to the decision maker
- where a court identifies a significant factual error or substantial anomaly in a decision, the court should have power to grant leave to the applicant to appeal on the merits. In a merits appeal by leave, the court should have the ordinary powers of appellate courts to set aside, vary or remit the decision.

Liberty Victoria is of the view that the current limitation of reviewability of migration decisions poses a serious threat to the operation of the rule of law in Australia, and should be changed.

Liberty Victoria believes that in applications for protection, which, by their very nature involve questions of life and death, mistakes of all kinds should be capable of being remedied by courts.

## **Impact of detention on children and families, and viable alternatives**

### **Guardianship of unaccompanied children**

Liberty notes that under the Migration (Guardianship of Children) Act, the Minister for Immigration is the legal guardian of children who arrive in Australia unaccompanied as refugees. Liberty Victoria also notes that this arrangement has given rise to spectacular and flagrant breaches of ordinary guardianship principles; most fundamentally the obligation to put the best interests of the child above all other considerations. Liberty wishes to point out the obvious fact that the indefinite detention of such children is *not* in their best interests. Neither is subjecting children to a legal process that is deeply flawed, unjust and stripped of procedural fairness. The proposed removal of unaccompanied children to Malaysia is not in the best interests of those children. And delaying valid applications for family reunion lodged by 15- and 16-year-olds until the children turn 18 and are no longer eligible for family reunion (thereby permanently depriving children of their parents) is not in the best interests of those children.

Liberty Victoria wishes to condemn the conduct of the Minister for Immigration in his role as guardian of refugee minors. There are blatant breaches of his guardianship obligations, and such breaches have left vulnerable children to be used as pawns in the political game of refugee policy.

### **Health concerns**

Liberty Victoria is gravely concerned about the mental health consequences that Australia's immigration detention policies are having on asylum seekers, in particular on vulnerable children and families. Community release is a more viable and cost-effective alternative that has proven to be successful in other jurisdictions, and should be implemented more thoroughly in Australia.

### *Children & mental illness*

Children are particularly vulnerable to mental illness while in detention. Detention can pose serious long-term effects on children. The Layton Report states that immigration detention of children is incompatible with their best interests, and is detrimental to their wellbeing.<sup>39</sup> Prolonged periods of detention exacerbate the trauma suffered by people coming to Australia.<sup>40</sup> They suffer from depression, anxiety and post-traumatic stress disorder before they even arrive. Their conditions are

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<sup>39</sup> [Http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/.....](http://www.hreoc.gov.au/human_rights/children_detention_report/.....)

<sup>40</sup> Mares, Sarah. Seeking Refuge, Losing Hope: Parents and children in immigration Detention. P. 95



worsened in prolonged detention, where they are exposed to their own parents and other adults who are depressed and suicidal. This is stifling their development.<sup>41</sup>

### *International obligations*

Australia is obligated to undertake special measures to protect children under the United Nations Convention on the Rights of the Child to ensure children are protected. Under this convention, Australia is obligated to ensure children are not suffering cruel, inhumane or degrading treatment or punishment, that no child shall be deprived of his or her liberty unlawfully or arbitrarily, and that detention shall only be used as a last resort for the shortest appropriate period of time. Detention must be suitable for children, and meet their needs, and if it does not then it may be regarded as arbitrary detention.<sup>42</sup> The Human Rights and Equal Opportunity Commission ('HREOC') Inquiry has recommended children and their parents must be released immediately into the community as this is in accordance with Australia's international obligations.

### *Bridging visas*

Bridging visas granted while a visa application is being processed are a viable alternative to keeping children in mandatory, indefinite detention. The length and quality of institutional care has devastating and long-term effects on children suffering trauma.<sup>43</sup> Children may be transferred into foster homes or transferred into home-based alternatives to detention while long-term options are being considered and established.<sup>44</sup> While bridging visas have never been used for unauthorised arrival of children, they are however, regularly used for children who arrive with a visa and become unlawful by overstaying their visa.<sup>45</sup> The Minister has discretion as to whether to issue this category of visa. The Department of Health Services has the ultimate responsibility for all children detained, and is the guardian for all unaccompanied children. The Department has an apparent conflict of interest. On the one hand the Minister is the guardian for unaccompanied children, and on the other hand, he has discretion as to whether to grant a bridging visa.

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<sup>41</sup> Mares, Sarah. Seeking Refuge, Losing Hope: Parents and children in immigration Detention. P. 95

<sup>42</sup> <http://www.unhcr.org/4dc949c49.html> pm 59

<sup>43</sup> <http://www.mapw.org.au/about-mapw/policies/-effect-detention-.....>

<sup>44</sup> <http://www.unhcr.org/4dc949c49.html> p. 58

<sup>45</sup> [Http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/.....](http://www.hreoc.gov.au/human_rights/children_detention_report/.....)

## *Identity checks*

Liberty Victoria believes that a short period of detention — strictly limited to obtaining important health, identity and security information — is justifiable and legitimate. However, such detention must not be prolonged and must be subject to review.<sup>46</sup> The current situation is unacceptable, as people are kept in detention for much longer than is strictly necessary. Those currently in detention should be placed in community-based alternatives with access to health, welfare and education services.<sup>47</sup>

The Gillard government has taken some steps to move more children and families out of detention centres and into community-based accommodation. It has also opened two new detention centres, including Inverbrackie, which can house up to 400 families. This measure, however, does not go far enough and more must be done to ensure that vulnerable people are not further traumatised by their time spent in Australian detention centres.

Families should not be separated for prolonged periods, for example where one is in detention and the others are released.<sup>48</sup> Immigration Minister Chris Bowen has said the majority of children from immigration in detention have been released, and that 329 remain,<sup>49</sup> with very little freedom of movement.<sup>50</sup> Although the system of community detention has already been introduced, it is rarely used in Australia. Community detention must also be extended to other people. In addition to children, vulnerable adults including those who have suffered torture, trauma, and depression should also be placed into community detention.<sup>51</sup>

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<sup>46</sup> Australian Human Rights Commission, *A Last Resort? National inquiry into Children in Immigration Detention* p. 1.

<sup>47</sup> Submission to the HREOC Inquiry into Children in Immigration Detention, May 2002, p. x

<sup>48</sup> Submission to the HREOC Inquiry into Children in Immigration Detention, May 2002, p. x

<sup>49</sup> <http://www.championsofchange.org.au/?p=741>

<sup>50</sup> <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>

<sup>51</sup> [http://www.hreoc.gov.au/about/media/speeches/speeches\\_president.....](http://www.hreoc.gov.au/about/media/speeches/speeches_president.....)

