



**Joint Submission of PILCH NSW and PILCH VIC to  
the Joint Select Committee on Australia's  
Immigration Detention Network**

**16 August 2011**

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the Joint Select Committee on Australia's  
Immigration Detention Network**

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## 1. Executive Summary

1. PILCH NSW and PILCH Vic (**PILCH**) welcomes the Inquiry into Australia's Immigration Detention Network (**the Inquiry**) and is pleased to provide this submission to the Joint Select Committee. PILCH considers the Inquiry to be an important opportunity to improve the protection and promotion of human rights of asylum seekers in Australia.
  2. Informed by our evidence and experience with asylum seekers, PILCH has prepared this submission with specific regard to the following Terms of Reference:
    - (a) any reforms needed to the current Immigration Detention Network in Australia
    - (b) the impact of length of detention and the appropriateness of facilities and services for asylum seekers
  3. Because we are relying on the evidence-base that stems from our provision of services to inform this submission, we have not directly addressed the complete list of the Terms of Reference.
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## 2. Recommendations

1. In summary, PILCH make the following recommendations:

**Recommendation No. 1:** *The Joint Select Committee adopt a human rights framework as the foundation of its investigation and the formation of its recommendations.*

**Recommendation No. 2:** *The inquiry should be used as an opportunity to strengthen the protection and promotion of human rights of asylum seekers in Australia and certainly not, in any way, to limit them.*

**Recommendation No. 3:** *The Australian Government repeal the provisions of the Migration Act 1958 relating to mandatory detention.*

**Recommendation No. 4:** *The Australian Government enact legislation to ensure that asylum seekers are detained only where strictly necessary and as a last resort.*

**Recommendation No. 5:** *The Australian Government codify in law time limitations on immigration detention.*

**Recommendation No. 6:** *The Australian Government should remain fully committed to the protection and promotion of human rights of asylum seekers and ensure that it complies with international treaties and obligations when developing laws and policies and making decisions.*

**Recommendation No. 7:** *The Australian Government should increase Legal Aid funding for migration matters which will allow Legal Aid Commissions to broaden its guidelines to provide advice and representation to asylum seekers.*

**Recommendation No. 8:** *The Department of Immigration and Citizenship establish and implement consistent communication protocols across the Detention Centre Network.*

**Recommendation No. 9:** *The Department of Immigration and Citizenship install Audio Visual Links in each Immigration Detention Centre.*

**Recommendation No. 10:** *The Department of Immigration and Citizenship allow and facilitate, including providing interpreters, lawyers to conduct judicial review information sessions at Immigration Detention Centres.*

**Recommendation No. 11:** *The Department of Immigration and Citizenship prepare and distribute letters and facts sheets in the native language to each individual who is refused at the Independent Merits Review stage.*

**Recommendation No. 12:** *The Department of Immigration and Citizenship educate Case Managers on the judicial review process and available referral pathways.*

**Recommendation No. 13:** *The Department of Immigration and Citizenship should provide access to computer facilities to enable people to have email communication with their lawyers.*

**Recommendation No. 14:** *The Department of Immigration and Citizenship should send a copy of the Independent Merits Review transcript to the client's migration agent or lawyer.*

**Recommendation No. 15:** *The Australian Government should extend the time frame for filing for judicial review in the Federal Magistrates Court from 35 days to 70 days for individuals in Immigration Detention.*

### 3. About PILCH

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4. The Public Interest Law Clearing House of New South Wales (PILCH NSW) was formed in 1992. PILCH NSW aims to bridge the justice gap by providing the community with access to pro bono legal representation and other professional services, to enable pursuit of important legal and social issues that would otherwise go unaddressed. PILCH is committed to protecting human rights, preventing abuses of power by the State, responding to emerging issues of public concern.
5. The Public Interest Law Clearing House (Vic) Inc is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono referral schemes (Public Interest Law Scheme, Victorian Bar Legal Assistance Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).
6. PILCH's objectives are to:
  - improve access to justice and the legal system for those who are disadvantaged or marginalised
  - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised
  - refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge
  - support community organisations to pursue the interests of the communities they seek to represent, and
  - encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

