



# Australia's Immigration Detention Network

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

August 2011

Contact:

**Emily Price, Legal and Policy Officer**

Email: [Redacted]

**Mandy Wyer, Public Affairs Manager**

Phone: [Redacted]

Email: [Redacted]

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001  
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E enquiries@lawyersalliance.com.au

[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

# Contents

<b>Who we are</b>	<b>4</b>
<b>Summary of recommendations</b>	<b>5</b>
<b>Introduction</b>	<b>6</b>
<b>A. Treatment within the immigration detention network</b>	<b>6</b>
a) Duty of care	6
b) Psychological damage	6
c) Revelations of recent ComCover report	8
<b>B. Legal Assessment</b>	<b>9</b>
a) International law	9
b) Child rights in international law	11
c) Guardianship of children and conflict of interest	11
d) Breach of guardianship	12
e) Harm	12
f) Education	12
g) Mandatory reporting	13
h) National Children's Commissioner	13
i) Precedent currently being set regarding breach of guardianship	13
<b>C. Access to compensation</b>	<b>14</b>
a) Past compensation claims	14
i) Case Study 1	15
ii) Case Study 2	15
iii) Case Study 3 – Cornelia Rau	15
b) Future Commonwealth liability to compensation claims	15
<b>D. Monitoring</b>	<b>16</b>
a) Ineffective monitoring and training	16
b) Failure to implement recommendations	16

<b>E. The Government's detention values</b>	<b>17</b>
a) 'Prompt resolution'	17
b) 'Last resort'	17
c) Detention of children	17
d) People in detention will be treated fairly and reasonably within the law	18
e) The dignity of the human person	18
<b>Conclusion</b>	<b>19</b>
<b>Reference List</b>	<b>20</b>



## Who we are

### Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

### Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

### Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

### Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

# Summary of Recommendations

The ALA contends that consistent **contravention of human rights obligations**, and **breach of the duty of guardianship by the Minister for Immigration**, may lead to **extensive claims for compensation** in the future.

The ALA submits that **mandatory detention increases psychological trauma**. In the absence of abolition of mandatory detention, **crucial reforms are required to improve mental health outcomes** within immigration detention centres.

The ALA recommends that the **Australian government must commit to genuinely founding immigration policy upon international human rights law**. This includes **abolishing arbitrary, mandatory detention** of asylum seekers.

The ALA submits that there is an **inherent conflict of interest** in the Minister for Immigration's role as a guardian, and in administering the *Migration Act*.

The ALA contends that **current treatment of unaccompanied asylum seeker children, may constitute breach of the duty of guardianship**.

The ALA submits that the Australian government should be aware that **precedent is currently being established surrounding breach of guardianship**.

The ALA submits that the **scope of asylum seeker compensation claims may demand** the creation of a **national compensation fund** in the future.

The ALA submits that **mandatory, arbitrary detention should be abolished**, and that **genuine community accommodation should be sought** for individuals while their claims are processed.

## Introduction

The Australian Lawyers Alliance (“the ALA”) welcomes the opportunity to contribute a submission to the Joint Select Committee on Australia's Immigration Detention Network on Australia’s immigration detention network.

The ALA has been a frequent commentator on issues relating to asylum seekers in the media.

We are especially concerned regarding the Australian Government’s breach of international human rights obligations in its operation of immigration detention facilities.

**The ALA contends that consistent contravention of human rights obligations, and breach of the duty of guardianship by the Minister for Immigration, may lead to extensive claims for compensation in the future.**

## A. Treatment within the immigration detention network

### a) Duty of care

The Commonwealth government is under a non-delegable duty to ensure that reasonable care is taken of detainees within immigration detention<sup>1</sup>.

*The duty imposed on the Commonwealth must accommodate that special dependence and the peculiar vulnerability to which detainees known to suffer mental illness are exposed. The duty must also take account of the very distinctive outsourcing arrangements the Commonwealth has been prepared to accept for the provision of health care services.*<sup>2</sup>

### b) Psychological damage

Furthermore, the Commonwealth ‘has a duty to provide healthcare to immigration detainees, a responsibility that extends to addressing vulnerability to psychiatric illness’<sup>3</sup>. The trauma sustained in immigration detention has been confirmed by a number of studies.