## **The impact, effectiveness and cost of mandatory detention and any alternatives, including community release**

Australia should adopt a policy similar to that of Europe and Canada, where restrictions on liberty are limited, and only those people who pose clear security risks are in detention. This should include mechanisms for regular review.<sup>52</sup> According to international law, it is not unlawful to seek asylum. Liberty Victoria believes — partly because of this — that it is unjust for people to be detained merely because they are asylum seekers.<sup>53</sup>

Article 37 of the Convention on the Rights of the Child states that detention of children should be used only be a last resort. As observed by Amnesty International, mandatory detention clearly cannot be described a last resort.<sup>54</sup> Rather, it is the first resort. That is what mandatory detention means.

Of the developed world, Australia has among the lowest intakes of refugees, however only Australia detains all people who enter the country without visas, regardless of whether or not they are seeking asylum.<sup>55</sup>

The vast majority of asylum seekers arriving by boat are processed and found to be genuine refugees. Between 2009–10, around 70% were found to be refugees.<sup>56</sup> When categories are limited to asylum seekers from Afghanistan and Iraq, more than 90% are found to be genuine refugees.

There are various types of immigration detentions in Australia for asylum seekers including, immigration detention centres, immigration residential housing, immigration transit accommodation and alternative places of detention. Detention in immigration detention centres is unnecessary, costly and inefficient. Suitable alternatives include community-based detention.

Similarly, in Residence Determinations asylum seekers can be placed into community detention, and move freely within the community without being accompanied by an immigration officer, with very little restriction on their movement. Through community assistance and support programs, families and detainees with complex needs can be released into the community and be provided with adequate support. NGOs can assist with housing, bills, and services. The department funds some NGOs to provide such services. Currently only a small number of NGOs are permitted to roll out this program. This is unfortunate, as it appears that many other NGOs and community agencies are ready and willing to assist in the operation of a wider community-detention program.

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<sup>52</sup> Submission to the HREOC Inquiry into Children in Immigration Detention, May 2002, p. x

<sup>53</sup> <http://www.unhcr.org/4dc949c49.html> p. 8

<sup>54</sup> [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/.....](http://www.hreoc.gov.au/human_rights/children_detention_report/.....)

<sup>55</sup> Public Health Association of Australia Inc – Asylum Seekers- Mandatory detention

<sup>56</sup> <http://www.refugeecouncil.org.au/asylum/detention.php>

Australia is only one of a few countries that have a policy of mandatory detention of asylum seekers. In other jurisdictions, for example in Belgium and Scotland, there is a program that provides coaching and assistance and building up skills for asylum seekers to return home voluntarily, if they wish to do so at a future time. Detention centres are not used. Open houses are favoured.

In Canada and in many parts of Europe, asylum seekers are initially placed in detention or processing centres for a limited amount of time from 48 hours to 3 months, and unless national security concerns arise, they are released, and free to move about the country while their claims are being processed.

Similarly, in the United Kingdom, detention of children has largely ceased, and the majority of asylum seekers are not detained — except for an initial period to do identity and security checks.

South Africa requires release for those applying for asylum, unless they pose a national security threat. The burden of proof is placed on the state to provide why detention is necessary. There is a presumption against detention.<sup>57</sup>

Australia should follow these examples. There is little risk of asylum seekers absconding because they have a vested interest in cooperating.

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<sup>57</sup> <http://www.unhcr.org/4dc949c49.html> p. 65

## **The total costs of managing and maintaining the immigration detention network and processing irregular maritime arrivals or other detainees**

The UNHCR Legal and Protective Policy states that there is no empirical evidence to support the argument that mandatory detention deters irregular migration.<sup>58</sup>

Detention costs are considerable, and far greater than alternatives. In Australia it costs, according to a conservative estimate, up to \$339 per person, per day. Alternatives, however, cost only up to \$39 per person, per day.<sup>59</sup> Recent estimates are that on average across the detention network it costs \$300,000 per annum to detain each man, woman and child.

The cost of the independent Merits Review processes totalled \$5.216 million between 2008–2011

The costs of immigration detention have tripled in the last two years, and now amounts to over \$800 million.

The offshore asylum seeker management program will cost \$1.058 billion, which is an increase of 39% on 2010–11.

The government will spend \$75.9 million on the agreement to send asylum seekers to Malaysia. Delays caused by recent injunctions issued by the High Court will increase the cost substantially.

In 2010–11, \$85.655 million was spent on immigration detention facilities.

Next year, 2011–12, it is predicted that \$709 million will be spent in detention centres, which averages \$90,000 for every asylum seeker.

It is arguable that abolishing the mandatory detention policy would save up to \$425 million every year.<sup>60</sup> This money should be alternatively used to support NGOs in providing services to asylum seekers living in the community. The cost of long-term mental health impacts of prolonged detention of future members of our society are difficult to calculate but must be considered, and cannot be understated.

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<sup>58</sup> <http://cpd.org.au/2011/05/john-menadue-trampling-on-human-Frights-is-expensive>.....

<sup>59</sup> <http://www.unhcr.org/4dc949c49.html> p. 97

<sup>60</sup> <http://cpd.org.au/2011/05/john-menadue-trampling-on-human-rights-is-expensive>.....

## The Australian government's immigration detention values

The Australian government's immigration detention values are closely tied to its rationale for immigration detention, and how those values are implemented affects the asylum seekers to which they are designed to apply.

By way of context, following the election of the Rudd government a set of immigration detention values were formulated to deal with people in the immigration detention system. This was to herald 'a new fair go for asylum seekers and other immigration detainees'<sup>61</sup>. These so-called immigration detention values are as follows.

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*.
- (Emphasis added)

These values are inherently contradictory. Immigration detention is a first resort for boat arrivals. People are not treated fairly and within the law — this is demonstrated by last year's moratorium on processing claims of Afghan and Sri Lankan asylum seekers,<sup>62</sup> and the proposed Migration

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<sup>61</sup> Commonwealth Ombudsman, above n 9.