### 4. Scope and Structure of Submission

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7. This submission analyses the following terms of reference:
  - (a) any reforms needed to the current Immigration Detention Network in Australia
  - (b) the impact of length of detention and the appropriateness of facilities and services for asylum seekers

8. This submission begins in Section 5 by detailing the human rights framework that creates the background for Australia's international obligations and is therefore the basis for our recommendations. Section 6 outlines our response to term of reference (a) regarding particular reforms we feel are necessary within the immigration detention network. Section 7 responds to term of reference (b) and clarifies our view on how the services provided to asylum seekers could be improved.
9. These submissions are based on personal experience and direct knowledge of the detention centre network by PILCH. We have developed programs to assist individuals in IDCs across Australia who have been refused a protection visa and have the right to judicial review. A significant focus of the project is to find legal representation for individuals in detention, recruit/train lawyers from the community to take these matters on a pro bono basis and coordinate a national response. The nature of these projects places PILCH in the unique position of dealing not only with the issues associated with having asylum seekers in IDCs but also with the gaps in resources, knowledge and capacity around judicial review. The following submissions relate to our direct experience with the Immigration Detention Network and with particular concerns surrounding the judicial review process.

## **5. Human Rights Framework**

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### **5.1 General Issues**

10. The Human Rights Framework provided in this submission is based on the direct experience of PILCH Vic in the course of their human rights based service provision. PILCH NSW fully supports the framework and recommendations laid out by PILCH Vic in this section.
11. PILCH Vic engages with human rights based service provision which means that it develops and executes its case work, advocacy and capacity-building in accordance with the following key human rights principles:
- treating people with dignity, respect, equality and non-discrimination
  - giving primacy to the asylum seeker's voice and empathising with them
  - adopting a 'whole of person' approach to service provision
  - promoting the asylum's seekers empowerment and participation, and
  - engaging in systemic advocacy and public education.
11. Human rights based service provision is a coherent framework with international recognition; it makes sense to use it as the foundation for policies and practices when providing people with services.
12. Accordingly, we urge the Joint Select Committee to adopt a human rights framework as the foundation of its investigation and the formation of its recommendations. Furthermore, the inquiry should be used as an opportunity to strengthen the legal protection of human rights of asylum seekers in Australia.

#### **Recommendation 1:**

*The Joint Select Committee adopt a human rights framework as the foundation of its investigation*

and the formation of its recommendations.

**Recommendation 2:**

*The inquiry should be used as an opportunity to strengthen the protection and promotion of human rights of asylum seekers in Australia and certainly not, in any way, to limit them.*

**5.2 Mandatory detention**

13. Australian law provides for mandatory immigration detention of 'unlawful non-citizens' and does not allow for judicial consideration of the need for detention in individual cases.<sup>1</sup> Immigration detention is not, as the Australian Government recently asserted<sup>2</sup>, a measure of last resort. Asylum seekers who arrive in Australia informally are detained as a matter of course before other options have been exhausted. Further, the law does not impose time limits on immigration detention and the Government may and does detain people in immigration detention indefinitely.<sup>3</sup>

14. On July 2008 the then Minister for Immigration and Citizenship, Chris Evans, delivered a speech entitled '*New Directions in Detention – Restoring Integrity to Australia's Immigration System*'. In this speech, Mr Evans outlined Australia's Immigration Detention Values that would guide and drive new detention policy and practice into the future. Two of the seven values prescribe that:

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, should be subject to regular review<sup>4</sup>

detention in IDCs is only to be used as a last resort and for the shortest practicable time<sup>5</sup>

15. To date, the Government has failed to implement these values. In a recent media release, the Commonwealth and Immigration Ombudsman stated:

What do the Government's seven key immigration detention values really mean today? Are they milestones to a fairer society, or 'motherhood' statements overtaken by reality? The challenges associated with immigration detention are unlikely to diminish, so perhaps the time has come to review, clarify and produce new operational guidelines designed to ensure the values can be fully implemented.<sup>6</sup>

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<sup>1</sup> *Migration Act 1958* (Cth), ss189(1) and 189(2)

<sup>2</sup> During the Human Rights Council's Universal Periodic Review of Australia in January 2011

<sup>3</sup> *Migration Act 1958* s 196(1)

<sup>4</sup> Value 4

<sup>5</sup> Value 5



There is no doubt that if these values were implemented, many of the Terms of Reference of this inquiry would fall away.

