ASYLUM SEEKERS RESOURCE CENTRE

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE ON MIGRATION LEGISLATION

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- *That a Royal Commission be held into all aspects of Australia's refugee determination program between 1999 and 2005 including: the circumstances of the arrival, treatment and detention of asylum seekers by boat and plane, the operation of detention centres in Australia, Nauru and Papua New Guinea, the cost of the TPV visa process, both in financial and human terms (including the psychological condition of TPV holder and the effect of prolonged separation from their families), the changes made to refugee law and procedure in this period and their compatibility with international standards.*

PROCESSING OF VISA APPLICATIONS GENERALLY

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- *That all unauthorized arrivals be informed of their right to apply for asylum in Australia.*

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- *That Protection Visa application forms be available on the DIMIA website as are other visa applications.*

PROCESSING OF FURTHER PROTECTION VISA APPLICATIONS FOR TEMPORARY PROTECTION VISA HOLDERS

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- *That DIMIA give genuine and serious consideration to the RRT's approach to cases from claimants from high set aside countries (eg Iraq and Afghanistan) with a view to minimizing the extreme discrepancies between approval and rejection rates at DIMIA and RRT levels.*

Recommendation 5

- *That DIMIA ensure greater consistency by case officers in claims with similar elements.*

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- *That DIMIA develop a more effective and reliable mechanism for ensuring that case officers are applying the 'real chance' standard in assessing the likelihood of future persecution, thus minimizing the necessity for review of claims.*

SECURITY CHECKS FOR APPLICANTS FOR FURTHER PROTECTION VISA HOLDERS

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- *That DIMIA ensure some level of consistency in security checking procedures and change current procedures only for good reasons.*

CONCERNS ABOUT REFUGEE REVIEW TRIBUNAL DECISION-MAKING

Recommendation 8

- *That the RRT incorporate into its Practice Direction specific guidelines on its approach to credibility, as is the case in Canada.*[1]

Recommendation 9

- *That the RRT use multi-member panels as recommended by the 2000 Senate Committee.*

Recommendation 10

- *That RRT members be given further training on making decisions in a way which minimizes the need to rely on credibility. In situations where a Tribunal member can make a decision without resorting to credibility findings, such as reliance on country information, they should give serious consideration to doing so.*

Recommendation 11

- *That the RRT give greater weight to expert medical reports such as those from doctors, psychologists, psychiatrists or specialist torture/trauma counselors detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.*

[1] We note that this suggestion was considered but not adopted by the 2000 Senate Committee but maintain that it would act as a useful brake on the arbitrary approach to credibility exhibited by some members.

Recommendation 12

- *That a summit be held specifically on the issue of credibility in the refugee determination process. Participants in the summit should include DIMIA case officers, Tribunal members, practitioners in the area, Federal Court judges, academics, medical experts, psychologists, counselors from torture/trauma counseling services, asylum seekers and refugees, international experts in refugee law and other relevant parties. The summit should aim for a broad ranging discussion on the issue with recommendations for change.*

ELIGIBILITY OF DETAINEES FOR RELEASE

Recommendation 13

- *Residence Determinations should be replaced by Bridging Visas. Alternatively, after an initial period of compliance with the conditions for a Residence Determination, detainees should become eligible for a Bridging Visa.*

Recommendation 14

- *That the Ombudsman be given the power to assess the appropriateness of detention of all detainees. Such recommendations should be binding on DIMIA. The Ombudsman's guidelines for assessing the appropriateness of detention should be restricted to; assessment of the physical and psychological consequences of long-term detention, security risks to the Australian community through release of the detainee and the risk of the detainee absconding.*

SUGGESTED EXPANDED USE OF BRIDGING VISAS

Recommendation 15

- *That the Migration Act and Regulations be amended to permit unauthorized arrivals to be eligible for Bridging Visas, in the same way that authorized arrivals are presently eligible for Bridging Visas.*

MENTAL HEALTH OF PERSONS IN IMMIGRATION DETENTION

Recommendation 16

- *That the Migration Act and Regulations be amended to include a detailed statutory and regulatory framework for detention centres, spelling out the duty of care owed by DIMIA to detainees, rights of detainees and binding enforcement mechanisms to ensure the duty of care is met.*

Recommendation 17

- *That state health authorities have complete responsibility for the provision of health services in immigration detention centres.*

Recommendation 18

- *That the Migration Act be amended to specify the circumstances in which guardians will be appointed to mentally incapacitated immigration detainees and to clarify the relationship between the State Public Advocates and DIMIA in this regard.*

Recommendation 19

- *That immigration detention centres should be managed by a government agency at arms length from DIMIA.*

NON-REFOULMENT OBLIGATIONS

Recommendation 20

- *That Australia's non-refoulment obligations pursuant to the Convention Against Torture and International Covenant on Civil and Political Rights be incorporated into Australian domestic law.*

Recommendation 21

- *That a system for assessing complementary protection needs be developed to replace or supplement the Ministerial Humanitarian Intervention system.*

REMOVAL OF PERSONS WHO ARE PSYCHOLOGICALLY UNWELL

Recommendation 22

- *That persons not be removed from Australia unless they are assessed as being psychologically fit to travel.*

Recommendation 23

- *That DIMIA ensure that persons who are psychologically unwell receive proper counseling and treatment prior to their removal. Consideration should be given to whether or not their removal is warranted or whether they should be permitted to remain in Australia for an extended period of time for humanitarian or medical reasons. Consideration should be given to the psychological treatment the returnee would receive if repatriated to their own country.*

PRE-REMOVAL RISK ASESSMENT

Recommendation 24

- *That all cases of forced removal be assessed by an independent agency, such as the Human Rights and Equal Opportunities Commission (HREOC) to ensure compliance with lawful removal procedures, health standards and international human rights protections.*

DETENTION PRIOR TO REMOVAL

Recommendation 25.

- *That detention prior to removal be a last resort and (used) only when alternative arrangements for ensuring compliance with removal arrangements have failed.*

Recommendation 26.

- *That a repatriation package be made available to failed asylum seekers to help facilitate their return. Such a package should include cost of the airfare and a financial package to assist asylum seekers with re-establishing themselves back home.*

CONDITIONS DURING REMOVAL

Recommendation 27.

- *That removal arrangements comply with international standards including the Council of Europe Guidelines on Forced Return.*

1. BACKGROUND TO THE ASYLUM SEEKER RESOURCE CENTRE

1. The Asylum Seeker Resource Centre (ASRC) is an independent non-government, welfare organisation that was established after identifying a desperate need to fill gaps in the limited services provided by existing organisations working in the area of asylum seeker services and care.

1.1 SERVICES PROVIDED BY ASRC

2. The first ASRC centre was established in Footscray (now located in West Melbourne) on the 8th of June 2001, with a second centre opening one year later in Thornbury'. Since opening we have gone on to become one of Australia's largest asylum seeker aid, advocacy and health organisations, having assisted over 2000 asylum seekers through the more than 25 different services that our centre offers. In 2003 the ASRC was awarded the Human Rights Award for the Community by the Human Rights and Equal Opportunities Commission. (HREOC).

3. The ASRC seeks to promote and protect the human rights of asylum seekers living in the community and in detention through working at a grassroots level to meet their daily living needs, while simultaneously advocating and lobbying at a structural level to create genuine social change. Services offered by the ASRC include: material aid, legal advice, health, employment, counselling, casework, advocacy, recreation, community & detention outreach, English language tutoring and financial aid.

1.2 ASRC HEALTH CLINIC

4. The ASRC established the 1st health centre for asylum seekers in Victoria. It was officially opened in 2002 by the then President of the AMA, Kerryn Phelps. The ASRC Health Clinic provides free care for hundreds of asylum seekers each year who are living in the Australian community on Bridging visas with no access to Medicare and no right to work.

5. The ASRC Health Clinic provides on-site volunteer GP's, physiotherapists, nurses, massage therapists and a medical fund to pay for the medical care of people with no income. This is complemented by our specialist health network that enables us to access services such as radiology and pathology for free.

1.3 ASRC WORK WITH ASYLUM SEEKERS IN DETENTION

6. The ASRC has played an important role in supporting and advocating for asylum seekers in immigration detention, in particular asylum seekers in the Maribyrnong Immigration Detention Centre (MIDC), but also for asylum seekers from Baxter and Port Hedland detention centres. The ASRC started the 1st friendship program for asylum seekers in the MIDC over 2 years ago. This program acted as a catalyst for the widespread community visiting that

now occurs at the MIDC. Furthermore, the ASRC have assisted directly in obtaining the release of over 30 asylum seekers from the MIDC onto Bridging Visa's in the past year.

7. It is the interface of our work with asylum seekers (both in detention and in the community) in the legal, medical and welfare spheres that we believe qualify us to make a valuable contribution to the current Senate inquiry.

2. PRELIMINARY COMMENTS

8. In making these submissions the ASRC has considered the report of the *2000 Senate Committee into the Operation of Australia's Refugee and Humanitarian Program* (2000 Senate Committee) and the recommendations made by the Committee. Unfortunately little has changed for the better over the intervening period. Arguably much has worsened.