The first systematic research study regarding the mental health of detainees in an Australian immigration detention facility was published in 2004<sup>4</sup>. This study ‘focused on members of families who had been detained for between two and three years in a remote detention centre. Every adult was diagnosed with a major depressive

<sup>1</sup> *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005) [207]

<sup>2</sup> *Ibid* [211]

<sup>3</sup> Dr Susan Rees, Professor Derrick Silove, Dr Jonathan Phillips & Dr Zachary Steel, ‘Asylum Seekers and Psychiatric Injury’ (2010) 99 *Precedent* 15.

<sup>4</sup> *Ibid* 16.

episode, and the majority had post-traumatic stress disorder (PTSD). Most expressed suicidal ideation, with one-third reporting incidents of actual self-harm while in detention. Prior to detention, only half of these persons had PTSD, a small number had co-morbid depression, and no adults had self harmed or had experiencing suicidal ideation. These rates of pre-detention mental disorders are consistent with the general findings of the literature on refugee mental health.<sup>5</sup>

Another Australian 2004 study assessed 16 adults and 20 children. Of the 10 children aged five or under, seven had spent half their lives in immigration detention. All children in this age range displayed delays in cognitive development, with some infants showing marked deficits. All children aged 7 – 17 years fulfilled criteria for PTSD and major depression with suicidal ideation.

As Rees, Silove, Phillips and Steel confirm:

*'The findings of these studies suggest that the **prevalence rate** of stress-related **mental disorder among children in detention is extremely high, much greater than would be expected** of refugee children living in the general community<sup>6</sup>.*

A recent study, by psychiatrist Jon Jureidini, of the Women's and Children's Hospital in Adelaide, says that 'detention has led to **self-harm in children as young as 10, infants with separation anxiety**, teenagers with **severe depression** and parents who have **lost the capacity to care for children**'<sup>7</sup>.

Furthermore, this evidence has been supported in international studies<sup>8</sup>. No studies have presented contrary findings<sup>9</sup>.

The inadequate provision of care towards asylum seekers is commonly identified in the media. As recently as 4 July 2011:

Dr Paul Bauert, director of Paediatrics at Royal Darwin Hospital, and president of the Northern Territory branch of the Australian Medical Association, says the primary health care provided to detainees in Darwin is poor and mental health care is almost non-existent:

*"The concern we have as doctors and paediatricians is that **the longer these children are kept in a lock-up facility the longer it is going to impact on their physical and mental health.**"*

ABC News cited that as at 4 July 2011:

*The Immigration Department confirmed asylum seekers in Darwin Immigration Detention Centre were waiting **four weeks to receive***

---

<sup>5</sup> Ibid.

<sup>6</sup> Ibid 17.

<sup>7</sup> Kirsty Needham, 'Families destroyed by asylum detention' *Sydney Morning Herald*, August 3 2011. Accessed 12 August 2011 at <http://www.smh.com.au/national/families-destroyed-by-asylum-detention-20110802-1ia3f.html>

<sup>8</sup> Rees et. al., above n 3, 18.

<sup>9</sup> Ibid 19.



*counselling for torture and trauma. Refugee advocates say four detainees attempted suicide at the centre in late June 2011, up to a hundred asylum seekers were involved in hunger strikes and five people sewed their lips together.*<sup>10</sup>

Rees, Silove, Phillip and Steel state that:

*Nevertheless, we believe that the data available at the very least provides a foundation of legitimacy for the pursuit of claims asserting that prolonged **immigration detention in its own right may be a cause of psychological injury***<sup>11</sup>.

**The ALA submits that mandatory detention increases psychological trauma. In the absence of abolition of mandatory detention, crucial reforms are required to improve mental health outcomes within immigration detention centres.**

### **c) Revelations of recent ComCover report**

On 12 August 2011, ABC News released details of a ComCover report, which identified that:

'The report identifies five major failures by the Department of Immigration across the detention centre network:

- There is no risk management process, despite the highly volatile environment.
- There is no plan to alter staffing levels to deal with dramatic fluctuations in detainee numbers.
- Staff are not trained to the point where they are confident and competent in their jobs.
- There is no effective written plan to deal with critical incidents like riots and suicide attempts.
- And no steps are taken to manage detainees' religious and cultural needs, detainees are roomed together even when there's a history of extreme violence between their ethnic groups in their home countries<sup>12</sup>.

The report details a system unable to respond to serious threats to life and limb like April's riots in Sydney's Villawood detention centre.