**Recommendation 3:**

*The Australian Government repeal the provisions of the Migration Act 1958 relating to mandatory detention.*

**Recommendation 4:**

*The Australian Government enact legislation to ensure that asylum seekers are detained only where strictly necessary and as a last resort.*

**Recommendation 5:**

*The Australian Government codify in law time limitations on immigration detention.*

### **5.3 International obligations**

16. Australia has obligations to protect the human rights of all asylum seekers who arrive in Australia, regardless of how or where they arrive and whether they arrive with or without a visa.

17. As a party to the Convention Relating to the Status of Refugees, Australia has agreed to ensure that people who need protection under the Convention are not sent back to a country where their life or freedom would be threatened.

18. While asylum seekers are in Australia (or otherwise subject to Australia's jurisdiction), the Government has obligations under various international treaties to ensure that their human rights are respected and protected. These treaties include the:

- International Covenant on Civil and Political Rights (**ICCPR**)
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**)
- Convention on the Rights of the Child (**CRC**)
- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**).

19. Australia therefore has legal obligations under international law to incorporate the rights contained in these instruments into its domestic law. Part of this commitment involves taking all necessary legal and administrative steps to respect, protect, promote and fulfill the rights therein. At a minimum, this requires the establishment of effective legislative development and scrutiny processes to ensure that Australia's domestic laws are not inconsistent with Australia's international human rights obligations.

**Recommendation 6:**

*The Australian Government should remain fully committed to the protection and promotion of*

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<sup>6</sup> <http://www.ombudsman.gov.au/media-releases/show/190>

*human rights of asylum seekers and ensure that it complies with international treaties and obligations when developing laws and policies and making decisions.*

#### **5.4 Access to justice**

20. Effective protection of human rights requires that people know their rights and have the capacity to enforce those rights. This requires access to appropriate and affordable legal advice, representation and advocacy services. Access to justice is a human right in itself and a critical element of the promotion, protection and fulfillment of other human rights. Accordingly, various practical resources are required to give individuals knowledge of, and the ability to enforce, their legal rights.
21. Conditions in IDCs have serious implications for the human rights of asylum seekers. Detention, particularly when indefinite or prolonged, has a detrimental impact on the mental health of persons who have suffered torture and trauma. This impact is magnified by limited access to legal aid and lawyers. This is particularly the case for asylum seekers detained in offshore or remote facilities, whose isolation renders the delivery of appropriate legal services difficult.

#### **Recommendation 7:**

*The Australian Government should increase legal aid funding for migration matters which will allow Legal Aid Commissions to broaden its guidelines to provide advice and representation to asylum seekers.*

### **6. Term of reference (a): 'any reforms needed to the current Immigration Detention Network in Australia'**

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#### **6.1 General Issues**

22. In our experience, asylum seekers in IDCs often report feelings of abandonment, hopelessness and helplessness. These feelings stem from the asylum seekers' lack of understanding of the refugee application process and not knowing where their matter lies within the system. Furthermore, both a geographical and communication separation from their lawyer means no one can adequately explain these things to them or update them on the progress and status of their matter.

#### **6.2 Reforms to Access to Asylum Seekers in IDCs**

23. Immigration Detention Centres are generally in the most remote and difficult to access areas of Australia. It is expensive, time consuming and difficult to travel to most of the IDCs which means that lawyers find it difficult to have any face-to-face contact with clients. Compounding this lack of direct access is the absence of consistent protocol between IDCs for contacting people over the phone. As an example, we have been told by one IDC that we should book a

phone call with a client a week in advance and told by another that we had to email the manager who would reply with a suitable date for a phone call.