9. It is beyond the scope of this Committee to consider some of the more far reaching changes in refugee and asylum law and practice since the arrival of larger numbers of boat people in 1999. During this period thousands of refugees and asylum seekers have been mandatorily detained for extended periods in now discredited and decommissioned detention centres including Woomera, Curtin and Port Hedland. We have also witnessed the failed 'Pacific Solution', the introduction of the Temporary Protection Visa and other widespread, drastic and unnecessary changes to refugee law and procedure which have placed Australia out of step with international refugee standards.

10. To do proper justice to the magnitude of these issues, the ASRC believes a Royal Commission must be established to take evidence from all interested and affected parties for the purpose of reporting on this bleak chapter in Australia's human rights history.

Recommendation 1

- *That a Royal Commission be held into all aspects of Australia's refugee determination program between 1999 and 2005 including: the circumstances of the arrival, treatment and detention of asylum seekers by boat and plane, the operation of detention centres in Australia, Nauru and Papua New Guinea, the cost of the TPV visa process, both in financial and human terms (including the psychological condition of TPV holder and the effect of prolonged separation from their families), the changes made to refugee law and procedure in this period and their compatibility with international standards.*

3. PROCESSING AND ASSESSMENT OF VISA APPLICATIONS

11. There are a number of defects within Australia's process of refugee determination which must be addressed in order for the Australian community to be confident in the ability of decision makers to correctly identify refugees. At present an overzealous approach by primary and review decision makers has resulted in the refusal of a significant percentage of compelling refugee cases, thus placing inordinate pressure on Australia's humanitarian 'safety net'.

12. Similar concerns were expressed in submissions to the 2000 Senate Committee including:

- Concerns about 'turnarounds' of genuine asylum seekers whom DIMIA have assessed as not invoking Australia's protection obligations.
- Lack of access by detained asylum seekers to appropriate information and legal advice.
- Poor quality of Departmental and Tribunal decision making.
- Lack of funding to assist disadvantaged asylum seekers in lodging protection visa applications.

13. Most of these issues continue to plague the system. In our view the majority of the problems are substantive, not procedural, and concern the quality of primary and review decision making. We have attempted to highlight some of these issues in our submission to the Committee with concrete case studies where appropriate.

3.1 PROCESSING OF VISA APPLICATIONS GENERALLY

14. The ability to access the protection visa process for genuine asylum seekers is integral to an assessment of the process in general. In its report 'Sanctuary Under Review', the 2000 Senate Committee noted instances where asylum seekers who had legitimately invoked Australia's protection obligations had been 'screened out' or turned around. This practice continues.

15. On 3 November 2003 14 Kurdish asylum seekers arrived on Melville Island, just north of Darwin, to claim asylum. The Immigration Minister initially claimed that the men had not asked for asylum. The asylum seekers were subsequently returned to Indonesia. Indonesian authorities indicated their intention to return them to Turkey. The Immigration Minister later conceded that the men had indeed asked for asylum in Australia. Where such fundamental principles of refugee law are breached, it is difficult to have any faith in DIMIA's assertion that asylum seekers who invoke our protection obligations are not refouled.

16. Another indication of the paranoia with which potential asylum claimants are treated by DIMIA is the fact that the 866 Protection Visa application forms are not available on the DIMIA website. Forms for other immigration applications are freely accessible and can be easily downloaded. Prospective

applicants for protection visas however, are forced to attend DIMIA offices to ask for the forms, a process which they often find intimidating.

Recommendation 2

- *That all unauthorized arrivals be informed of their right to apply for asylum in Australia.*

Recommendation 3

- *That Protection Visa application forms be available on the DIMIA website as are other visa applications.*

3.2 PROCESSING OF FURTHER PROTECTION VISA APPLICATIONS FOR TEMPORARY PROTECTION VISA HOLDERS

17. For most of the refugee 'boat arrivals' to Australia between 1999-2001 the refugee determination process has been an unrelenting administrative nightmare. Many of these predominantly Iraqi and Afghan refugees are only now obtaining their Permanent Residence. Others are only now being released from detention on Temporary Protection Visas, after 4-5 years in detention.

18. At the time of the introduction of the Temporary Protection Visas in 2001 some critics described the visas as not only an inappropriate form of protection for genuine refugees, but a colossal waste of money as the TPV holders would most likely be found to be refugees in three years time. Subsequent events have proved those critics right. In the meantime TPV holders have spent three years in limbo, not knowing whether or not to make their home in Australia, and deprived of being together with their immediate family (ie spouses and children). Millions of taxpayer dollars have been spent on reprocessing their applications.

19. As a threshold issue, the ASRC considers the processing bar on Iraqi applications and the subsequent lifting of the bars in mid 2004 to have been opportunistic. TPV holders were entitled to have their applications for further protection visas dealt within in accordance with the 36 month timeframe. Freezing the application process during the time that Saddam Hussein remained in power and re-commencing processing shortly after his collapse (in the knowledge that the claims of most Iraq TPV holders were based on their anti-Saddam profile) reeks of political and undermines the credibility of the refugee determination process. It is a reasonable assumption that many within DIMIA expected the claims of many of the Iraqis to fail once the Hussein regime fell.

20. DIMIA's justification for the freeze, namely that it was difficult to obtain reliable country information on the situation in Iraq during this period, is unconvincing. DIMIA case officers are continually required to assess asylum claims against countries where it is difficult to get accurate or reliable information. This is inherent within the protection visa process.

21. Of greater concern to the ASRC is the element of randomness inherent in the decision making. Similar cases, including those in which the claims of family members are spread between different case officers, are often dealt with inconsistently **(Case example omitted).**

22. One issue of particular concern is the failure by case officers to apply the 'real chance' test in assessing the well-foundedness of protection visa applications. Again, this issue has particular relevance to Iraqi applications. Some country information is ambivalent about the risks for Iraqi returnees from the West. Some sources indicate a high degree of risk whilst other sources indicate a lower risk. Some case officers accept this information as indicating at least a real possibility of a claimant's persecution (in our view the correct legal test) whilst other case officers prefer the information which indicates lower risks (in our view the incorrect legal test). The test is not one of the balance of probabilities but the balance of possibilities.

23. Other cases have demonstrated a lack of care in drafting or proof reading decisions. **(Case example omitted).**

24. (Case example omitted).

25. The glaring discrepancies in the approval rates of Iraqi and Afghan cases by DIMIA as compared to the RRT should be a matter of embarrassment to DIMIA. Afghan and Iraqi claimants overwhelmingly succeed at the RRT but not necessarily at DIMIA (although we note that Iraqi approvals have increased at the DIMIA stage in recent times). Both DIMIA and the RRT have access to the same country information so it is difficult to rationally explain the discrepancy to clients. This in turn undermines the integrity of the process.

26. The ASRC appreciates that different decision makers legitimately draw different conclusions about similar cases. However the ASRC considers that a consistent approach should be taken when a 'lowest common denominator' factor is present (ie risks to returnees to Iraq from the West, or domicile in a prima facie dangerous place such as Baghdad). DIMIA case officers refer to conflicting country information when assessing the risks to returnees. On this basis, some case officers then approve cases whilst others reject them citing a lack of reliable information about risks to returnees. The RRT has consistently set aside Iraqi cases on this basis. It is suggested that if DIMIA officers applied the 'real chance' standard more judiciously, the discrepancy between primary and review cases would be significantly less. In *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)*, Brennan J said that:

"Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."[2]

[2] *Re Drake v Minister for Immigration and Ethnic Affairs* (No 2), (1979) 2 ALD 634 at 639

Recommendation 4

- *That DIMIA give genuine and serious consideration to the RRT's approach to cases from claimants from high set aside countries (eg Iraq and Afghanistan) with a view to minimizing the extreme discrepancies between approval and rejection rates at DIMIA and RRT levels.*

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- *That DIMIA ensure greater consistency by case officers in claims with similar elements.*

Recommendation 6

- *That DIMIA develop a more effective and reliable mechanism for ensuring that case officers are applying the 'real chance' standard in assessing the likelihood of future persecution, thus minimizing the necessity for review of claims.*

3.3 SECURITY CHECKING OF TEMPORARY PROTECTION VISA HOLDERS APPLYING FOR PERMANENT PROTECTION

27. The security check requirements for TPV holders applying for Permanent Protection Visas have changed so frequently that they border on farce. In the process they have resulted in additional stress and expense for TPV holders.

28. It is our experience that all TPV holders understand the need for careful security checks to ensure the overall safety of the Australian community (of which they are a part). However they remain confused and frustrated by the continually changing security check requirements.

29. It is currently taking between 6-10 months for Form 80's security checks to be processed by ASIO. Whilst ASIO clearly has a heavy workload, this timeframe seems excessive. Further, there appears to be no particular system to ensure chronological assessment of the checks. There is a large degree of randomness in the finalization of the checks with many applicants getting their decisions after persons who lodged security checks with DIMIA many months later than them.

30. DIMIA's requirements for the security checks are continually changing. First, applicants were urged to submit their Form 80s and Australian Police Checks as early as possible. Now applicants are being advised to lodge them after their DIMIA interview or when requested. This appears to have significantly slowed the processing of the applications. Form 80s for TPV holders have changed format at least three times in the last 12 months. Applicants who have already submitted Form 80s are asked to resubmit essentially the same forms with minor changes for DIMIA. Australian Federal Police clearances previously valid for 12 months are now apparently valid for 15 months. As of July 2005 applicants who have lived in Iran for more than 12 months are now being asked to complete a Statutory Declaration confirming they have

committed no offences in Iran. This was not previously a requirement (or not a requirement that was enforced).