"There were clear indicators (that Villawood staff advise were present at the time) that the riots were reasonably foreseeable. Despite the apparent clear indications, no

<sup>10</sup> Kristy O'Brien and Kate Wild, ABC News, 'Doctor's condemn delays in freeing refugee children', 4 July 2011. Accessed 15 July 2011 at <http://www.abc.net.au/news/2011-07-04/doctors-condemn-delays-in-freeing-refugee-children/2781534?section=justin>

<sup>11</sup> Rees et. al., above n 3, 19.

<sup>12</sup> Tom Iggulden, 'Report scathing of detention centre conditions', ABC News, 12 August 2011. Accessed 12 August 2011 at <http://www.abc.net.au/news/2011-08-11/comcare-report-scathing-of-detention-centre-conditions/2835820>



critical incident plans were in place for staff to follow, should such a situation occur," the report said.

The lack of training has led to serious ramifications identified in the ComCare report, which details how Serco staff are thrown into situations of extreme risk with little idea of how to respond.

"Serco staff provided information about the level of serious assaults on staff, witnessing the deaths of detainees and the distress of having to deal with it. Staff also advised of feeling inadequately trained and the lack of instruction and supervision/support during times of critical incidents," the report said.

Lateline recently obtained a log of incidents in the Christmas Island detention centre detailing up to 12 incidents of self-harm or attempted suicide per day.

The ComCare report suggests the number could be higher, as could other dangerous events, saying: "there is (a) level of under-reporting of notifiable incidents in accordance with s68 of the OHS Act."

ComCare told Lateline it has identified a number of potential breaches by the Immigration Department of the Occupational Health and Safety Act<sup>13</sup>.

Such failures indicate a systemic failure to address the needs of detainees, and point to the unsuitability of such detention facilities to house detainees.

**The ALA submits that asylum seekers should be placed in community based alternatives to detention centres.**

## B. Legal assessment

### a) International law

In particular, the mandatory detention of asylum seekers is in contravention of international human rights law.

The Universal Declaration of Human Rights ("**the Declaration**"), which is accepted as international customary law, provides that:

***Everyone** has the right to seek and to enjoy in other countries asylum from persecution.*<sup>14</sup>

Similarly, the Declaration provides:

***No one shall be subjected to arbitrary arrest, detention or exile.***<sup>15</sup>

The mandatory detention imposed on asylum seekers is often arbitrary in nature.

<sup>13</sup> Ibid.

<sup>14</sup> Article 14(1), *Universal Declaration of Human Rights*.

<sup>15</sup> Article 9, *Universal Declaration of Human Rights*.

Article 9 of the International Covenant of Civil and Political Rights (“the ICCPR”) provides:

***Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.***<sup>16</sup>

The Australian Human Rights Commission (“the AHRC”) commented on the arbitrary nature of detention in its 2004 report, *A last resort? National Inquiry into Children in Immigration Detention*.

In the report, a teenage boy, later found to be a refugee, commented on the uncertainty associated with being in detention:

*I know what most of the people don't know about a detention centre, like how it is, but I think every Australian knows what a prison is, what a prison is and what happens in a prison. All the people, even in prison, like the prisoners they know when they're gonna be released, when they're sentenced they know that for this long they're in prison and at that date they're gonna get their freedom.... **But in detention centre, no one knows** when they're gonna be released. Tomorrow, day after tomorrow, for two years like, waiting how much hard it is...*<sup>17</sup>

Article 10(1) of the ICCPR provides that:

***All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.***

A June 2011 report released by non-government organisation ChilOut detailed the practice of referring to detainees by their number (boat number/number)<sup>18</sup>. This does not amount to treating persons with humanity, dignity and respect.

Human rights should be the guiding foundation for the development of immigration policy. However, Australia's current record not only contravenes an individual's human rights, but also sets an appalling national public image in the region, therefore negating our ability to negotiate with other nations on their own appalling human rights' records.

---

<sup>16</sup> Article 9, *International Covenant of Civil and Political Rights*.

<sup>17</sup> Teenage boy found to be a refugee, cited in Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention*, April 2004. Accessed at [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/report/index.htm](http://www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm)

<sup>18</sup> Kate Gauthier, Dianne Hiles, Siobhan Marren & Jessica Perini (June 2011) *No Place for Children: Immigration detention on Christmas Island* at 22 [4.4.2]. Accessed at [http://www.chilout.org/web\\_images/No%20Place%20for%20Children%20-%20Final.pdf](http://www.chilout.org/web_images/No%20Place%20for%20Children%20-%20Final.pdf)

The ALA recommends that the Australian government must commit to genuinely founding immigration policy upon international human rights law. This includes abolishing arbitrary, mandatory detention of asylum seekers.