24. A further issue is the fact that only one IDC in Australia has the capabilities to hold an Audio Visual Link (AVL) conference. There are definite circumstances when it is in the lawyer and client's best interest to be able to communicate face-to-face. This lack of resources within IDCs is a serious detriment to the asylum seekers' access to their lawyer and to justice.
25. Finally, in regards to the judicial review process, we feel that there is a significant need to provide access to individuals who can enter the IDCs and provide information sessions and take instructions from people who have received a negative Independent Merits Review (**IMR**) decision and hold the right to judicial review. As explained above, this direct access is necessary to fully explain a relatively new, uncertain and important step in the refugee process to asylum seekers.
26. Based on our experience, access to information and ability to access asylum seekers are two of the most significant reforms which need to take place within the detention centre network. Not only would these reforms assist to streamline the process, they would also help to manage asylum seekers' expectations. By keeping asylum seekers sufficiently informed about the process and giving them lines of access to their lawyers, these reforms could decrease the psychological stress currently associated with mandatory detention and provide people with a realistic view of their options within the system.

**Recommendation 8:**

*The Department of Immigration and Citizenship establish and implement consistent communication protocols across the Detention Centre Network.*

**Recommendation 9:**

*The Department of Immigration and Citizenship install Audio Visual Links in each Immigration Detention Centre.*

**6.3 Reforms to Information Provision to Asylum Seekers**

27. The Department of Immigration and Citizenship (**the Department**) should provide asylum seekers with clear and simple information, in their native language on the refugee application process and on their options at each stage of the process. This is particularly important for asylum seekers who may have the right to judicial review for several reasons. First, this stage of the process is potentially their final opportunity to have their matter reviewed. Second, because asylum seekers lose their migration agents after refusal at the IMR level this means that unless the migration agent acts above and beyond their contract they are under no obligation to explain to the asylum seeker their right to judicial review or to assist them through that process. Finally, judicial review in refugee matters is not very widely understood by asylum seekers.

28. Due to communication difficulties we recommend in-person information sessions be conducted at IDCs with interpreters provided for all who have been refused at the IMR level. These sessions should be run by lawyers or migration agents in the community and not by agents of the Department so that the people feel that the information is being provided independently. This would also provide an invaluable opportunity for individuals to ask questions so that a wider understanding of the process is gained through each session.
29. Along with these sessions, we would also recommend distribution of materials and fact sheets in the relevant native languages to each individual who is refused at the IMR level. In particular, letters from the Department relating to their application should be translated to their native language. At the moment, such information is provided in English which means the majority of people are unable to read and understand the documents sent to them. In addition to having individual documents translated, there is a real need for fact sheets. In our experience, asylum seekers have minimal understanding of their options and potential rights after refusal which these fact sheets could address. The fact sheets should provide information on options after refusal, the basis for judicial review and outline referral pathways that they can contact in order to have their particular matter assessed.
30. Finally, an important step to improving access to information is to educate Case Managers from the Department. In our experience, Case Managers have minimal knowledge about the judicial review process or the referral pathways that exist for people across Australia. As the primary points of contact for people in detention, it is vital that Case Managers can answer questions and assist.

**Recommendation 10:**

*The Department of Immigration and Citizenship allow and facilitate, including providing interpreters, lawyers to conduct judicial review information sessions at Immigration Detention Centres.*

**Recommendation 11:**

*The Department of Immigration and Citizenship prepare and distribute letters and fact sheets in the native language to each individual who is refused at the IMR level.*

**Recommendation 12:**

*The Department of Immigration and Citizenship educate Case Managers on the judicial review process and available referral pathways.*

**7. Term of Reference (b): 'the impact of length of detention and the appropriateness of facilities and services for asylum seekers'**

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**7.1 General Issues**

31. Our focus on assisting asylum seekers with judicial review means that we have particular insight into the appropriateness of facilities and services for asylum seekers at this point in the

application process. Our joint experience has been that there are significant gaps in several areas including the provision of legal representation, failure to provide additional resources to support judicial review, difficulties in obtaining documentation and issues around a very narrow time frame within which to apply for judicial review in Australian Courts.