<sup>62</sup> See, e.g., The Australian, 'Australia suspends Afghan, Sri Lankan asylum-seeker claims' (9 April 2010) <<http://www.theaustralian.com.au/politics/australia-suspends-afghan-sri-lankan-asylum-seeker-claims/story-e6frgczf-1225851763188>>; Sydney Morning Herald, 'Immigration clampdown: processing of asylum seeker claims from Sri Lankans and Afghans suspended' (9 April 2010) <<http://www.smh.com.au/national/immigration-clampdown-processing-asylum-seeker-claims-from-sri-lankans-and-afghanis-suspended-20100409-rwcd.html>>

Amendment (Strengthening the Character Test and Other Measures) 2011 Bill. Asylum seekers who arrive by boat — who are put into immigration detention — are stripped of their dignity and treated differently to those who arrive by plane — who are released into the community. This is a flagrant breach of the non-discrimination clause of the Refugees Convention. Significantly, Australia is the only Refugee Convention signatory to detain asylum seekers mandatorily and indefinitely rather than allow community release.<sup>63</sup>

*Compliance with the Australian government's immigration detention values within the detention network*

Significantly, the Commonwealth Auditor-General has raised concerns regarding the application of the Australian government's immigration detention values. The Ombudsman has suggested these 'compassionate' values have led Australia 'to landscape of fear and mutual distrust'.<sup>64</sup> Although 'an unpredictable increase in the number of [boat arrivals]' is cited as 'overwhelming [d]etention facilities and logistic and administrative arrangements', Liberty Victoria endorses the Ombudsman's remarks that '[a]dministrative challenges do not ... justify elasticity in interpreting or applying the detention values to which the Government has committed'.<sup>65</sup>

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<sup>63</sup> The Royal Australasian College of Physicians, 'Medical specialists call for immediate end to detaining children' (15 March 2011); see also The Royal Australian and New Zealand College of Psychiatrists, 'No place for children in detention' <<http://www.ranzcp.org/latest-news/no-place-for-children-in-detention.html>>

<sup>64</sup> Commonwealth Ombudsman, above n 9.

<sup>65</sup> Ibid.

# **The effectiveness and long-term viability of outsourcing immigration detention centre contracts to private providers**

## *Background*

Australia's immigration detention system has been run by private companies since 1997. The decision to privatise was taken with a view to reducing the cost and improving the efficiency of the detention network. For the first six years of privatisation, the contract was held by Australian Correctional Management, after which a new contract was signed with Group 4 Falck Global Solutions Pty Ltd (later known as GSL). The current contractor, Serco Australia Pty Ltd ('Serco'), has run the network since 2009.<sup>66</sup>

There are three separate contracts in place in relation to immigration detention, which relate to:

- detention services;
- healthcare services to people in detention; and
- immigration residential housing and immigration transit accommodation.

At present, healthcare services are provided by International Health and Medical Services Pty Ltd ('IHMS'), with the remaining two contracts held by Serco.

## *Transparency & accountability*

Transparency — both real and perceived — has been impacted by the contracting of detention services to private operators such as Serco. Detention centres are shielded from public scrutiny because private operators are not themselves subject to freedom-of-information laws, and their dealings with government are protected because of commercial-in-confidence requirements. Parliamentary Committees do not have jurisdiction to call Serco management before them to give evidence, as they do for heads of Commonwealth agencies. As only some of the terms of the contract between the Commonwealth and Serco are made public, it is not possible to examine the obligations imposed upon the provider, or its compliance with those obligations, in any detail. Furthermore, while government policy does not theoretically deny access by the media to the

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<sup>66</sup> Joint Standing Committee on Migration, 'Facilities, Services and Transparency', Report 3 of the Inquiry into immigration detention in Australia, 18 August 2009, 3.3-3.43, available at: <http://www.aph.gov.au/house/committee/mig/detention/report3/chapter3.pdf>.



facilities, in reality the media's access to detention centres is severely restricted.<sup>67</sup> These problems are exacerbated by the fact that Serco, as a private company, has limited reporting requirements under Australian law.<sup>68</sup>

This means that Serco's accountability is dependant on the discretionary efforts made by government to monitor, record and enforce compliance with the terms of the contract. In particular, the 'metric' used for measuring compliance is agreed as between Serco and DIAC, with its criteria and Serco's performance not made public for 'commercial' reasons.<sup>69</sup> A consequence of this is that Parliament has historically only demanded changes to the detention system when media attention demands it. For example, after Cornelia Rau's case came to light in the media, the government had no option but to review its contracting arrangements. The review conducted by Mick Palmer concluded that:

The current detention services contract with Global Solutions Limited is fundamentally flawed and does not permit delivery of the immigration detention policy outcomes expected by the Government, detainees and the Australian people. ... [It] is onerous in its application, lacks focus in its performance audit and monitoring arrangements, and transfers the risk to the service provider. Service requirements and quality standards are poorly defined, performance measures are largely quantitative and of doubtful value, as are financial penalties for non-compliance.<sup>70</sup>

As a result of extensive criticism, DIAC altered its approach to its contractors, and the standards it sought to impose by the contract. However, this change only came about as the result of media attention.<sup>71</sup>

Concerns have also been expressed that DIAC, which has sole responsibility for determining whether Serco is meeting current standards, does not have the capacity to monitor contractor

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<sup>67</sup> Joint Standing Committee on Migration, 'Facilities, Services and Transparency', Report 3 of the Inquiry into immigration detention in Australia, 18 August 2009, 4.81-4.91, available at: <http://www.aph.gov.au/house/committee/mig/detention/report3/chapter4.pdf>.

<sup>68</sup> Serco Australia Pty Ltd is a wholly owned subsidiary of UK parent company Serco Group plc: Serco Annual report and accounts 2010, 160, available at: [http://www.serco.com/Images/ARA\\_2010\\_tcm3-37329.pdf](http://www.serco.com/Images/ARA_2010_tcm3-37329.pdf).

<sup>69</sup> Parliament of Australia, Senate Legal and Constitutional Affairs Committee, Estimates hearing, 24 May 2011, answers of Fiona Lynch-Magor, 30-33, available at: [http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/2bad1661-1c20-4717-a627-79e42071335d/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2011\\_05\\_24\\_127\\_Official.pdf?fileType=application%2Fpdf#search=%22\(%20%20committees%20%20\)%20hanson%20serco%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/2bad1661-1c20-4717-a627-79e42071335d/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2011_05_24_127_Official.pdf?fileType=application%2Fpdf#search=%22(%20%20committees%20%20)%20hanson%20serco%22).

<sup>70</sup> Mick Palmer, Department of Immigration and Citizenship, 'Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau', July 2005, xiii and 176, available at: <http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf>.