## b) Child rights under international law

Article 37(b) of the *Convention of the Rights of the Child* which provides that:

***No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.***

The immigration detention of children has been as a first, instead of last resort, especially in Australia's off-shore policy, and has not been for the shortest period of time.

Article 3 of the *Convention on the Rights of the Child* similarly provides that:

***In all actions concerning children... the best interests of the child shall be a primary consideration.***

The psychological impact of immigration detention on children has been well documented, including high levels of developmental delays, mood disorders, post traumatic stress disorder, depression, suicide ideation, anxiety and physical health problems<sup>19</sup>.

In 2011, the breach of the rights of child asylum seekers has been constantly highlighted in the media. In the past year, there has been the proposal to swap unaccompanied children under the Malaysian solution; the X-raying of children's wrists as an age determinant; the placing of three Indonesian boys in maximum security prisons; denial of refugee protection to a 15 year old who, subject to appeal, may be deported back to Afghanistan; the detrimental treatment of children in detention on Christmas Island; the coronial inquest into the deaths of children aboard the SIEV 221 at Christmas Island; and suicidal tendencies among children as young as ten in detention centres.

These are only some of the issues that are daily occurring within immigration detention and policy. These events **indicate an endemic and consistent contravention of international human rights law.**

## c) Guardianship of children and conflict of interest

The ALA is concerned regarding the guardianship of unaccompanied minors. Currently, the Minister for Immigration and Citizenship is the legal guardian of all unaccompanied minors, as provided for under section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth).

---

<sup>19</sup> Ibid 28 – 29.

This provides an inherent conflict of interest between the Minister's role as guardian and the Minister's role in administering the *Migration Act*. This has been recognised by the courts<sup>20</sup>.

Under section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth):

*The **Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.***

Under the common law, duties of a guardian include: 'to protect the child from harm; to provide for maintenance; to educate; to show affection and provide emotional support'<sup>21</sup>. Such a duty has previously been interpreted to be fiduciary in nature, and carried a high level of duty of care.

**The ALA submits that there is an inherent conflict of interest in the Minister for Immigration's role as a guardian, and in administering the *Migration Act*.**

#### **d) Breach of guardianship**

It is certainly arguable that these common law duties of guardianship are being breached, in the failure to provide against the disintegration of children's psychological and social health and arbitrary detention within immigration detention.

#### **e) Harm**

Children are exposed to harm within detention centres in witnessing suicide attempts and rioting, and all associated trauma. Access to quality health care and mental health care is also constrained, especially within remote locations. Fostering of emotional support is also lacking. The failure to place children in community based alternatives to detention, robs children of the opportunity to participate in community life and develop relationships and social skills.

#### **f) Education**

On Christmas Island, children aged under 12 may attend the local school. Children aged over 12 attend classrooms serviced by West Australian Department of Education Christmas Island District High School staff, on a shift basis of

<sup>20</sup> See for example, *Odhiambo* [2002] FCAFC 194; (2002) 122 FCR 29, 37 [41].

<sup>21</sup> Antonio Buti, 'British Child Migration to Australia: History, Senate Inquiry and Responsibilities' (2002) 9(4) *Murdoch University Electronic Journal of Law*, [26].

approximately 1 -2 hours per day.<sup>22</sup> This is inadequate to substitute for secondary education.

This lack of adequate education in formative years of a young person's life will also place asylum seekers at severe disadvantage later in life.

### **g) Mandatory reporting**

State legislation invests certain professions with an obligation to mandatorily report instances of child abuse. However, a lack of child engagement with these professionals in some detention centres, and a lack of comparative adequate mandatory reporting mechanisms means that there are potentially many undocumented cases of abuse.

### **h) National Children's Commissioner**

The NGO sector has consistently called for the establishment of a National Children's Commissioner. However, this call has been consistently ignored. In the absence of appointing a new legal guardian, the Commonwealth is therefore continually opening itself to new possibilities of litigation regarding breach of guardianship.

**The ALA contends that current treatment of unaccompanied asylum seeker children, may constitute direct breach of duty of guardianship.**

### **i) Precedent currently being set regarding breach of guardianship**

In 2011, a class action was lodged for breach of guardianship by the Minister for Immigration by individuals who were British migrant children in the 1940s. This case has the potential to set significant precedent regarding the breach of guardianship by the Minister, and the lodging of class actions<sup>23</sup>.