Recommendation 7

- *That DIMIA ensure some level of consistency in security checking procedures and change current procedures only for good reasons.*

3.4 CONCERNS ABOUT DECISION MAKING AT REFUGEE REVIEW TRIBUNAL

31. The ASRC's primary concern in relation to RRT applications relate to the vexed issue of credibility. We accept that the RRT process provides applicants with a reasonable opportunity to provide material in support of their claims prior to the hearing and that RRT members are generally well versed in the law and the country information. However it is our view that RRT members regularly question applicants in an inappropriate manner and often draw unfair and unjustified conclusions on matters of credibility.

32. We note that a significant number of submissions to the 2000 Senate Committee addressed the issue of inappropriate approaches to credibility by the RRT. The Senate Committee made various recommendations including the use of multi-member panels. This recommendation has never been implemented. The credibility issue remains as problematic now as before.

33. In our view, the following four examples are indicative of different examples of poor practice in determining an applicant's credibility by the RRT.

34. (Case example omitted).

35. (Case example omitted).

36. (Case example omitted).

37. (Case example omitted).

38. The following case indicates the consequences of injudicious and overly optimistic decision making by the RRT. **(Case example omitted).**

39. On other occasions, it is the Tribunal's lack of procedural flexibility that is of concern. **(Case example omitted).**

40. (Case example omitted)

41. Assessment of psychological reports from torture/trauma counseling services in relation to an applicant's history of past persecution present apparent difficulties for the RRT. Little weight is generally given to such reports by RRT members. However members are often limited in their expertise and their ability to fairly and accurately make findings on the credibility of persons who are victims of torture/trauma. Recently the government has made

changes to the Spouse Domestic Violence regulations to allow primary and review decision makers to defer to 'independent experts' if they are not convinced, by information contained in Statutory Declarations from 'competent persons', that domestic violence has taken place. Tribunal members should be similarly encouraged to defer to 'experts' in relation to other complex issues.

42. Many suggestions have been made to the RRT over the years in relation to their approach to credibility. With the exception of the mantra of 'ongoing training for RRT members' we are not aware of any substantive attempts to deal with the issue. Nevertheless, we continue to make the following suggestions for change.

Recommendation 8

- *That the RRT incorporate into its Practice Direction specific guidelines on its approach to credibility, as is the case in Canada.*[3]

Recommendation 9

- *That the RRT use multi-member panels as recommended by the 2000 Senate Committee.*

Recommendation 10

- *That RRT members be given further training on making decisions in a way which minimizes the need to rely on credibility. In situations where a Tribunal member can make a decision without resorting to credibility findings, such as reliance on country information, they should give serious consideration to doing so.*

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- *That the RRT give greater weight to expert medical reports such as those from doctors, psychologists, psychiatrists or specialist torture/trauma counselors detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.*

Recommendation 12

- *That a summit be held specifically on the issue of credibility in the refugee determination process. Participants in the summit should include DIMIA case officers, Tribunal members, practitioners in the area, Federal Court judges, academics, medial experts, psychologists, counselors from torture/trauma counseling services, asylum seekers and refugees, international experts in*

[3] We note that this suggestion was considered but not adopted by the 2000 Senate Committee into Australia's Refugee and Humanitarian Determination System but maintain that it would act as a useful brake on the arbitrary approach to credibility exhibited by some members.

refugee law and other relevant parties. The summit should aim for a broad ranging discussion on the issue with recommendations for change.

4. IMMIGRATION DETENTION

43. The ASRC is fundamentally opposed to the mandatory detention of asylum seekers. Our submissions to the Senate will necessarily reflect this. Nevertheless there have been recent significant changes to the system of mandatory detention, most notably with the introduction of the Removal Pending Bridging Visa, the *Migration Amendment (Detention Arrangements) Act* and greater powers given to the Commonwealth Ombudsman to review the appropriateness of the detention of long-term detainees. In this submission we comment on those developments from a practical perspective and make further suggestions for improvement. We appreciate that some of the practical matters raised in our submission may have been clarified by the time the Senate considers its findings.

44. It is our primary submission that the changes, whilst welcome, do not go far enough. It would be far simpler, fairer and more efficacious for DIMIA to amend the *Migration Act* to make unauthorized arrivals (whether asylum seekers or otherwise) eligible for Bridging Visas in the same way that authorized arrivals are eligible upon their making an application to remain in Australia.

4.1 FUNDAMENTAL OBJECTION TO MANDATORY DETENTION

45. Australian immigration law requires the mandatory and non-reviewable detention of all persons (including asylum seekers) who arrive in Australia without a visa. Section 189 of the *Migration Act* states that persons may only be released from immigration detention if they are either granted a visa or removed from Australia.

46. Our policy of mandatory detention is in breach of section 9(1) of the International Covenant on Civil and Political Rights and the UNHCR Guidelines on the Detention of Asylum Seekers. In the 1997 case of *Applicant A v. Australia*, the UN Human Rights Committee held that the mandatory and non-reviewable detention of the complainant was arbitrary as the Australian government had not advanced any grounds particular to the complainant's case which would justify his continued detention. Eight years after the decision in *Applicant A*, Australia's detention policies continue to breach international standards.

4.2 ELIGIBILITY FOR RELEASE FROM DETENTION

4.2.1 Comment on recent changes

47. In some ways it is premature to comment on the likely results of the recent detention changes as many of the changes have not yet taken full effect. Only a handful of persons have been released from detention on Removal Pending

Bridging Visas (RPBV's). As far as we are aware DIMIA has not yet attempted to remove any RPBV holders on the grounds that their removal has now become practicable and possible. The Ombudsman's office has not yet developed its guidelines on assessing the appropriateness of the detention of long term detainees. A number of Residence Determinations were made by the Minister on 29 July 2005 but it is too early to assess their suitability. No-one is clear how the Minister intends to exercise her new discretionary power, pursuant to section 195A of the *Migration Act*, to grant a detainee a visa. Nevertheless, we offer the following comments on the changes.

4.2.2 Removal Pending Bridging Visas

48. The ASRC are generally supportive of the concept of the Removal Pending Bridging Visa now that DIMIA have removed the two major structural defects of the visa – namely the precondition requiring detainees to sacrifice their legal rights to apply to remain in Australia, and the precondition forcing detainees to provide a signed undertaking agreeing to cooperate with arrangements to remove them from Australia. Release from detention on an RPBV is clearly preferable to remaining in detention pending removal for a detainee who has exhausted all legal avenues.

49. We remain concerned about two aspects of the RPBV, namely the attendant uncertainty for RPBV holders which allows them to be removed from Australia at short notice and at any time, and the non-reviewability of forcible repatriation arrangements. This issue is dealt with later in our submission.

4.2.3 Detention of children as a matter of last resort

50. The introduction into the *Migration Act* of the principle that children should only be detained as a matter of last resort is significant. Provided that this principle is reflected in practice, this should bring Australia into practice with international legal protections under the *Convention on the Rights of the Child (CROC).*

4.2.4 Residence Determinations

51. Our experience with Residence Determinations are thus far positive. **(Case example omitted).**

52. (Case example omitted).

53. This situation underscores our primary concern with Residence Determinations, namely that the concept of 'detention within the community' is a confusing nonsense and should be abolished. As an interim measure, we submit that once a family has been compliant with the conditions of a Residence Determination for a reasonable period (ie two months) they should become eligible for a Bridging Visa formally releasing them lawfully into the community. Such a Bridging Visa should continue to have appropriate income, medical and welfare support.

Recommendation 13

- *Residence Determinations should be replaced by Bridging Visas. Alternatively, after an initial period of compliance with the conditions for a Residence Determination, detainees should become eligible for a Bridging Visa.*

4.2.5 Ombudsman's powers to review long-term detention

54. Under recent changes to the *Migration Act*, the Ombudsman is provided with the power to make recommendations to the Minister for Immigration concerning the appropriateness of the continued detention of a long-term detainee.

55. The introduction of a system of independent scrutiny of the appropriateness of detention of long-term detainees is welcome, but there is no good reason why the Ombudsman's jurisdiction should be limited to long-term detainees. Rather, DIMIA should inform the Ombudsman as soon as a person is detained. A recommendation for release or continued detention should be made within 30 days of their detention.

56. There are further details to be resolved before commenting on the effectiveness of these changes. Guidelines for the use of the Ombudsman's powers have yet to be developed. It is unclear whether or not the Government will accept recommendations made by the Ombudsman.

57. The ASRC believes that any guidelines developed by the Ombudsman on the need for immigration detention should be premised on a number of basic principles. Firstly, long-term detention is inherently harmful to a person's mental well-being and can result in mental illness and depression. Secondly, prolonged detention should be the exception rather than the rule. Thirdly, recommendations for the continued detention of a long-term detainee should generally not be made unless the detainee has first been given an opportunity to comply with the conditions for a Bridging Visa in the community. Fourthly, lack of conclusive proof of a person's identity should not be a justification for long-term detention. UNHCR Guidelines state that asylum seekers are often unable to prove their identity with documentary evidence. Fifthly, foreign nationals have the right to pursue all available legal avenues to obtain a visa to remain in Australia. Negative inferences should not be drawn from a detainee who explores all rights to remain in Australia (including through judicial review or requests to the Minister for humanitarian intervention).