<sup>71</sup> Joint Standing Committee on Migration, 'Facilities, Services and Transparency', Report 3 of the Inquiry into immigration detention in Australia, 18 August 2009, 3.26-3.38, available at: <http://www.aph.gov.au/house/committee/mig/detention/report3/chapter3.pdf>.

performance effectively.<sup>72</sup> While a number of other bodies are also able to monitor detention centres, for example the Immigration Detention Advisory Group and the Immigration Ombudsman, the sheer number of geographically disparate sites seriously limits the ability of such groups to carry out monitoring effectively. Alternative monitoring groups are further hampered in their efforts because only limited access is granted to non-government groups. Finally, bodies such as the Australian Human Rights Commission, although currently very active in monitoring the detention system, have no statutory right to enter Serco facilities in order to carry out inspections.

### *Corporate objectives misaligned with best interests of detainees*

Serco International is a multinational corporation, which has aggressively marketed to governments worldwide its low-cost solutions to a range of services, particularly prisons. Detention centres have been described as a 'growth business'.<sup>73</sup> The media release regarding the selection of Serco made it clear that delivering value for money was a focus of the contract between the parties. Throughout the tender process, 'achieving the best value for money for the Commonwealth' was a key goal.<sup>74</sup> It is clear that one of Serco's selling points in the tendering process was its ability to provide value for money.

Serco Australia's continuing obligation to the Commonwealth is to meet its contractual obligations. The arrangement with the Commonwealth is that, in the event of any breach of contractual duties or obligations, Serco Australia can be fined. The local union claims that this provides a disincentive for Serco Australia, and consequently its staff, to report serious incidents.<sup>75</sup> It appears that where Australia's management of detention centres is concerned a profit margin is the carrot, monetary penalties are the stick and any external reporting on compliance is at the discretion of DIAC. In this context, the best interests of detainees cannot be the primary concern.

Reduced (or rather, inadequate) staffing levels and insufficient training and support for staff, leading to a high turnover of staff, are some of the criticisms made of Serco-run detention centres.<sup>76</sup> While staff shortages could partly be attributed to the fact that these centres are in very remote areas

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<sup>72</sup> Joint Standing Committee on Migration, 'Facilities, Services and Transparency', Report 3 of the Inquiry into immigration detention in Australia, 18 August 2009, 3.167, available at: <http://www.aph.gov.au/house/committee/mig/detention/report3/chapter3.pdf>.

<sup>73</sup> Australian Broadcasting Commission, 'Detention centres under spotlight', 7.30, 18 April 2011, transcript available at: <http://www.abc.net.au/7.30/content/2011/s3194932.htm>.

<sup>74</sup> Department of Immigration and Citizenship, 'Immigration detention services preferred tendered announced', Media Release, 31 March 2009, available at: [http://www.newsroom.immi.gov.au/media\\_releases/692/print](http://www.newsroom.immi.gov.au/media_releases/692/print).

<sup>75</sup> Australian Broadcasting Commission, 'Detention centres under spotlight', 7.30, 18 April 2011, transcript available at: <http://www.abc.net.au/7.30/content/2011/s3194932.htm>.

<sup>76</sup> Australian Broadcasting Commission, 'Detention centres under spotlight', 7.30, 18 April 2011, transcript available at: <http://www.abc.net.au/7.30/content/2011/s3194932.htm>.

of Australia, a NSW Parliamentary Inquiry into private prisons found that expenses relating to staff make up 70% of costs for government-run prisons, and that private prison providers can operate at lower costs due to reduced staffing levels and lower wage rates.<sup>77</sup> This offers a further example of where pecuniary motivations provide poor outcomes for detainees and staff.

### *Uncertainty and gaps in the duty of care*

Outsourcing of detention centres generates further difficulties because of the uncertain and sometimes obscure lines of responsibility it creates.

Uncertainty as to the obligations imposed on contractors can arise because that contracting is often done outside of any regulatory framework. That is, contractual obligations are used as a substitute for proper legislative framework; a situation which judges of the Federal Court have described as a ‘regulatory vacuum’.<sup>78</sup> This absence of regulation

...necessarily results in uncertainty as to what powers and obligations apply. That uncertainty involves risks not only to those detained in detention centres, but also to those employed there. In relation to those employed there they are subject not only to public law duties, but also to tortious and (perhaps) even criminal liabilities if they breach the duties imposed on them by law.<sup>79</sup>

Exactly this kind of uncertainty arose in the *Mastipour* case, where it was not clear to the Court which person was in law detaining the applicant, a crucial question when determining the rights and duties of parties to the proceeding.<sup>80</sup>

Further, governments use contractors as (amongst other objectives) a way of removing themselves from the consequences of failure. For political purposes, this entails removing itself from the consequences of its policies. But the Commonwealth government owes a non-delegable duty of care to detainees (and others in their custody).<sup>81</sup> By placing the service provision at arm’s length and not exercising appropriately active oversight, its duty of care is more difficult to fulfil. The problem is exacerbated where multiple layers of contracting are involved.

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<sup>77</sup> NSW Legislative Council, General Purpose Standing Committee No 3, ‘Inquiry into the privatisation of prisons and prison-related services’, Report 21, June 2009, 5.91 available at:

[http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/e368f47aee63f6ecca2575cc000da1e4/\\$FILE/090603%20final%20report%20version%203.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/e368f47aee63f6ecca2575cc000da1e4/$FILE/090603%20final%20report%20version%203.pdf).

<sup>78</sup> Secretary, Department of Immigration & Multicultural & Indigenous Affairs v Mastipour [2004] FCAFC 93, [18] (Selway J, with whom Finn J agreed on this point).

<sup>79</sup> Secretary, Department of Immigration & Multicultural & Indigenous Affairs v Mastipour [2004] FCAFC 93, [17].

<sup>80</sup> Secretary, Department of Immigration & Multicultural & Indigenous Affairs v Mastipour [2004] FCAFC 93, [18].

<sup>81</sup> S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs [2005] FCA 549, [199].