The claimants allege that they suffered physical and sexual abuse that has had severe consequences for years after. The claimants also contend that the Commonwealth was the legal guardian of the children and had a non-delegable duty to exercise reasonable care for their safety and welfare.<sup>24</sup>

The former students allege that the Commonwealth was the legal guardian of the children, by virtue of s6 of the *Immigration (Guardianship of Children) Act 1946* (Cth), which is exactly the same section of the same Act that invests guardianship for asylum seeker children in the Minister for Immigration and Citizenship.

<sup>22</sup> Gauthier et. al., above n 18, 25.

<sup>23</sup> *Giles & Anor v Commonwealth of Australia & Ors* [2011] NSWSC 582, was filed against the Federal Government, the NSW Government and the Fairbridge Foundation. The class action is represented by people who were children at Fairbridge Farm School between 1938 and 1974 and suffered abuse.

<sup>24</sup> *Giles & Anor v Commonwealth of Australia & Ors* [2011] NSWSC 582

Academics have written extensively about the past abusive treatment of British migrant children<sup>25</sup>. Factually, their situation has eerie parallels with the current treatment of child asylum seekers.

The outcome of this case will set precedent regarding breach of guardianship by the Minister for Immigration in personal injury cases, and the use of class actions to remedy the breach.

**The ALA submits that the Australian government should be aware that precedent is currently being established surrounding breach of guardianship.**

## C. Access to compensation

### a) Past compensation claims

There have already been an extensive number of compensation claims lodged against the Commonwealth and its agents regarding negligence and psychological injury of asylum seekers and refugees. In the past decade, more than \$16 million in compensation has been paid to detainees<sup>26</sup>.

Between 2008 and 2010, more than 50 immigration detainees have received an average of \$100,000 each in compensation payouts<sup>27</sup>. In 2008, there were 32 cases, with a total payout of \$3.3 million, and 22 cases between July 2009 and May 2010, involving a total of \$2.1 million.<sup>28</sup> *The ALA has made a Freedom of Information application sourcing more recent figures, and is awaiting receipt of these statistics.*

Dr Zachary Steel, senior lecturer in psychiatry at the University of NSW, says that 'the basis for most of the lawsuits was psychological harm caused by trauma experienced in detention, including riots, self-harm and, in some cases, allegations of mistreatment by other inmates and operators'<sup>29</sup>. Dr Steel has also commented that 'since detainee numbers burst through the 2000 mark about 18 months ago, centres have become 'trauma inducing' settings.

<sup>25</sup> For example, see Buti, above n 21.

<sup>26</sup> Heather Ewart, 'Australia to pay price for detainee compensation' *ABC News*, June 20 2011. Accessed 8 August 2011 at <http://www.abc.net.au/news/2011-06-20/australia-to-pay-price-for-detainee-compensation/2765046>

<sup>27</sup> Simon Kearney, 'Compensation bill for asylum seekers rising', *The Sunday Telegraph*, September 19 2010. Accessed 8 August at <http://www.dailytelegraph.com.au/news/national/compensation-bill-for-asylum-seekers-rising/story-e6freuzr-1225926099583>

<sup>28</sup> *Ibid.*

<sup>29</sup> Nick Tabakoff, 'Asylum seekers set to sue for millions of dollars for psychological damage in detention' *The Courier Mail*, June 6 2011. Accessed 8 August 2011 at <http://www.couriermail.com.au/news/national/asylum-seekers-set-to-sue-for-millions-of-dollars-for-psychological-damage-in-detention/story-e6freooo-1226069739639>

Many individuals may claim psychological scars inflicted during detention have left them unable to work,<sup>30</sup> in some cases leaving them 'welfare dependent'<sup>31</sup>.

### i) Case Study 1

In 2008, an Iranian refugee suffered horrific experiences after being separated from his wife and son while in detention, resulting in self harm. He sewed his lips together and attempted suicide several times while in detention in Woomera between 2001 and 2004. In 2008, Mr Yousefi was reportedly awarded a record damages payout of more than \$800,000 for psychological damage suffered in detention.<sup>32</sup>

### ii) Case Study 2

In 2011, an Iranian refugee launched legal action for pain and suffering while in detention after arriving in Australia as an asylum seeker. He was granted a temporary protection visa and later Australian citizenship. He alleged that the Australian government breached its duty to him, resulting in physical, psychological and psychiatric harm. He now suffers from post-traumatic stress disorder, a major depressive disorder, anxiety and suicidal tendencies.<sup>33</sup>

### iii) Case Study 3 – Cornelia Rau

The case of Cornelia Rau, an Australian citizen suffering mental illness, was wrongly imprisoned in immigration detention, was highly publicised. Cornelia Rau was legally represented by a member of the ALA. In this case, she was awarded \$2.3 million for wrongful detention.