58. The ASRC further believes that the Ombudsman should adopt a simple three-step test in assessing the necessity for a person's detention. Relevant considerations should include:

- The physical and psychological consequences of long-term detention
- Security risks to the Australian community
- The risk of absconding.

59. Yet even with these safeguards there remain cases of detainees whose detention cannot be reviewed by an agency outside of DIMIA. (Case example omitted).

Recommendation 14

- *That the Ombudsman be given the power to assess the appropriateness of detention of all detainees . Such recommendations should be binding on DIMIA. The Ombudsman's guidelines for assessing the appropriateness of detention should be restricted to; assessment of the physical and psychological consequences of long-term detention, security risks to the Australian community through release of the detainee and the risk of the detainee absconding.*

4.3 EXPANDED USE OF BRIDGING VISAS

60. The simplest and most effective means of ensuring Australia's compliance with international standards on the administrative detention of non-citizens is to permit unauthorized arrivals to apply for Bridging Visas for release from detention in the same way that authorized arrivals (including visa overstayers) are permitted to apply for them.

61. Presently unauthorized arrivals are eligible for only a small number of categories of Bridging Visa pursuant to Reg 2.20 of the *Migration Regulations* and section 72 of the *Migration Act*. In essence these categories permit the discretionary release of five categories of persons including: persons married to Australian nationals, persons over the age of 65, children, provided DIMIA are satisfied that adequate arrangements have been made for their care in the community, persons with torture/trauma or other health issues whom a DIMIA appointed medical specialist has advised cannot be cared for within the detention environment and persons who have been waiting for more than 6 months for a primary decision from DIMIA. DIMIA have near total discretion over whether or not to release persons within these categories. For example, release on torture/trauma grounds cannot occur without DIMIA first appointing their own medical specialist.

62. It would be preferable if this ad-hoc and deeply flawed system of Bridging Visas for eligible non-citizens was abolished. Unauthorised arrivals should have full and unfettered access to the Bridging Visa system enjoyed by authorized arrivals once preliminary identity, health and security checks have been completed. There are a number of advantages in such a system:

63. Firstly, such a system would be in accordance with international law standards. Compliance with international principles would enhance Australia's battered overseas reputation in relation to the treatment of asylum seekers and refugees.

64. Secondly, identity, health and security checks can be carried out relatively quickly and concurrently with the processing of a claimant's asylum application. Whilst identity checks can be more problematic, it is a basic principle of refugee law that many refugees fleeing persecution are unable to obtain official identification documentation in their own country of origin. In such circumstances it is incumbent on DIMIA to make an initial assessment of a person's identity based on the available evidence and the testimony of the asylum seeker, including through the use of any necessary biometric data. The detainee should then be released on a Bridging Visa with an identity card, subject to the imposition of any reasonable conditions. Identity verification would continue throughout the refugee determination process.

65. The circumstances of Cornelia Rau and Peter Qasim demonstrate the dangers of prolonged detention of a person whilst efforts are made to verify their identity. Cornelia Rau would not have suffered the psychological harm that she did had she been released from detention on a Bridging Visa whilst her identity was being ascertained. Peter Qasim's situation is self-explanatory.

66. Thirdly, this system would minimize the incidence of long-term detention and its associated side-effects including mental illness, incidents of violence or frustration borne out of seemingly indefinite detention, breakdown of family relationships, loss of significant and irreplaceable periods of a person's life in detention and resorting to the media or other forms of protest to highlight a detainee's plight.

67. Fourthly, integrity and compliance with the system of Bridging Visa release could be ensured through the imposition of a range of conditions. DIMIA could base their decision to release or not to release on the information available to them about the claimant's circumstances and with the presumption that a person should generally be released unless there are good reasons warranting their continued detention. It should be assumed that a claimant will abide by their conditions unless there are sound reasons for believing they will not. Information compiled by community welfare agencies such as the Hotham Mission Asylum Seeker Project indicates that the rate of compliance for unauthorized arrivals released into the community is high.

68. Fifthly, this system would avoid the fiction of a person's continued detention within the community pursuant to a Residence Determination. The idea that a person is in detention whilst they are shopping in the city, attending church or catching a train is farcical and undermines the integrity of the system. Further, it involves the fraught issues of DIMIA's duty of care to a person whilst they are in 'immigration detention' pursuant to a Residence Determination. DIMIA may continue to be liable for a person whilst they are living in the community under detention, despite the fact that DIMIA will have no control over the 'detainee's' movements or activities. No such duty of care or liability exists for persons released on Bridging Visas into the community.

69. Sixthly, there are considerable cost savings in such as system. The costs of detaining a person in a detention centre are well over $100 a person a day. The costs of covering a person's living expenses pursuant to a Residence

Determination are also considerable. There is minimal cost to the Government for a person's release on a Bridging Visa. However Bridging Visa holders must continue to have an entitlement to work rights, or alternative income support, and Medicare.

Recommendation 15

- *That the Migration Act and Regulations be amended to permit unauthorized arrivals to be eligible for Bridging Visas, in the same way that authorized arrivals are presently eligible for Bridging Visas.*

4.4 MENTAL HEALTH OF PERSONS IN IMMIGRATION DETENTION

4.4.1 Preliminary comments on healthcare in detention

70. The inadequacy of healthcare in immigration detention has been comprehensively dealt with by the Palmer Inquiry. The ASRC made submissions to the Palmer Inquiry and read with interest the final report and recommendations. We agree with many of the conclusions of the report and note that DIMIA intend to implement many of those recommendation by September.

71. We also maintain that some of the findings did not go far enough, partly on account of the limited terms of reference and the lack of will in challenging the fundamental defects of immigration detention. Whilst improved quality and access to healthcare for detainees is critical, this in part obscures the primary solution for detainees with health care needs – namely that the detention environment is not suited to persons who are unwell. The solution is to provide unauthorized arrivals with access to Bridging Visas.

72. The ASRC's experience of trying to have mentally unwell asylum seekers released from detention has been one of resistance, apathy, indifference and neglect on behalf of DIMIA. DIMIA has consistently sought to prevent the release or transfer of mentally unwell asylum seekers from Australia's detention centres.

73. Our concerns are based on up to 100 separate cases over 3½ years in which we have been formally involved in assisting mentally ill/unwell detained asylum seekers to get medical care, transfer to hospital or release from detention.

4.4.2 Comment on Palmer Inquiry Recommendations

74. The Palmer Inquiry made a number of recommendations including:

- Further training for compliance officers on the power to detain
- Reviewing the functions of the Detention Review Committee
- Reviewing procedures relating to the detention of persons in the Baxter Management Unit
- Making structural changes to Baxter

- Requiring GSL to provide training to staff in recognizing behaviour that may be symptomatic of mental illness
- Exploring the possibility of contracting the South Australian Mental Health Service to service the mental health care needs of detainees in Baxter
- Conducting a review of procedures and arrangements between DIMIA and the South Australian Department of Health
- Setting up a Health Advisory Panel
- Setting up an Immigration Detention Health Review Commission as an independent body under the Ombudsman

75. In this part of the submission we have concentrated on issues that we believe were not adequately dealt with in the Palmer report.

76. At the outset, the report indicates only limited understanding of the fact that detention is inherently harmful to the physical and mental health of asylum seekers. Palmer ignores alternatives to detention and fails to consider their appropriateness (Recommendation 4.12).

77. It is unfortunate that the Palmer Report fails to call for a comprehensive overhaul of DIMIA's policies and practices in relation to immigration detention generally despite finding a culture that 'ignores criticism, is unduly defensive and unwilling to question itself'. Palmer allows DIMIA Management off the hook, despite finding them to be responsible for 'failed practices, poor decisions and regrettable outcomes', and who do not have the 'credibility and objectivity to bring about the fundamental change of mindset that is necessary'. Palmer does not question DIMIA's ability to continue in those roles and does not call for the removal of any senior DIMIA officials. The buck stops nowhere.

78. Palmer's recommendations continue to vest all power with DIMIA when it comes to the management and treatment of asylum seekers in detention despite Palmer finding that DIMIA have consistently misused and abused this power to the detriment of asylum seekers. Misuse of authority necessitates a change in guardian. The report makes no recommendation for the establishment of an independent body with an enforcement mechanism that would hold DIMIA accountable for their actions and compel them to adhere to their responsibilities and duty of care to detainees.

79. The recommendation to establish a Health Advisory Panel (Recommendation 6.10) does not go far enough. With no power to have their recommendations enforced, what real value will they have? The Immigration Detention Advisory Group has been in existence for 5 years yet has achieved little.

80. The establishment of an Immigration Detention Health Review Commission (Recommendation 6.11) is recommended to carry out external reviews of asylum seeker welfare and of the health and medical services provided to them. Yet they are provided with no power to compel DIMIA to provide the medical care needed or to compel DIMIA to have a detainee released from detention because they cannot be properly cared for.