In particular, the Commonwealth cannot fulfil its duty of care to detainees by merely engaging ‘qualified and ostensibly competent independent contractor[s]’.<sup>82</sup> It is required to actively ensure reasonable care is taken of detainees who, because of their detention, cannot take care of themselves.<sup>83</sup> Where this is done via a contractor (or, in some cases, via a sub-contractor of a contractor), and especially where several contractors are involved, the duty of care requires the Commonwealth to satisfy itself that the services are adequate, appropriately designed and delivered with sufficient skill, through regular and systematic performance audits.<sup>84</sup>

In the case of *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*,<sup>85</sup> the Commonwealth was said to have failed its duty of care by failing to provide adequate mental health services to meet the needs of detainees. Finn J noted that the Commonwealth had put itself and detainees at risk by, for the most part, relying on the service providers to advise on whether the duty of care was being met by the very same service providers.<sup>86</sup> This was described by Finn J as ‘founded more on faith than informed knowledge’.<sup>87</sup> It was found to have breached its duty of care to both appellants, by failing to provide adequate psychiatric care,<sup>88</sup> and by failing to take reasonable steps to satisfy itself that reliance on the advice of its contractors was appropriate.<sup>89</sup>

Cases such as *Re S* demonstrate the risks for the Commonwealth, service providers and detainees as a result of complex, devolved and fragmented contracting arrangements. As set out above, without transparency in the conditions of service provision and Serco’s compliance with these, the risks remain real.

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<sup>82</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [207].

<sup>83</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [212].

<sup>84</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [220]-[221].

<sup>85</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549.

<sup>86</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [224].

<sup>87</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [260].

<sup>88</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [227].

<sup>89</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [262].

## **The reasons for and nature of riots and disturbances in detention facilities & the management of good order and public order with respect to the immigration detention network**

The Commonwealth and State governments are required to maintain order within immigration detention centres for the safety and security of people kept in detention. However, as discussed in the introduction to this submission, the detention of frustrated, often traumatised asylum seekers for protracted periods of time naturally generates disorder and unrest. In the words of the Immigration Advice and Rights Centre:

While a person may be recognised as a genuine refugee... this process that can take an unfortunate length of time. Many are sole breadwinners for their remaining family members and find themselves in a world of uncertainty, having escaped persecution and now unable to provide for their children while their detention becomes a political game. Then there are those who have been promised a better life by smugglers. They sell their house to pay for a journey that could cost them their life, only to be told many months down the track that their sacrifices were in vain. That people in such circumstances can break and act irrationally is understandable.<sup>90</sup>

A particular problem with the recent episodes of protesting and unrest is the diversion of law enforcement resources it entails. For example, when the riots on Christmas Island began in March 2011, there were 32 Australian Federal Police ('AFP') members stationed on Christmas Island. Over the course of the riots, additional members needed to be deployed to the island, bringing the total number of AFP members to a peak of 202.<sup>91</sup> A range of AFP members were deployed, including federal agents, protective service officers and specialist public order management officers, all of whom needed to be 'retasked' from their usual duties.<sup>92</sup> This is clearly an unnecessary diversion of police resources and, where the detention centre is in a remote location (such as Christmas Island) also requires great expense. In Liberty's view, this demonstrates again the need to identify alternative accommodation options for people currently in detention.

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<sup>90</sup> Immigration Advice and Rights Centre, 'Detention on Christmas Island - A continuing dilemma', Immigration News, 29 April 2011, available at: [http://www.iarc.asn.au/blog/Immigration\\_News/post/Detention\\_on\\_Christmas\\_Island\\_-\\_a\\_continuing\\_dilemma/](http://www.iarc.asn.au/blog/Immigration_News/post/Detention_on_Christmas_Island_-_a_continuing_dilemma/).

<sup>91</sup> Senate Legal and Constitutional Affairs Committee, Estimates, 26 May 2011, evidence of Andrew Colvin, 51, available at: [http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13793/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2011\\_05\\_26\\_135.pdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13793/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2011_05_26_135.pdf).

<sup>92</sup> Senate Legal and Constitutional Affairs Committee, Estimates, 26 May 2011, evidence of Tony Negus, 55, available at: [http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13793/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2011\\_05\\_26\\_135.pdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13793/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2011_05_26_135.pdf).

Liberty is also concerned by reports regarding the level of authority Serco management have over the management of ‘public order’ incidents inside immigration detention centres. In the first place, Serco have the ability and resources (including ‘conflict de-escalation experts’) to manage public order incidents, including violence, on their own, without police involvement<sup>93</sup> This is understandable. However, it appears that, during the March incident, Serco officers were also engaged, alongside AFP members, in the use of force against detainees.<sup>94</sup> This is a troublesome development, because although AFP members are bound by a clear use-of-force policy,<sup>95</sup> there is no such document for Serco staff, no mechanism for addressing complaints and no transparency of outcomes.

### *Immigration detention the cause*

Liberty Victoria submits that it is the fraught, tense and uncertain atmosphere in immigration detention that gives rise to riots and disturbances in detention facilities. Notwithstanding the Australian government’s determination to remain oblivious to the difficulties endured by detainees, it is observed by the Ombudsman:<sup>96</sup>

Common challenges include delays in finalising protection visas, assessments and decisions; a lack of detailed plans for managing rejected asylum seekers who can’t be returned to their countries of origin; remoteness of accommodation; poor levels of decision making — evidenced by a high rate of decisions overturned upon review; and physical and mental health problems.

Tensions generated by these issues are exacerbated by uncertainties about Third Party Transfer policies. ...

Liberty Victoria is gravely concerned by the Ombudsman’s observations of deteriorating psychological health of detainees, citing no less than 30 reports of self-harm at Christmas Island and over 1,100 such incidents threatened in 2010–11.<sup>97</sup> Immigration detention is failing as a policy; asylum seekers are unduly demonised and people who might otherwise become productive

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<sup>93</sup> Senate Legal and Constitutional Affairs Committee, Estimates, 26 May 2011, evidence of Peter Drennan, 52, available at: [http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13793/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2011\\_05\\_26\\_135.pdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13793/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2011_05_26_135.pdf).

<sup>94</sup> Ben Packham, ‘Ombudsman launches probe into Christmas Island riots, flags suicide prevention audit’, The Australian, 14 April 2011, available at: <http://www.theaustralian.com.au/national-affairs/ombudsman-launches-investigation-into-christmas-island-riots-flags-suicide-prevention-audit/story-fn59niix-1226039217843>.