## b) Future Commonwealth liability to compensation claims

Former Federal Court judge, Ron Merkel, has acknowledged that the compensation claims of asylum seekers have **the potential to 'bounce up into a class action'**<sup>34</sup>. He alleges that it is bound to happen, 'unless the Government changes its ways and accepts it has the highest duty of care in these detention centres'<sup>35</sup>.

Ultimately, the continuation of trauma inflicted on detainees through immigration detention, may demand the creation of a national compensation fund specifically designated to fund the large number of claims that will inevitably arise.

---

<sup>30</sup> Ibid.

<sup>31</sup> Professor Louise Newman, cited in Ewart, above n 26.

<sup>32</sup> Nick Tabakoff, 'Refugees set to sue Australia for millions for psychological damage' *The Daily Telegraph* June 6 2011. Accessed 8 August 2011 at <http://www.couriermail.com.au/news/national/asylum-seekers-set-to-sue-for-millions-of-dollars-for-psychological-damage-in-detention/story-e6fre000-1226069739639>

<sup>33</sup> Shelley Hadfield, Chris Robinson, 'Asylum seeker wants compensation for suffering' *The Sunday Times*, March 19 2011. Accessed 8 August 2011 t [http://www.perthnow.com.au/news/western-australia/asylum-seeker-wants-compensation-for-suffering/story-e6frg13u-1226024584176?from=public\\_rss](http://www.perthnow.com.au/news/western-australia/asylum-seeker-wants-compensation-for-suffering/story-e6frg13u-1226024584176?from=public_rss)

<sup>34</sup> Ewart, above n 26.

<sup>35</sup> Ibid.



**The ALA submits that the scope of asylum seeker compensation claims may demand the creation of a national compensation fund in the future.**

## **D. Monitoring**

### **a) Ineffective monitoring and training**

The recently released ComCover report indicates that there is ineffective training of staff within detention centres, and that periodic monitoring is not ensuring administrative changes within detention centres.

Failure to allow media entry and cameras also adds to a lack of transparency that isolates immigration detention centres from genuine review.

### **b) Failure to implement recommendations**

The immigration detention network has been subject to numerous reviews, recommendations and submission by the Australian Human Rights Commission, and the NGO and legal sectors.

In July 2011, the Commonwealth Ombudsman raised issues relating to the mental health of detainees.

The ALA is concerned about the consistent failure of the Australian government to implement recommendations and conform to benchmark standards of international law.

While the government has cited that its detention policies are overseen by independent bodies, the crisis in mental health within immigration detention; the extensive numbers of compensation claims lodged for psychological injury; rioting by detainees and calls for reform by ComCare and ComCover, indicates that current governing and review processes are grossly inadequate.

For example, in April 2011, ComCare served an Improvement Notice regarding inadequate staffing at Villawood detention centre. Days later, the rooftop protests at Villawood occurred<sup>36</sup>.

On 12 August 2011, the public was also made aware of a ComCare report detailing overcrowding, inadequate staffing levels, and inadequacies in staff training, risk management and failure to create systems regarding ethnic tension and suicide risk<sup>37</sup>.

---

<sup>36</sup> Ibid.

<sup>37</sup> Tom Iggulden, above n 12.

## E. The Government's detention values

The Australian Lawyers Alliance has been frustrated by the politicisation of the plight of individuals in immigration detention.

In 2008, it appeared that the Federal Government was in part, increasing its compliance to international norms in its treatment of asylum seekers. However, the significant gains that the 'New Directions in Detention' appeared to herald, have been gravely departed from in practice.

### a) 'Prompt resolution'

The 'Seven Key Detention Values', and the government's approach to immigration detention purports to 'seek a prompt resolution of cases'<sup>38</sup>. Similarly, the government represented in 2008 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, would be subject to regular review.***

However, this has not been the case. The average amount of time of an individual being detained under immigration detention as of March 2011 was 214 days<sup>39</sup>.