81. In recommendations 6.9 and 6.10, where Palmer recommends access to better health services and better reporting systems, he fails to provide a benchmark or minimal standards to ensure adequate medical care is provided to detainees in regards to their mental and physical health needs.

82. In order to ensure that asylum seeders get the medical care they need, the ASRC recommends further training and better communication systems by DIMIA and GSL rather than legally enforceable mechanisms.

83. The report identifies a deeply flawed and problematic relationship between DIMIA and GSL that has led to the neglect and mistreatment of asylum seekers and yet fails to recommend an end to this relationship and an end to private operators running detention centres (recommendation 4.2).

84. The Auditor General's last three reports on detention have criticized the lack of auditing processes or accountability within DIMIA. Palmer simply mirrors this and goes no further in terms of demanding real legislative changes. The other 3 reports have been tabled in Parliament and noted by the government yet no changes have been made.

85. In failing to recommend that State Mental Health Services be in control of the mental health care and treatment of detainees, Palmer leaves detainee care in the hands of a Department that has no commitment to their proper care and treatment.

86. In Recommendation 4.3 on improving the detention environment Palmer appears to miss the point. Instead of recommending real changes to an environment that is inherently harmful to the well–being of asylum seekers and is based on a denial of their most basic human rights, all Palmer offers detainees are meaningless rights which include better explanations as to why they are being held in detention and the duty of care that the government has to them. The problems lie in the system itself not in additional trivial matters such as 'establishing a process for determining a list of topics for discussions one week before each consultation forum is to be held' nor in detainees being consulted about what food they will be eating in detention (Recommendation 4.6) or in detainees earning the 'privilege' to participate in monthly outings (Recommendation 4.8).

87. The report fails to call for any genuine independent safeguards and systems that will protect the rights of asylum seekers. For example, Recommendation 4.5 recommends that detainees be provided with feedback on questions and issues they have raised ~~by~~ with DIMIA and GSL. What will happen to these questions and issues? How will detainees get an assurance that they will be dealt with? Who will ensure that they are followed up and addressed? It is to be noted that similar systems have been tried and failed in most detention centres in Australia over the years, including in the MIDC.

88. In Recommendation 8.3 on how to deal with the removal and deportation of detainees, Palmer fails to recommend any safeguards to ensure that mentally ill or seriously physical ill detainees are not deported. Palmer provides no

requirement for a human rights audit to ensure that the person is genuinely fit to travel, fails to address the fact that DIMIA continues to have no requirement to address the mental fitness of a person to be removed and provides no requirement for an assessment of whether the detainee is in any danger upon return.

89. Most recommendations rely upon DIMIA acting on good faith and good will to deliver a more humane system rather than on the legislative changes needed to ensure they are accountable and follow the law.

4.4.3 Mental health issues for detainees

90. Detainees present with a range of mental health issues which are often associated with their long term detention as well as trauma from events in their country of origin and their journey to Australia. As a result, they may already have symptoms of post-traumatic stress disorder or other mental illnesses that are exacerbated by detention.

91. Numerous independent studies have documented the detrimental psychological impact that long-term detention has on detainees.[4] Isolation, frustration, anxiety in relation to their protection cases, inability to exercise any control over their day to day lives, as well anger at their treatment in detention adds to the sense of despair and hopelessness which many detainees feel and which is a major contributor to their mental deterioration.

92. Studies have shown that there are a disproportionately high number of detainees displaying symptoms of mental illness characterized be severe depression, hopelessness, paranoia, despair, chronic rage, persecutory delusions, psychosis, suicidal ideations and persistent self-harming behaviour.[5] A significant proportion of the detainees displaying such symptoms have gone undiagnosed and untreated due to the unsatisfactory level of mental health care in immigration detention and the culture of neglect demonstrated by DIMIA. The results of untreated mental illness in detainees is also well documented, however our submission does not propose to provide a detailed discussion of the incidence of self harm and the like which have resulted from the failure of DIMIA and GSL to provide any reasonable or appropriate standard of care to asylum seekers in detention.

4.4.4 Standards of care for mentally ill detainees

93. The regulatory framework currently in place to assess and treat mentally ill detainees is wholly inadequate. There is no provision in the *Migration Act* or the *Migration Regulations* which codifies the standard of care for the treatment of detainees in immigration detention, particularly in relation to assessment and treatment of mental illness. The Federal Court has pointed out

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[4] Psychiatric Harm and Long Term Detention – Summary of Evidence" by Zachary Steel, Clinical Psychologist and Senior Lecturer, Centre for Population Mental Health, School of Psychiatry, University of New South Wales, last updated 12 November 2003

[5] A. Sultan & K. O'Sullivan 'Psychological disturbances in asylum seekers held in long-term detention: a participant observer account' *Medical Journal of Australia* (2001) 175, 593-596.

that the extent of DIMIA's duty of care to detainees is unclear as the immigration detention regime itself is largely unregulated.[6]

94. What regulatory framework as exists is limited to the Immigration Detention Standards developed by the Department to regulate the "quality of care and quality of life expected in immigration detention facilities." These outline the required standard of care that is meant to underpin the service delivery of service providers contracting with the Department. The sole service provider contracting with the Department for the delivery of immigration detention services is currently GSL Australia Pty Ltd ("GSL").

95. Under the Immigration Detention Standards ("IDS") detainees are required to have the following standard of mental health care:

- Access to **timely** and **effective** psychological and psychiatric services including counseling in a culturally responsive framework and by referral to external advice and/or treatment. (2.2.1.1.1)
- Special care needs of detainees, such as those who are at risk of self-harm, or in need of psychiatric care are to be identified, assessed and responded to. (2.2.3.1)
- Any transfer of a detainee to a mental health facility should be made according to relevant State mental health laws and consistent with any arrangements agreed between the Department and State health authorities and relevant Departmental procedures or instructions (2.2.3.1.2).
- The potential for detainees to self-harm is minimized, to the fullest extent possible (2.2.3.4.1)
- Detainees who self-harm or attempt self-harm are provided with medical assistance as soon as possible and, post-incident, with ongoing appropriate treatment including but not limited to psychological/psychiatric assessment and counseling (2.2.3.4.2)

89. Patently these standards are not met. This is largely due to the absence of a statutory and regulatory framework setting out the duty of care owed by DIMIA to detainees, including appropriate enforcement mechanisms.

Recommendation 16

- *That the Migration Act and Regulations be amended to include a detailed statutory and regulatory framework for detention centres, spelling out the duty of care owed by DIMIA to detainees, rights of detainees and binding enforcement mechanisms to ensure the duty of care is met.*

4.4.5 The conflict in care

90. The central reason for the extreme reluctance of DIMIA to release mentally ill persons from immigration detention centres is that it underscores the fact that

[6] *See Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93 (29 April 2004) S v Secretary, DIMIA [2005] FCA 549 (5 May 2005)

prolonged detention often leads to mental illness and that mental illness cannot be properly treated in a detention environment.

91. As DIMIA are required, pursuant to section 189 of the *Migration Act*, to detain unlawful non-citizens, they are reluctant to engage in alternative care arrangements which will undermine their primary statutory duty to detain unlawful non-citizens within detention centres. It is our belief that DIMIA views the release of individuals from detention on mental health grounds as weakening Australia's policy of mandatory detention and as having the potential to open the floodgates to others.

92. The ASRC initiated litigation in the case of *VQAS v MIMIA [2003] FCA 832 (6 August 2003)* where the Federal Court ordered DIMIA to appoint a medical specialist to determine whether the applicant had a special health need pursuant to Section 2.20(9) of the *Migration Regulations*. We were forced to initiate litigation as DIMIA would not themselves 'appoint a medical specialist' and vigorously contested their duty to appoint such a specialist. Ryan J found that there was evidence on file demonstrating the progressive deterioration of the applicant's medical condition, that none of the medical practitioners involved in his case had made any coherent assessment of care and that the authors of the medical reports demonstrated a superficial understanding of the facilities available in a detention centre.

93. There is a fundamental conflict of interest when DIMIA have responsibility for making decisions to detain as well as being responsible for the care of persons in detention.

94. For these reasons, the ASRC submits that responsibility for the physical and mental health of detainees should be removed from DIMIA and transferred to the appropriate State government health department within each state as is the case with many state prisons. In Victoria, for example, the Department of Justice have delegated responsibility for health issues within state prisons to the Department of Human Services who appoint medical subcontractors to provide health services in prisons. We understand that a similar situation exists in South Australia. This arrangement provides for an appropriate separation of executive functions between government agencies and transfer of health functions to an agency with expertise in health management.

4.4.6 A culture of neglect

95. Both DIMIA and GSL have consistently refused or failed to provide psychiatric assessment to detainees displaying symptoms of mental illness in order to determine whether they require further psychiatric care, particularly in circumstances where they require removal to an external facility.

96. The ASRC regularly encounters apathy and neglect by DIMIA in arranging psychiatric assessment of detainees who we have identified as mentally unwell. In some cases it has taken up to six months to have a DIMIA authorized psychiatrist assess a detainee. There have been numerous instances where we have arranged for external, independent psychiatrists to assess a

detainee. Despite strong recommendations that the detainee be transferred to an external mental health facility or released into community care, these recommendations are routinely ignored by DIMIA and discredited as biased and lacking independence.