<sup>95</sup> Commissioner Michael Keelty, ‘The AFP Commissioner’s Order on Use of Force’, Commissioner’s Order 3, published 1 July 2011 and updated 16 May 2011, available at: <http://www.afp.gov.au/about-the-afp/~media/afp/ips-foi-documents/ips/afp-operational-information/PC00003%20-%20Use%20of%20Force%20CO3%2020MAY11.ashx>.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

Australian citizens are being damaged by the resurrected policy of the Howard Government — namely, offshore detention and processing of claims — which has never served as a deterrent for asylum seekers seeking refuge from the threat of persecution.

In particular, Liberty Victoria refers the Senate to its submission to the Inquiry on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011. There is a wide range of circumstances which may cause riots and disturbances in detention facilities, which include but are not limited to the:

- extended time asylum seekers who arrive by boat<sup>98</sup> are held in immigration for, with 63.3% being held for between 6–18 months<sup>99</sup>
- overcrowded, unsanitary, stressful conditions of detention for indefinite periods of time
- psychological stress caused by prolonged detention with no knowledge of when, or whether, that detention will end
- stress of detention eventually causing people to break — damaging themselves or the things around them only to be punished by the civil courts
- unavailability of medical and mental health services, social supports, education and recreation only serves, which exacerbate the harshness of experience of immigration detention.

Liberty Victoria notes with concern the following remarks of the International Justice Project, cited in its aforementioned submission:<sup>100</sup>

Trauma encompasses a multitude of issues including, but not limited to, physical, sexual, emotional, and environmental abuse. The impact of trauma upon later violent behaviour have however, only recently begun to be addressed. Trauma and abuse are widely accepted to be life altering experiences, however connecting such experiences to later violent behaviour can be problematic. *The experiences, which at one point would have invoked sympathy, are pushed aside as unconnected to the behaviour exhibited. There remains a denial of both the element of causation and the construct of violent crime in relation to earlier traumatic or abusive experiences.* (Emphasis added)

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<sup>98</sup> NB. Bernard Keane, 'Boat people: driven by Rudd or war?', Crikey (15 October 2009) < <http://www.crikey.com.au/2009/10/15/latest-wave-of-boat-people-push-or-pull/> >: 'Of asylum claims made within Australia by people who have arrived by aircraft, 55% are rejected. The rejection rate of claims made by people who arrive by boat varies between 2-15%'.

<sup>99</sup> Liberty Victoria, Submission to Inquiry on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, 3

<sup>100</sup> Ibid, 11.

The Australian Government's current policy of immigration detention for boat arrivals totally ignores the sentiments expressed in the aforementioned remarks. Rioting and other disturbances in immigration detention centres are a consequence of this policy that stigmatises boat arrivals; the Australian Government's policy fails to recognise this. Immigration detention for extended periods of time is the cause of this behaviour. Only with the end of the current policy of immigration detention will we see an end to images of deeply traumatised asylum seekers lashing out at their squalid predicament.

### **The impact of character testing**

Liberty Victoria is gravely concerned at the impact of character testing on asylum seekers driven to destruction, owing to the abhorrent circumstances of their detention which add to the trauma they have experienced not only at home but also on the high seas.

Section 501 of the Migration Act enables the Immigration Minister exclusive discretion to cancel a visa or refuse to grant one to a person failing the character test,<sup>101</sup> which is defined by a persons' criminal record, personal associations, past and present criminal and general conduct and (from this) their likelihood of further criminal offending or unsavoury general conduct.<sup>102</sup> Worse still, the rules of natural justice and due process do not apply.<sup>103</sup> This creates an absurd situation where even those asylum seekers who are not processed in Australia's criminal justice system for offences allegedly committed in immigration detention continue to be oppressed by the unfettered whims of the minister of the day. Indeed, Liberty Victoria is not alone on this analytical point, this exact concern being highlighted in other analyses of section 501.<sup>104</sup>

Section 501 of the Migration Act, as it applies to asylum seekers, '[does] not comply with the right to due process and [is] not compatible with the rule of law'.<sup>105</sup> Considering that asylum seekers arriving by boat are overwhelmingly genuine refugees,<sup>106</sup> Liberty Victoria is concerned by the Australian Government's perceived and careless disregard of article 32 of the Refugees Convention,<sup>107</sup> which requires that refugees 'shall [be expelled from a country in which they have sought refuge] only in pursuance of a decision reached in accordance with due process of law'.<sup>108</sup>

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<sup>101</sup> Migration Act 1958 (Cth) subss 501(1),(2),(3).

<sup>102</sup> Migration Act 1958 (Cth) s 501(6).

<sup>103</sup> Migration Act 1958 (Cth) s 501(5).

<sup>104</sup> See, e.g., Susan Harris Rimmer, 'Dangers of character tests under Australian migration laws' (2010) 17 AJ Admin L 229, 230: 'Section 501 can be used as a simpler alternative process for removing an individual compared with lengthier and more rigorous processes required by the Migration Act'.

<sup>105</sup> Ibid.

<sup>106</sup> See above, n 21.

<sup>107</sup> United Nations Convention relating to the Status of Refugees, adopted in 1951, entered into force on 22 April 1954.

<sup>108</sup> Ibid, art 32(2).



Furthermore, Liberty Victoria endorses the analysis of Susan Rimmer of the Australian Research Council that the ‘s[ection] 501 criteria represent Australian values in a particularly narrow and subjective way’.<sup>109</sup> Any Australian, with a sense of self-reflection, not least our national leaders who must set the tone of our national debate, should realise Australia’s current immigration detention policy is at odds with this nation’s foundational history. Australia was a settled by boat people and our national anthem invokes to the world a tolerance which is not conveyed by our current policies on immigration detention.

We’ll toil with *hearts* and hands,  
To make this Commonwealth of ours  
Renowned of all the lands;  
For those who’ve *come across the seas*,  
We’ve *boundless plains to share* (Emphasis added)

Character testing is necessarily subjective,<sup>110</sup> it is tantamount to profiling, and while it enables politicians and security agencies to err on the side of caution, they are currently getting it very wrong.<sup>111</sup> Liberty Victoria notes its particular concern and objection to the Minister’s discretionary power under section 501 of the Act. A Ministerial decision under this section necessarily involves a denial of natural justice: the subject of a section 501 decision is not entitled to hear the Minister’s reasons, nor to present a counter-argument. Furthermore, he or she has no right of review at the Administrative Appeals Tribunal.<sup>112</sup> This flies in the face of the revered Australian notion of fair go, which is otherwise frequently invoked in public discourse by our political leaders.