## **7.2 Difficulties in providing legal representation**

32. One of our primary functions is to assist individuals with finding legal representation for their appeals for judicial review. This is a challenging task for several reasons. First, while the High Court<sup>7</sup> has found that individuals have the right to judicial review, the Department has failed to provide any additional resources to ensure that people are able to exercise that right. Perhaps most strikingly, the migration agents appointed by the Department lose their funding to represent their clients after the refusal of the refugee application but before the judicial review appeal. This means that the relationship with their client is lost and their critical understanding of the client's case. The migration agents may be the only people who may have a complete understanding of the case and process, yet they are unable to assist their client or newly engaged barristers because of the loss of their government funding.
33. As organisations focused on pro bono work, we have been able to arrange for barristers and solicitors to act on a pro bono basis. The generosity and dedication of our partners has been able to support the system thus far, however it is anticipated that the numbers of individuals who will be coming through the system applying for judicial review will grow exponentially. As this number grows, it will mean that our pro bono resources, which are already stretched, may no longer be able to support the number of applications coming in. This could lead to an increased number of unrepresented and unmeritorious applications coming before the Federal Magistrates Court. Accordingly, this may lead to a clogging of the system and an inability by the Court to effectively process these applications.

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<sup>7</sup> Plaintiff M61/2010E v Commonwealth of Australia & Ors and Plaintiff M69 v Commonwealth of Australia & Ors [2010] HCA 4

### **7.3 Difficulty in obtaining documentation**

34. For lawyers who have taken on these matters and for PILCH, one of the most significant difficulties we have faced is obtaining documents in a timely and complete manner. The geographic isolation of IDCs and the lack of clarity around communication protocols between IDCs compounds these difficulties. Another difficulty is that many of the documents are held by the migration agents who, as described above, are no longer employed to represent their client at this stage of the process and therefore have to act outside of budget to ensure that documents get forwarded to the new lawyers.

#### **Recommendation 13:**

*The Department of Immigration and Citizenship should provide access to computer facilities to enable people to have email communication with their lawyers.*

#### **Recommendation 14:**

*The Department of Immigration and Citizenship should send a copy of the Independent Merits Review transcript to the client's migration agent or lawyer .*

### **7.4 Issues with the time frame for filing**

35. The current time for filing for judicial review in the Federal Magistrates Court is 35 days from the date of the letter alerting the asylum seeker to their failure at the IMR. This means that the person has 35 days to break through the isolation of the detention centre, find someone who is willing to assist them in finding a lawyer, find a way to get their documents to the lawyer, have a barrister review the matter for merit, prepare the appropriate grounds for filing and go through the procedures to file.

36. In our experience this is an unreasonably tight timeframe and indeed through our personal experience and through conversations with lawyers around Australia it is extremely common to receive inquiries from asylum seekers who are well out of time. It has meant that many matters are filed out of time, are filed with only skeleton grounds outlined to try and meet the time often without a merits assessment, and that altering the original grounds after lawyers have had the opportunity to thoroughly review the matter is almost a standard procedure. This has also meant in several instances that community organisations with no real legal background have filed the matters for individuals in detention who were unable to find legal representation within the time frame. This is clearly an undesirable approach for the individuals, the Court and lawyers. In order to take into account the realities of the difficulties associated with handling these matters we recommend that the time frame for filing be extended from 35 days to 70 days.

37. In our experience, the facilities and services provided to asylum seekers seeking judicial review are minimal and insufficient to ensure appropriate access to lawyers and the Courts. The 35 day time window is rushed and disproportionate to the time these individuals have had to spend in detention waiting for their decisions to be handed down. If the system is actively suppressing people's right to judicial review by ensuring that many have to file out-of-time and ultimately lose their right to judicial review then it is working contrary to the intention of the High Court and Australia's international obligations.

**Recommendation 16:**

*The Australian Government should extend the time frame for filing for judicial review in the Federal Magistrates Court from 35 days to 70 days.*