97. There is an inherent culture within DIMIA and GSL which refuses to acknowledge that the behavior of detainees is symptomatic of a mental disorder caused by detention. Staff become accustomed to extreme incidents within the detention environment and mistakenly attribute many of them to 'behavioural issues', not symptoms of underlying mental illness. This is evidenced from the findings of the Palmer Report that despite the concerns expressed by fellow detainees and visitors, Ms Rau, who was clearly displaying bizarre behaviour during her time at Baxter, was unwell and required proper psychiatric care, was not provided with appropriate care by GSL staff and DIMIA. Rather, it is often the case that bizarre, aggressive or unmanageable behaviour is deemed to be 'playing up' and is punished by solitary confinement of the detainee.

98. (Case example omitted).

99. Other concerns include DIMIA not disclosing (in fact hiding) independent medical reports that they have commissioned that recommend the release of asylum seekers (on the grounds that they cannot be cared for in detention) to prevent the granting of a Bridging Visa and release of an asylum seeker.

100. On other occasions DIMA has ignored specialist medical reports that document that an asylum seeker is at risk/suicidal and cannot be cared for in detention. We have many instances where we have submitted to DIMIA reports from independent, respected psychiatrists and psychologists raising grave concerns for the mental health of asylum seekers. They are consistently ignored.

101. In 3½ years of advocating on behalf of asylum seekers in detention who specifically are mentally ill or unwell we have not been able to get DIMIA to have a detainee independently assessed within a period of 4 weeks (the average is 2 to 3 months). This is despite the fact that most of these cases concern individuals or families who are believed to be high suicide risks and who are already engaging in self–harm (ie hunger strikes, slashing wrists, trying to poison themselves etc).

102. DIMIA will rarely exercise its legal discretion and power to have a mentally ill asylum seeker transferred to a hospital or released into the community. In the majority of cases DIMIA will only utilise this power when they have been pressured by NGO's, community groups or churches.

103. It is common for DIMIA to only intervene when they are concerned that the particular story of neglect and mistreatment may end up in the public sphere. The ASRC has on numerous occasions been told by DIMIA that if we were to go public on particular cases of asylum seekers who are mentally ill/unwell we would jeopardise any chance of their release from detention.

104. A strongly held view within DIMIA appears to be that little to no weight is to be given to medical reports about the mental health of asylum seekers because asylum seekers are supposedly 'acting', 'putting it on', 'not really ill' among other unfounded and disturbing views.

105. There is an almost total absence of a 'duty of care' culture within DIMIA. The overwhelming impression you are left with in your dealings with DIMIA is that they do not believe they have a duty of care to ensure the appropriate care and treatment of people in detention. This is best reflected in cases where DIMIA does finally accept that an asylum seeker cannot be properly cared for and releases them from detention on medical grounds. The released detainees receive Bridging Visa E's giving them no access to Medicare, no income support, no right to work and absolutely no safety net, thus placing their well–being and health at further risk.

106. Under Section 72 of the *Migration Act* a decision by DIMIA to not grant a bridging visa to non–immigration cleared asylum seekers (ie those who have arrived by boat and represent the majority of asylum seekers in detention in the last 10 years) on health grounds, cannot be appealed. This is of great significance because DIMIA knows they cannot be held accountable when they refuse to intervene. This fosters a culture of abuse of excessive executive power.

4.4.7 Availability of psychiatric care

107. The availability of psychiatric staff and their access to detention centres and to assess detainees is highly unsatisfactory. Psychiatrists are contracted to attend detention centres on an infrequent basis. In Baxter it was previously every six to fourteen weeks, though the Minister has since advised that psychiatrists now attend Baxter every two weeks. We are not aware of whether these changes apply to Maribyrnong or Villawood detention centres. It is to be hoped that this situation will change with the implementation of the Palmer recommendations.

4.4.8 Inadequacy of treatment of mental illness

114. We have noted the difficulty for detainees in accessing medical care and the inadequacy of care provided by the contracted GPs. GPs can do little more than prescribe medication for mental illness. There is no co-ordinated delivery of services with contracted psychiatrists and as a result, no proper treatment plan is in place for asylum seekers who are identified as having a mental illness. The treatment of detainees with mental illness very rarely involves on-going and regular treatment with counselors and psychiatrists. Rather, detainees must make do with a mix of drugs prescribed by GPs.

4.4.9 Independence of psychiatrists and medical practitioners

115. A psychiatrist sub-contracted to provide services to GSL has limited independence and cannot deliver the standard of care required by detainees.

We consider that a psychiatrist that has a contractual relationship with GSL, is unlikely to jeopardize their contract by making strong recommendations that detainees should be transferred out of detention, for fear that this may be perceived as making a political statement or may undermine GSL's profit motive. We are concerned that sub-contracted psychiatrists may not make decisions that are in the best interests of the detainee for fear of losing their contract.

116. GPs who provide services to detention centres are also sub-contracted by GSL and as such are not independent. It is easy to see how a detainee's best interests are not necessarily the primary consideration for a general practitioner that wishes to maintain their contract with GSL.

4.4.10 Bias in delivery of care

117. Due to the infrequent attendance of psychiatrists, detainees must rely on assessment by general practitioners and on-site health staff to have their mental illness diagnosed and treated.

118. The usual practice for a consulting GP attending a detention centre is to detainees who are on a list provided by on-site medical staff. On-site medical staff decide which detainees to include on the list, who then have access to a GP. Our concern in this regard is the way in which detainees who are singled out as 'trouble makers' are denied access to consulting GPs and proper health care. In the ASRC's dealings with the DIMIA, it has been demonstrated that where detainee's cases are made public, or where there is pressure placed on DIMIA regarding a particular detainee, that detainee is treated adversely in their access to proper care.

4.4.11 No cost incentive to meet standards of care

119. It is our further submission that the current contract between DIMIA and GSL provides no incentive to GSL to provide adequate and timely health care due to the cost implications. We note that in paragraph 7.1.3 of the Contract states that:

"The Services Provider will be responsible for costs associated with medical treatment within a detention facility, at a day care facility, at hospital outpatients and for referral to specialists. Where a detainee is admitted to a hospital, the Department will be responsible for the costs. However, this will be considered on a case-by-case basis, having regard to protocols that are being developed, and in some circumstances the Services Provider may be responsible for the costs of hospitalisation."

Recommendation 17

- *That state health authorities have complete responsibility for the provision of health services in immigration detention centres.*

4.4.12 The release of mentally ill detainees into community care:

120. The *Migration Act* and *Regulations* provide insufficient provision for the release of mentally ill persons from immigration detention into managed care or into the community. The *Migration Regulations* must be amended to allow greater flexibility for the release of persons with mental illnesses from immigration detention. Designating hospitals or private houses as places of 'immigration detention' is a ridiculous and unworkable artificial construct which merely serves to highlight the inadequacies of the *Migration Act* with regard to the treatment of the mentally ill.

121. Section 5.35 of the *Migration Regulations* permits the Secretary of DIMIA to authorize involuntary medical treatment to a person if a registered medical practitioner is of the opinion that the detainee needs medical treatment and if medical treatment is not given to that person there will be a serious risk to his or her life or health. Use of this section should be a matter of last resort. There is a strong case for the development of alternative care arrangements with the consent of the individual concerned which would obviate the use of this section.

4.4.13 Guardianship of detainees

122. The guardianship of mentally incapacitated detainees is a significant area of concern for the ASRC. There is no provision in the *Migration Act* governing the guardianship of mentally incapacitated detainees. There are also no arrangements between the Federal and State authorities regarding guardianship.

123. In the case of Cornelia Rau, the South Australian Public Advocate contended that he had jurisdiction over mentally incapacitated persons in Baxter Detention Centre pursuant to his powers under the *Guardianship and Administration Act (SA) 1993*[7]. The Commonwealth denied that he had jurisdiction. The Public Advocate has previously initiated court action to clarify the situation but the issue is unresolved. The Victorian Public Advocate is also unclear on the scope of his powers in detention centres.[8] Whilst State guardianship bodies have expertise in the area and operate under a detailed legislative scheme in determining guardianship of mentally incapacitated persons, there is no Commonwealth equivalent.

124. If an external guardian cannot be appointed for mentally incapacitated detainees, then DIMIA itself acts as guardian and must act in the detainee's best interests, making decisions on their behalf in relation to legal and medical matters. This is a fundamental conflict of interest, particularly given the Department has the power to remove persons from Australia under section 189 of the *Migration Act*. It will often not be in the best interests of a mentally incapacitated person to be removed from Australia, particularly if they come from a dangerous country.

Recommendation 18

[7] (see 2001-2002 Annual Report of South Australian Public Advocate).
[8] (see interview with Victorian Public Advocate, Julian Gardner, 8 February 2004, ABC774 'Could it happen in Victoria?')

- *That the Migration Act be amended to specify the circumstances in which guardians will be appointed to mentally incapacitated immigration detainees and to clarify the relationship between the State Public Advocates and DIMIA in this regard.*

4.5 OUTSOURCING OF MANAGEMENT AND OTHER SERVICES AT IMMIGRATION DETENTION CENTRES

125. It has been government policy for a number of years to outsource the management and provision of services at immigration detention centres to private contractors. By any criteria, this has been an abysmal failure. Both ACM and GSL have demonstrated their ineptitude and unsuitability to manage immigration detainees.