Section 501 continues a ‘long trend towards unfettered executive power’,<sup>113</sup> which is increasingly subjective owing to Ministerial discretion and is nigh on impossible to appeal.<sup>114</sup> Its application to immigration detainees is particularly inappropriate, especially considering its perceived use as a method to circumvent due processes otherwise applying under the Migration Act.<sup>115</sup> For a country founded on the rule of law<sup>116</sup> — on law for all — that Australia would check her values at the

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<sup>109</sup> Susan Harris Rimmer, above n 27, 230.

<sup>110</sup> Ibid, 238.

<sup>111</sup> Ibid, 229.

<sup>112</sup> Ibid, 238.

<sup>113</sup> Ibid, 232; see also, The Hon Justice McHugh, ‘Tensions between the executive and the judiciary’ (Paper presented at the Australian Bar Association Conference, Paris, 10 July 2002).

<sup>114</sup> Ibid, 229.

<sup>115</sup> Ibid, 230.

<sup>116</sup> See, e.g., Matthew Stephenson, ‘Rule of Law as a Goal of Development Policy’ (2011) The World Bank <<http://go.worldbank.org/DZETJ85MD0>>: ‘a society in which government officials have little or no discretion has a high level of rule of law, whereas a society in which they wield a great deal of discretion has minimal rule of law’.

continental shelf is incomprehensible. Asylum seekers are no less entitled to procedural fairness and due process.

Liberty Victoria contends that the section 501 character test too broad in its scope and abhors its use as a policy tool for dealing with frightened, traumatised, vulnerable asylum seekers who could not otherwise be blamed for acting out at the merry-go-round their fight for survival has become for the sake of the governing political party's (Coalition or Labor as the case may be) political survival.

Asylum seekers have a genuine fear of persecution in their home countries, however, boat arrivals (who, more often than not are in genuine need of asylum) are detained as if they are criminals. Following a risky journey for people who have come across the seas, asylum seekers are detained in overcrowded, unsanitary facilities with no access to mental health, social supports or education, and told they will be sent back for no other reason than their status as 'boat arrivals' offends the manipulated sensitivities of the Australian public at large.

## **The resources, support and training for employees of Commonwealth agencies and/or their agents or contractors in performing their duties, and the health, safety and wellbeing of employees of Commonwealth agencies and/or their agents or contractors in performing their duties relating to irregular maritime arrivals or other persons detained in the network**

Liberty is concerned that staff (particularly guards and other security personnel) at detention centres have not been adequately trained or prepared to manage the challenges that confront them in the detention centre environment. Liberty therefore fears that the traumatic and desperate circumstances detainees find themselves in present real risks to the mental health of detention centre staff. There is also a need for training which enables guards to treat detainees respectfully, non-punitively and in a manner appropriate to their cultural background.<sup>117</sup>

Countless bodies have previously remarked that immigration detainees have a markedly higher incidence of mental illness. As one of many expressing concerns,<sup>118</sup> the Ombudsman recently remarked that he was ‘alarmed’ to find more than 30 reports of self-harm at the Christmas Island centre in the space of one week in June 2011.<sup>119</sup> In addition, those at risk are difficult to identify. At Villawood, for example, health services contractor IHMS is not resourced to conduct outreach or monitoring services.<sup>120</sup> Liberty emphasises, in this context, that all detention centre staff must be adequately trained to, first, appropriately respond to mental distress and potential self harm and, second, cope with the traumatic aftermath of such incidents.

There is evidence that the level of training and support provided by the government and its contractors is failing detainees and detention centre staff. A number of reports suggest that Serco is placing inexperienced or under-trained staff into immigration detention centres, possibly due to pressures on its expanding network.<sup>121</sup> The Australian Human Rights Commission has expressed

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<sup>117</sup> Joint Standing Committee on Migration, ‘Facilities, Services and Transparency’, Report 3 of the Inquiry into Immigration Detention in Australia, [3.140] available at: <http://www.aph.gov.au/house/committee/mig/detention/report3/chapter3.pdf>.

<sup>118</sup> Others include the Australian Human Rights Commission

([http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html) at 11.3), the Australian Medical Association

(<http://www.abc.net.au/am/content/2011/s3262029.htm>) and the Public Health Association of Australia

([http://www.phaa.net.au/documents/policy/policy\\_inthealth\\_mandatory.pdf](http://www.phaa.net.au/documents/policy/policy_inthealth_mandatory.pdf))

<sup>119</sup> Commonwealth Ombudsman, ‘Inquiry to examine suicide and self-harm in immigration detention’, Media Release, 29 July 2011, available at: <http://www.ombudsman.gov.au/media-releases/show/189>.

<sup>120</sup> Australian Human Rights Commission, ‘Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood’, May 2011, 11.2(b), available at:

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

<sup>121</sup> Australian Broadcasting Commission, ‘Asylum seekers continue rooftop protest’, Lateline, 21 April 2011, transcript available at: <http://www.abc.net.au/lateline/content/2011/s3198512.htm>, Australian Broadcasting Commission, ‘Whistleblower claims Christmas Island understaffed’, 6 May 2011, available at: <http://www.abc.net.au/news/2011-05-06/whistleblower-claims-christmas-island-understaffed/2706640>, Australian Broadcasting Commission, ‘Detainees used lighter in bid to prevent suicide’, 18 May 2011,

alarm that, despite DIAC having a policy in place to prevent self-harm,<sup>122</sup> many staff throughout the network have not been trained in its implementation.<sup>123</sup> In other areas (for example, child protection) the Commission was concerned there was no policy at all.<sup>124</sup> It also appears that understaffing at detention centres may have jeopardised the safety of detainees (including those on ‘suicide watch’).<sup>125</sup>

Serco retains casual security staff from other agencies, for example MSS Security. Such employees are not required to undergo the same level of training as permanent Serco guards, despite being exposed to similar scenarios and self-harm/suicide events.<sup>126</sup> In addition, MSS Security staff allege that absenteeism amongst Serco’s own employees has required untrained MSS Security employees to undertake tasks they are not trained to complete (i.e. ‘client contact’ roles).<sup>127</sup>

Serco denies that it has attempted to cut costs by reducing staff levels or providing inadequate training. It continually emphasises that it meets or exceeds its contractual obligations to the Australian government. However, Liberty notes that media reports are frequently the only means available to the public to test these assertions, due to the opaque contracting arrangements employed by the government for managing the immigration detention network. It reiterates the concerns expressed elsewhere in this submission regarding the lack of transparency associated with the current arrangements.