### b) 'Last resort'

The government also stated that:

***The values commit the department to detention as a last resort, to detention for the shortest practicable period and to the rejection of indefinite or otherwise arbitrary detention.***<sup>40</sup>

However, the government's offshore detention policy is certainly the continuation of mandatory as a first resort.

### c) Detention of children

The Government also represented that:

***Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.***<sup>41</sup>

<sup>38</sup> Australian Government, Department of Immigration and Citizenship, 'Fact Sheet 82 – Immigration Detention'. Accessed 1 July 2011 at <http://www.immi.gov.au/media/fact-sheets/82detention.htm>

<sup>39</sup> ABC Radio National, *Breakfast*, 22 March 2011. Accessed 12 August 2011 at <http://www.abc.net.au/rn/breakfast/stories/2011/3170016.htm>

<sup>40</sup> Australian Government, Department of Immigration and Citizenship, above n 38.

<sup>41</sup> *Ibid.*

Children are, once again, being held in immigration detention. In February 2011, 1046 children were detained in immigration detention<sup>42</sup>.

At 15 April 2011, there were 1048 children in immigration detention. Of these, 156 were detained in the community under residence determinations, 742 were in alternative temporary detention, 24 were in immigration residential housing and 126 were in immigration transit accommodation. 658 of those children were detained on Christmas Island<sup>43</sup>.

**The ALA submits that mandatory, arbitrary detention should be abolished, and that genuine community accommodation should be sought for individuals while their claims are processed.**

#### **d) People in detention will be treated fairly and reasonably within the law**

The rights available to non-citizens in detention, and even on protection visas, are extremely inhibited in relation to Australian citizens. The differential treatment between the processing of on-shore and off-shore arriving asylum seekers amounts to extremely unfair treatment, especially as asylum seekers who arrive by boat are statistically more likely to be acknowledged as refugees.

#### **e) The dignity of the human person**

The Government also represented that:

*The conditions of detention will ensure the inherent dignity of the human person.*<sup>44</sup>

The extremely poor conditions of mental health within immigration detention centres delivers a scathing commentary on the fulfilment of this value.

Psychological trauma, psychological injury, suicide attempts, suicide ideation, hunger strikes, and rioting all indicate that individuals have not been treated with inherent dignity. ChilOut also identified that detainees are being referred to by number and referring to themselves by number, indicating further depersonalisation<sup>45</sup>.

Access to mental health professionals is appallingly deficit. Similarly, the remote location of some detention centres have inhibited access to medical care.

Detainees are not being treated with inherent dignity.

<sup>42</sup> Miranda Devine, 'Australia remains all at sea on boats', *The Herald Sun*, February 27 2011. Accessed 12 August 2011 at <http://www.heraldsun.com.au/ipad/australia-remains-all-at-sea-on-boats/story-fn6bn88w-1226007199877>

<sup>43</sup> ChilOut, *Detention statistics – Australia's littlest prisoners*, Accessed 12 August 2011 at <http://www.chilout.org/>

<sup>44</sup> Australian Government, above n 38.

<sup>45</sup> Gauthier et. al., above n 18, 22.

## Conclusion

There have been repeated calls for reform of the immigration detention network for an extensive period of time, by the NGO sector, the legal sector, the media, and from Commonwealth bodies such as the Ombudsman and ComCare.

Ultimately, the government needs to exercise political will to address the very valid concerns of the Australian people.

There is a very real danger that this inquiry will not provoke genuine policy change.

While the Government's newest immigration policy, the Malaysian Solution, awaits testing in the High Court, it also remains that those who have been and are currently exposed to immigration detention continue to have rights under international law.

As Buti writes: 'the right to reparations for wrongful acts has long been recognised as a fundamental principle of law, essential to the functioning of legal systems'<sup>46</sup>.

The Government should be aware of the fact that compensation claims for treatment in immigration detention will continue to rise. However, urgent policy change is required to ensure that the current immigration detention network does not remain as it is.

---

<sup>46</sup> Buti, above n 21, [51].

## Reference List

### Cases

*Giles & Anor v Commonwealth of Australia & Ors* [2011] NSWSC 582

*Odhiambo* [2002] FCAFC 194; (2002) 122 FCR 29, 37

*S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005)

### Government sources

Australian Government, Department of Immigration and Citizenship, 'Fact Sheet 82 – Immigration Detention'. Accessed 1 July 2011 at <http://www.immi.gov.au/media/fact-sheets/82detention.htm>

### International law

*International Covenant of Civil and Political Rights*

*Universal Declaration of Human Rights*

### Journal articles

Antonio Buti, 'British Child Migration to Australia: History, Senate Inquiry and Responsibilities' (2002) 9(4) *Murdoch University Electronic Journal of Law*.