126. ACM's failings were so serious that DIMIA was forced to choose another contractor. Their failings have been detailed in various reports including by the HREOC and other agencies. GSL have fared little better. On 30 July 2005 GSL were the subject of a damning report finding them guilty of the mistreatment of 5 detainees en route from Maribyrnong to Baxter in which detainees were assaulted, deprived of food and water, denied toilet breaks and subjected to sensory deprivation over an extended period of 6 hours. Two of these persons were ASRC clients. Such failings, when taken together with GSL's failings in managing health care in Baxter should immediately disqualify them from continuing to manage detention centres in Australia. The experiment with private contractors has failed.

Recommendation 19

- *That immigration detention centres should be managed by a government agency at arms length from DIMIA*

5. REMOVAL OF FAILED ASYLUM SEEKERS OR UNLAWFUL NON-CITIZENS FROM AUSTRALIA

5.1 NON-REFOULMENT OBLIGATIONS

127. Any forced removals process needs to ensure that Australia is compliant with its obligations under international human rights law. Under the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), individuals in need of protection have the right to *non-refoulement*; that is the right not to be returned to a country where they will be subject to torture or other human rights abuses. The scope of this right to *non-refoulement* is broader than the scope of the Refugee Convention. Australia has an obligation under the CAT and the ICCPR to ensure that individuals who have been assessed as not meeting the definition of a refugee, are not returned to situations where their human rights will be violated.

128. As the *non-refoulement* provisions of the CAT and the ICCPR have not been incorporated into Australian domestic law, there are no provisions for legal redress for apparent breaches of these conventions.[9] The 2000 Senate Committee recommended that these obligations to not *refoule* be explicitly incorporated into Australian domestic law. To date, the Australian government has taken no action to do so. The result is that an individual's right not to be repatriated to a country where they will face torture or other inhumane treatment is not upheld by Australian law, but rather is dependent upon the discretion of the Immigration Minister. This is clearly not a sufficient mechanism for ensuring that Australian's international obligations are met, and there have been many reported cases where Australia has deported individuals to situations where they faced significant danger and human rights violations.[10] The Australian system of immigration and deportation clearly does not conform to international *non-refoulement* obligations, and has placed many asylum seekers in positions of great risk of harm.

129. As a mechanism for ensuring that people are not *refouled*, Australia should implement a system of assessing for Complementary Protection.[11] This system would allow a separate visa category, taking into account an individual's possible need for international protection, on grounds that fall beyond the specific scope of the 1951 Refugee Convention. Such a category could encompass those who would face torture or other human rights abuses upon return to their country, those fleeing war-torn countries, or those who are stateless. A system of

[9] Edmund Rice Centre for Justice and Community Education, Deported to Danger, A Study of Australia's Treatment of 40 Rejected Asylum Seekers, September 2004, p.42.

[10] For further discussion, please see 'Deported to Danger', Edmund Rice Centre for Justice and Community Education. This report found that 35 out of the 40 people interviewed were living in dangerous circumstances immediately after deportation from Australia, even after advising the Australian authorities that they would not be safe.

[11] Refugee Council of Australia, National Council of Churches in Australia, Amnesty International Australia, 'Complementary Protection: The Way Ahead', April 2004. This report outlines a clear proposal for the implementation of a system of Complementary Protection in Australia.

complementary protection would provide Australia with a clear mechanism to meet its international obligations to ensure that individuals are not returned to situations where their human rights may be violated.

Recommendation 20

- *That Australia's non refoulment obligations pursuant to the Convention Against Torture and International Covenant on Civil and Political Rights be incorporated into Australian domestic law.*

Recommendation 21

- *That a system for assessing complementary protection needs be developed to replace or supplement the Ministerial Humanitarian Intervention system.*

5.2 REMOVAL OF PERSONS WHO ARE PSYCHOLOGICALLY UNWELL

130. DIMIA have a statutory obligation to remove unlawful non-citizens from Australia 'as soon as reasonably practicable'.[12] Unfortunately DIMIA often exercise this role over zealously and without regard to physical or mental health issues, welfare issues or human rights concerns in the country of repatriation.

131. Whilst there is an obligation upon DIMIA to conduct a pre-departure assessment of a person's physical fitness to travel, DIMIA do not assess a person's mental fitness to travel. Persons with chronic mental illness are routinely removed from Australia in circumstances where there is no treatment for them upon arrival in the country of repatriation. This does not mean that DIMIA should never remove a person who is psychologically unwell, merely that this should be done in a sensitive and appropriate way in accordance with best mental health practice standards. In many cases it may be appropriate to organise counselling and or psychological treatment prior to removal.

132. Vivian Alvarez's removal may have been avoided had closer attention been paid to her mental health. This may have resulted in her further stay in Australia which may also have established her identity.

133. The ASRC was recently involved in the case of the attempted removal of a mentally-ill asylum seeker. **(Case example omitted).**

134. **(Case example omitted).**

Recommendation 22

- *That persons not be removed from Australia unless they are assessed as being psychologically fit to travel.*

[12] S 189 of the Migration Act

Recommendation 23

- *That DIMIA ensure that persons who are psychologically unwell receive proper counseling and treatment prior to their removal. Consideration should be given to whether or not their removal is warranted or whether they should be permitted to remain in Australia for an extended period of time for humanitarian or medical reasons. Consideration should be given to (the?) psychological treatment the returnee would receive if repatriated to their own country.*

5.3 PRE-REMOVAL RISK ASESSMENT

135. For failed asylum seekers DIMIA should conduct a pre-departure human rights and personal security audit to ensure that Australia's primary human rights obligations are being met. At a minimum the circumstances of asylum seekers should be assessed against the following international treaties: Convention on International Civil and Political Rights, Convention Against Torture, Convention on the Rights of the Child, Convention on the Elimination of Discrimination Against Women and the Convention on the Reduction of Statelessness.

136. Identification of human rights obligations would not necessarily result in that person being entitled to remain in Australia but might require the person to receive some temporary humanitarian status within the community or for DIMIA to develop a welfare, protection and monitoring package to minimise any harm to the deportee upon return to their home country. In other cases permanent humanitarian protection might be appropriate.

137. The ASRC believes that there should be some independent scrutiny of DIMIA decisions to deport to make sure not only that all relevant removal safeguards have been complied with[13], but also that a pre-departure assessment of the removee's individual circumstances is conducted to ensure that Australia's human rights obligations are being met. In the course of such an assessment any health or welfare needs of the removees must be considered and serious consideration given to their reception upon return. It is not sufficient, in an area where individual human rights are the concern of the global community to abdicate responsibility for a person once they depart our shores.

138. We note that DIMIA on occasion conduct 'International Obligations and Humanitarian Concerns Assessments'. We are unclear in what circumstances these assessments are conducted, but understand that they are not conducted in all cases of forced removals. These assessments are apparently designed to ensure that Australia's international obligations under various international treaties and conventions including the CAT, the CROC and the Convention on the International Civil and Political Rights (ICCPR) are being met. The questions contained in the assessments are detailed and comprehensive and address Australia's primary human rights obligations. If properly conducted such

[13] Including that appropriate travel arrangements have been made for the removee, that a valid travel document has been obtained, that there has been appropriate contact with the authorities of the country of repatriation, including any guarantees or undertakings of fair treatment upon return.

assessments would be a good guide to assessing humanitarian issues for removees.

139. The ASRC, however, is concerned that such assessments are not properly conducted. The assessments appear to be conducted by DIMIA case officers without any special expertise in human rights or welfare issues. In an assessment recently provided to the ASRC by an applicant the case officer had reached conclusions about child protection and welfare issues in relation to the applicant's country of reference without first interviewing or inviting comment from the applicant and his children. Only after the assessment was completed was the applicant invited to comment.

140. The case officer concluded that there was no indication that the children would be unable to resettle and integrate in their home country nor ~~that~~ was there ~~was~~ (?) any indication that the home country would fail to afford the children the rights provided for in the CROC or the ICCPR. Shortly after reaching this finding the case officer quoted from country information including: "…the situation of children was poor…child abuse was endemic throughout the country. Abuses ranged from general neglect, physical abuses, abandonment and confinement to work in order to pay off families debts…Children did not have adequate access to adequate health care and only one children's hospital existed in the country; however it was not accessible to citizens in distant provincial districts…". It would appear that there was no input into the assessment by relevant welfare or human rights experts. It is difficult to understand how the case officer felt in a position to reach such conclusions without informed input.

141. Under the category 'Non-refoulment obligations' the questionnaire required 'yes/no' responses to the issues of whether there were substantial grounds for believing the applicant to be at risk of torture under CROC, or at real risk of violation of their fundamental human rights under the ICCPR or whether there was a real risk that a child would face violation of their fundamental rights under CROC. The case officer answered 'no' to each of the three questions, despite the fact that the applicants had not been invited to comment on any of these matters and despite the fact that the applicants had not presented their refugee or humanitarian claims for many years.