Many stories have emerged of the deep and lasting impacts for employees of immigration detention centre from around 2000–2003, particularly at Woomera. Former guards and psychologists at the centre have told of the trauma associated with cutting down detainees who have attempted to, or

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available at: <http://www.abc.net.au/news/stories/2011/05/18/3219866.htm>, Australian Broadcasting Commission, ‘Claims Christmas Island staff in danger’, 22 July 2011, available at: <http://www.abc.net.au/news/2011-07-22/malaysia-deal/2805558/?site=kimberley>.

<sup>122</sup> Department of Immigration and Citizenship, Psychological Support Program for the Prevention of Self Harm in Immigration Detention (April 2009).

<sup>123</sup> Australian Human Rights Commission, ‘Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood’, May 2011, 11.3(a) available at:

[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html), Australian Human Rights Commission, ‘Immigration Detention at Leonora: Summary of observations from visit to immigration detention facilities at Leonora’, February 2011, 8.2, available at: [http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_leonora.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_leonora.html), Australian Human Rights Commission, ‘Immigration Detention in Darwin: Summary of observations from visits to immigration detention facilities in Darwin’, December 2010, 8.2, available at: [http://www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_darwin.html](http://www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.html).

<sup>124</sup> Australian Human Rights Commission, ‘Immigration Detention at Leonora: Summary of observations from visit to immigration detention facilities at Leonora’, February 2011, 7, available at:

[http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_leonora.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_leonora.html),

<sup>125</sup> Australian Broadcasting Commission, ‘Detention centre insiders issue suicide warning’, 26 May 2011, available at:

<http://www.abc.net.au/news/stories/2011/05/26/3227207.htm?site=kimberley>, Australian Human Rights Commission, ‘Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood’, May 2011, 11.3(a) available at: [http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html).

<sup>126</sup> Paige Taylor, ‘Detention toll too much for centre guard’, The Australian, 11 July 2011, available at:

<http://www.theaustralian.com.au/national-affairs/detention-toll-too-much-for-centre-guard/story-fn59niix-1226091921645>.

<sup>127</sup> Anthony Lowenstein, ‘Villawood guards blow whistle on OH&S issues at the centre’, Crikey, 22 February 2011, <http://www.crikey.com.au/2011/02/22/villawood-guards-blow-whistle-on-ohs-issues-at-the-centre/>.

succeeded in, hanging themselves. They recount being confronted with constant self-harm by detainees, including children. Employees describe being asked to negotiate with desperate people intent on killing themselves, without having being trained or even prepared for this. The consequences for former employees have included suicide attempts, relationship breakdowns and over 50 cases of post-traumatic stress disorder.<sup>128</sup>

Liberty believes it is clear that the pressures which were placed on staff at Woomera are re-emerging in the strained environment of the current detention network. Reports of self-harm continue to escalate,<sup>129</sup> and recent media reports indicate that the Christmas Island centre lacks the resources to properly respond to self-harm attempts, with Serco guards left responsible for at-risk detainees, in makeshift mental health wards.<sup>130</sup> Several staff have been forced off work because of the pressures placed on them, including continued exposure to suicide and graphic self-harm.<sup>131</sup> Liberty is particularly shocked by documents which reveal guards are required to carry knives to cut down hanging attempts.<sup>132</sup> That Serco has been required to engage a full-time psychologist to support staff underlines the extent of the dangers.<sup>133</sup>

Liberty Victoria notes with sadness the suicide of Kieran Webb; a 28 year old Serco officer who had been involved in cutting down a young Hazara man who had died by hanging at Curtin. It is a measure of Mr Webb's distress and trauma that he chose to end his life by that same method during a family holiday just weeks later.

Liberty urges the Committee to consider the impact of immigration detention on front-line staff, as well as detainees. The impact on inexperienced and inadequately trained staff is a secondary but significant reason for the complete abolition of mandatory detention of unauthorised arrivals by sea.

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<sup>128</sup> Madeleine Byrne, 'Tales from the desert camps', Griffith Review, Edition 8, available at: <http://www.griffithreview.com/edition-8-people-like-us/tales-from-the-desert-camps>, Australian Broadcasting Commission, 'The Guards' Story', Four Corners, 15 September 2008, transcript available at: <http://www.abc.net.au/4corners/content/2008/s2365139.htm>.

<sup>129</sup> Australian Broadcasting Commission, 'Detainees used lighter in bid to prevent suicide', 18 May 2011, available at: <http://www.abc.net.au/news/stories/2011/05/18/3219866.htm>, Commonwealth Ombudsman, 'Inquiry to examine suicide and self-harm in immigration detention', Media Release, 29 July 2011, available at: <http://www.ombudsman.gov.au/media-releases/show/189>, Australian Human Rights Commission, 'Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood', May 2011, 11.2(a) available at: [http://www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_villawood.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html)

<sup>130</sup> Paige Taylor, 'Detention misery cuts both ways on Christmas Island', The Australian, 13 July 2011, available at: <http://www.theaustralian.com.au/news/features/detention-misery-cuts-both-ways-on-christmas-island/story-e6frg6z6-1226093376728>, Australian Broadcasting Commission, 'Detention centre insiders issue suicide warning', 26 May 2011, available at: <http://www.abc.net.au/news/stories/2011/05/26/3227207.htm?site=kimberley>.

<sup>131</sup> Paige Taylor, 'Detention misery cuts both ways on Christmas Island', The Australian, 13 July 2011, available at: <http://www.theaustralian.com.au/news/features/detention-misery-cuts-both-ways-on-christmas-island/story-e6frg6z6-1226093376728>.

<sup>132</sup> Lisa Martin and Larine Statham, 'Mandatory detention policy under question', The Age, 29 July 2011, available at: <http://news.theage.com.au/breaking-news-national/mandatory-detention-policy-under-question-20110729-1i3pf.html>.

<sup>133</sup> Paige Taylor, 'Detention toll too much for centre guard', The Australian, 11 July 2011, available at: <http://www.theaustralian.com.au/national-affairs/detention-toll-too-much-for-centre-guard/story-fn59niix-1226091921645>.

However, should the continuation of mandatory detention be considered necessary, Liberty considers it imperative that:

- all staff involved in the immigration network, including security contractors, be adequately trained in the prevention of and response to self harm and suicide by detainees;
- free and unlimited counselling services be made available to staff; and
- IHMS be funded for and required to provide mental health outreach and monitoring services for all detainees.