Dr Susan Rees, Professor Derrick Silove, Dr Jonathan Phillips & Dr Zachary Steel, 'Asylum Seekers and Psychiatric Injury' (2010) 99 *Precedent*.

### News reports

ABC Radio National, *Breakfast*, 22 March 2011. Accessed 12 August 2011 at <http://www.abc.net.au/rn/breakfast/stories/2011/3170016.htm>

Heather Ewart, 'Australia to pay price for detainee compensation' *ABC News*, June 20 2011. Accessed 8 August 2011 at <http://www.abc.net.au/news/2011-06-20/australia-to-pay-price-for-detainee-compensation/2765046>

Kirsty Needham, 'Families destroyed by asylum detention' *Sydney Morning Herald*, August 3 2011. Accessed 12 August 2011 at <http://www.smh.com.au/national/families-destroyed-by-asylum-detention-20110802-1ia3f.html>

Kristy O'Brien and Kate Wild, ABC News, 'Doctor's condemn delays in freeing refugee children', 4 July 2011. Accessed 15 July 2011 at <http://www.abc.net.au/news/2011-07-04/doctors-condemn-delays-in-freeing-refugee-children/2781534?section=justin>

Miranda Devine, 'Australia remains all at sea on boats', *The Herald Sun*, February 27 2011. Accessed 12 August 2011 at <http://www.heraldsun.com.au/ipad/australia-remains-all-at-sea-on-boats/story-fn6bn88w-1226007199877>

Nick Tabakoff, 'Asylum seekers set to sue for millions of dollars for psychological damage in detention' *The Courier Mail*, June 6 2011. Accessed 8 August 2011 at <http://www.couriermail.com.au/news/national/asylum-seekers-set-to-sue-for-millions-of-dollars-for-psychological-damage-in-detention/story-e6fre000-1226069739639>

Nick Tabakoff, 'Refugees set to sue Australia for millions for psychological damage' *The Daily Telegraph* June 6 2011. Accessed 8 August 2011 at <http://www.couriermail.com.au/news/national/asylum-seekers-set-to-sue-for-millions-of-dollars-for-psychological-damage-in-detention/story-e6fre000-1226069739639>

Paige Taylor, 'Villawood detention centre 'a basket case'', *The Australian*, 23 April 2011. Accessed 1 August 2011 at <http://www.theaustralian.com.au/news/nation/villawood-detention-centre-a-basket-case/story-e6frg6nf-1226043525093>

Simon Kearney, 'Compensation bill for asylum seekers rising', *The Sunday Telegraph*, September 19 2010. Accessed 8 August at <http://www.dailytelegraph.com.au/news/national/compensation-bill-for-asylum-seekers-rising/story-e6freuzr-1225926099583>

Shelley Hadfield, Chris Robinson, 'Asylum seeker wants compensation for suffering' *The Sunday Times*, March 19 2011. Accessed 8 August 2011 t [http://www.perthnow.com.au/news/western-australia/asylum-seeker-wants-compensation-for-suffering/story-e6frg13u-1226024584176?from=public\\_rss](http://www.perthnow.com.au/news/western-australia/asylum-seeker-wants-compensation-for-suffering/story-e6frg13u-1226024584176?from=public_rss)

Tom Iggulden, 'Report scathing of detention centre conditions', *ABC News*, 12 August 2011. Accessed 12 August 2011 at <http://www.abc.net.au/news/2011-08-11/comcare-report-scathing-of-detention-centre-conditions/2835820>

## Reports

Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention*, April 2004. Accessed at [http://www.hreoc.gov.au/human rights/children detention report/report/index.htm](http://www.hreoc.gov.au/human%20rights/children%20detention%20report/report/index.htm)

Kate Gauthier, Dianne Hiles, Siobhan Marren & Jessica Perini (June 2011) *No Place for Children: Immigration detention on Christmas Island* at [http://www.chilout.org/web\\_images/No%20Place%20for%20Children%20-%20Final.pdf](http://www.chilout.org/web_images/No%20Place%20for%20Children%20-%20Final.pdf)

## Websites

ChilOut, *Detention statistics – Australia's littlest prisoners*, Accessed 12 August 2011 at <http://www.chilout.org/>