142. In our view, such 'International Obligations and Humanitarian Concerns Assessments' should be conducted by HREOC as an expert independent human rights agency specializing in gender, race, disability and children's rights. HREOC officers should invite applicants to address them in writing on humanitarian aspects of their claims and should conduct interviews with removees if deemed necessary. Such procedures would involve additional cost to the Australian government, but would be an effective and ultimately efficient way of ensuring that basic human rights of removees were respected.

143. There are numerous examples of inappropriate removals from Australia which could have been avoided with an independent reviewing mechanism.

Recommendation 24

- *That all cases of forced removal be assessed by an independent agency, such as the Human Rights and Equal Opportunities Commission (HREOC) to ensure compliance with lawful removal procedures, health standards and human rights protections.*

5.4 PRE-REMOVAL DETENTION

144. Under international guidelines, it is a general principle that asylum seekers must not be detained[14], and detention should only be considered if there are no other alternatives. Detention must only be used where it is necessary, proportionate, lawful and complies with one of the grounds recognised as legitimate by international standards[15] and must only be applied based upon an assessment of risk posed by the individual.

145. Where detention is being considered as a means of ensuring compliance with pending deportation, other non-custodial measures should be adequately considered, such as supervision systems, the requirement to report regularly to the authorities, bail, or other guarantee systems.[16] Any detention pending removal should be for as short a period as possible, and in every case, the need to detain an individual should be reviewed at reasonable intervals of time, including by judicial review in the case of prolonged detention periods.[17] Australian policy on the detention of asylum-seekers should be in line with UNHCR standards, and should avoid the detention of certain categories of vulnerable people, including unaccompanied minors, elderly persons, trauma or torture victims and persons with a mental or physical disability.[18]

146. Yet under our current system almost no unsuccessful asylum seekers who are required to depart Australia are provided with repatriation assistance from our government. The majority of these are people who have been living in the community on a Bridging Visa E with no income or work rights for many years. They are often destitute and have no capacity to pay airfares and other costs involved in departing Australia. Under the current system DIMIA will only assist with their removal if done so as a 'destitute removal', which requires they be detained for an unspecified period of time until they can be removed. This is despite this group being people who are agreeing to voluntary depart Australia. Whilst DIMIA has arbitrarily provided repatriation packages to certain refugee groups, namely the Kosovars, Iraqis, Afghans and East Timorese they have excluded other asylum seeker groups from such assistance.

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[14] UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 2.

[15] Amnesty International, The Human Cost of "Fortress Europe": Detention and Expulsion of Asylum-seekers and Migrants in the EU, 20 June 2005, AI Index: IOR 61/014/2005.

[16] Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, 9 May 2005 CM(2005) 40, Guideline 6

[17] Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, 9 May 2005 CM(2005) 40, Guideline 8

[18] UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guidelines 6 and 7.

147. If you are an asylum seeker who agrees to return to your country and do not have the means to financially pay for a plane ticket for you and your family, you will have to become unlawful (that is have your bridging visa expire) before DIMIA will assist you. DIMIA will not currently provide financial assistance that enables people to remain in the community until they are able to voluntarily depart Australia.

148. The consequences of this are far–reaching and include: people becoming unlawful, families going into hiding out of fear of being placed in detention and families being traumatised and distressed by the removal process. These are people who are often already quite emotionally fragile and mentally unwell.

149. The provision of a financial repatriation package to failed asylum seekers who are willing to return home but are unable to cover the airfare and are reluctant to return home without any means of immediate financial support would most likely result in a greater percentage of voluntary returns. This in itself would save the government significant detention costs.

Recommendation 25.

- *That detention prior to removal be a last resort and (used) only when alternative arrangements for ensuring compliance with removal arrangements have failed.*

Recommendation 26.

- *That a repatriation package be made available to failed asylum seekers to help facilitate their return. Such a package should include cost of the airfare and a financial package to assist asylum seekers with re-establishing themselves back home.*

5.5 CONDITIONS DURING REMOVAL

150. If a decision has been made to forcibly remove an asylum seeker from Australia, the process should be undertaken in a way that respects the rights and dignity of the returnee, and uses the minimum force required.

151. Restraint may be used only if absolutely necessary to ensure the safety of staff and others, and the use of restraints must be strictly proportionate to the risk posed by the returnee.[19] Escorts, where used, should be adequately trained to conduct the removal safely and appropriately. Clear standards and procedures for the forcible removal of individuals from Australia must be developed and adhered to.

152. Minimum forms of physical restraint may be used only in exceptional circumstances, and restraints that pose a significant risk to the health or well-being of the returnee must never be used. Numerous reports internationally have highlighted instances where severe injury or death by asphyxiation have

[19] Committee of Ministers, op.cit., Guidelines 18 and 19.

resulted from the excessive use of force and inappropriate means of restraint. Such cases are clear breaches of fundamental human rights, and Australia must seek to avoid any such further cases.

153. In addition, the removals process should be open and transparent. The returnee should be given sufficient time to prepare for the departure, should be provided with all appropriate information relating to the journey, and should also be given choices about aspects such as the timing of the return.[20] In a recent case brought to the attention of the ASRC, the applicant was given only 10 minutes notice of his departure from Maribyrnong Detention Centre, insufficient time for him to go to his locker and collect his belongings.

5.6 POST-REMOVAL MONITORING

154. Australia has obligations to undertake not only an assessment of the appropriateness of deporting an individual, but also to undertake a monitoring role after the individual's repatriation.

155. Appropriate procedures should be set in place to check that returnees have reached their destination safely, and to ensure that there is no risk of persecution. This monitoring process may be used not only to ensure the safety of the repatriated individual, but also as a mechanism to evaluate whether the Australian immigration system has undertaken thorough and accurate assessments of the protection needs of asylum seekers. HREOC has explained that 'Australia must be confident that its processes are effective and its determination accurate. The only way to be sure of this is to follow up those returned in order to document whether their claims to be at risk prove unfounded as predicted.[21]

156. Recommendations have been made that the Australian government examine the implementation of a system of monitoring repatriated individuals, in conjunction with non-government organizations.[22] However, the Australian government has rejected any obligation to conduct such monitoring, and this leaves Australia open to breaching its *non-refoulement* obligations under CAT and ICCPR.

157. The removal of detainees from immigration detention facilities occurs on a daily basis.[23] Of these, forced removals occur on approximately a monthly basis.[24] GSL has moved people between centres, without notice, and early in the morning, with no indication as to where they are being transported.[25] It is difficult to gauge adherence to the DIMIA procedure that requires 48 hours notice be given before people are moved. Often, management will get around

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[20] European Council on Refugees and Exiles, Position on Return, October 2003, paragraph 76.
[21] HREOC, cited in Senate Legal and Constitutional Committee, op. cit., paragraph 11.12.
[22] Senate Legal and Constitutional References Committee, op.cit., Recommendation 11.1.
[23] 'Iranians to be drugged, blindfolded and deported. August 21, 2003. The Age. http://www.theage.com.au/articles/2003/08/21/1061387810896.html?oneclick=true.
[24] Charandev Singh. http://www.rac-vic.org/html/chem-res.htm. 'Second Opinion: the use of chemical restraint in deportation."
[25] ASRC Detention Forum held on 3 November 2004

this by notifying individuals, and then immediately placing them in isolation, effectively rendering them helpless to seek assistance from lawyers or human rights worker, to try to halt the process.[26]

158. Forced removals will often involve the employment of high levels of violence. Detainees will often be placed under restraints, both chemical and physical.[27] In many cases, medications have been forcibly administered by nurses in order to sedate detainees, allowing them to be passively removed.[28] This non-consensual medical treatment constitutes a fundamental violation of the detainees' personal security, and a grave bodily assault.[29] Individuals who are seen as too physically or mentally ill to travel are not exempt from these forced deportations, and have in some instances attempted suicide to avoid removal.[30] Deportations are often carried out at remote airport locations, using charter flights with untrained casual flight crews to avoid attention.[31]

Recommendation 27.

- *That removal arrangements comply with international standards including the Council of Europe Guidelines on Forced Return.*

These are the matters we wish to put before the Senate Committee.

We thank the Committee for its consideration of the submissions made by the ASRC and would welcome the opportunity to elaborate on any of the matters raised in this submission.

For further comment, please contact Martin Clutterbuck, Legal Coordinator or Kon Karapanagiotidis, Coordinator, of the Asylum Seekers Resource Centre on (03) 9326 6066.

[26] Detention Forum 23 November 2004
[27] Detention Forum 23 November 2004
[28] Rogalla. http://www.rac-vic.org/html/chem-res.htm. 'Second Opinion: the use of chemical restraint in deportation." Reiterated in 'Iranians to be drugged, blindfolded and deported. August 21, 2003. The Age. http://www.theage.com.au/articles/2003/08/21/1061387810896.html?oneclick=true "We would be very surprised if there wasn't drugging involved, blindfolding involved and handcuffing involved - it has happened before," advocate Jack Smit from Western Australia-based group Project Safecom said.
[29] Charandev Singh. http://www.rac-vic.org/html/chem-res.htm. 'Second Opinion: the use of chemical restraint in deportation."
[30] Immigration denies detainee too ill for deportation. Nov 22, 2004. http://www.abc.net.au/news/newsitems/200411/s1249162.htm.
[31] Charandev Singh. http://www.rac-vic.org/html/chem-res.htm. 'Second Opinion: the use of chemical restraint in deportation."