By Claire O'Connor

PERSONAL INJURY CLAIMS FOR IMMIGRATION DETAINEES

In the last 12 months, 17,000 refugees seeking asylum arrived in Australia by boat, using the Indonesian-Christmas Island/Ashmore Reef route.[1] Of those, almost all will be detained in one of the immigration detention centres in Australia, if they are lucky. Others have been sent to Nauru and to Manus Island under the revised Pacific Solution.

Those who are detained in Australia will mostly receive a visa under the *Migration Act*, which has adopted the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (the Refugees Convention) in its provisions.

There has been criticism in and outside Australia for over a decade, now, regarding the conditions of the detention centres in which detainees are held. Formerly, most detainees were kept in detention centres in South Australia and Western Australia,[2] but those in Australia are now housed on Christmas Island,[3] in the Northern Territory,[4] Western Australia,[5] Victoria[6] and in New South Wales.[7] There are other, smaller, detention centres around the country as well as Alternative Places of Detention (APODs), primarily used for families or for short-term stays.[8]

The criticisms continue in spite of the statements made by the then Minister for Immigration, Chris Evans, when Labor was elected in 2007, that the government would respect the human rights of those seeking asylum and in spite of the *Seven Key Immigration Values*[9] issued in 2008. Although community detention was meant to be a major component of the reforms postulated by the current government, the statistics provided on the Department's own website shows that only just over 20 per cent of asylum seekers were in community housing under a residential determination as at October 2012.[10] The figure is about half for males, who make up the largest proportion of asylum seekers in Australia.[11]

Although there are no children in actual detention centres, most are kept either in APODs, such as Sydney's Residential Housing Facility next to Villawood Detention Centre, at Construction Camp or Phosphate Hill on Christmas Island, or at Inverbrackie in the Adelaide Hills.

Health services are provided within the detention centres and the APODs by a private health company contracted by the Commonwealth (International Health and Medical Services (IHMS)) and the facilities are run by Serco, another private company. The Department of Immigration has staff to oversee the running of every centre.

Decisions about where to house a detainee are made by the Department; whether a detainee can live in residential housing under a Residential Determination is a non-reviewable decision made by the Minister.[12]

The time a person spends in detention varies. The Department of Immigration provides the following table for detainees as at October 2012.[13]

The nationality of those detainees seeking asylum who have recently arrived by boat differs from those who arrived in the period 1999 to 2005, who were mostly Iranians, Iraqis and Afghanis. In October 2012, the makeup of detainees in APODs and Detention Centres showed that 43 per cent were Sri Lankan, 17 per cent Iranian and 14 per cent Afghani. However, the statistics for those who had been given a residential determination showed that it was more likely to be Iranians who were successful (30 per cent) compared with the low numbers for Sri Lankans (18 per cent).

Time in detention	No. of people	Percentage of detainees
7 days or less	423	4.5%
8 days - 31 days	2,151	22.8%
32 days - 91 days	3,697	39.1%
92 days - 182 days	1,919	20.3%
183 days - 365 days	388	4.1%
366 days - 547 days	160	1.7%
548 days - 730 days	199	2.1%
Greater than 730 days	512	5.4%
Total	**9,449**	**100%**

This figure shows that 9.2 per cent of all detainees have been in detention for more than one year, with over half that figure being in detention for more than two years.

CLAIMS FOR DETAINEES WHO HAVE BEEN IN IMMIGRATION DETENTION

Since the High Court delivered its judgment in *Behrooz v The Secretary, Department of Immigration and Multicultural Affairs*[14] (*Behrooz*), many have brought claims for harm caused by their immigration detention experience. As the Full Federal Court recently said:

> 'It is well established that a gaoler owes a duty of care under the common law to exercise reasonable care for the safety of persons held in custody (authorities omitted). But that obligation is not a guarantee of the safety of the detainee; it is an obligation of reasonable care to avoid harm to the detainee whether that harm be inflicted by a third person or by the detainee himself or herself.'[15]

Many have sued the Commonwealth for false imprisonment when they were detained or were removed unlawfully from Australia. The high-profile cases of Vivian Solon and Cornelia Rau were just two examples of those claims. Their payments of $4.5 million and $2.3 million respectively were the highest payments made for such detentions and/or unlawful removals, but many more millions have been paid out to successful litigants.[16]

The number of successful claims brought for persons detained lawfully but who claim they were harmed through negligence and/or intentional torts is, however, difficult to ascertain. What is known is the total amount paid and the total claims brought, as the Commonwealth from time to time is required to release these figures. In an article in the *Sydney Morning Herald* in June 2012, it was acknowledged that:

> 'Almost $8 million in compensation has been paid to 55 asylum seekers and detainees in the past two years for injuries and psychological damage suffered while in Australian detention centres.
>
> The payments bring the total amount of compensation paid in the past decade to more than $16 million, Department of Immigration figures show. From 2000 to 2009, there were 54 compensation cases…
>
> Advocates have warned that, as the number of asylum seekers and others being kept in detention centres continues to rise, so will the number of cases for compensation.'[17]

In the *Daily Telegraph* on 23 August 2012, it was reported that:

> 'Immigration Department figures show that from July 1 last year to June 30 this year, the federal government paid out $2.1 million, excluding legal costs, in compensation to former detainees. All of those claims relate to pre-2007 incidents, and are for a combination of personal injuries or the unlawful detention of 13 former detainees who each were paid on average about $160,000. Between June 2008 and June 2010, about 50 former asylum seekers were paid $5.4 million in compensation payouts for injuries they suffered while in detention. The average payout in that time was $100,000.'[18]

None of the successful compensation cases has been the result of a judgment awarding damages; some have settled during negotiations and mediations. For example, the case of Shayan Bedraie,[19] who was awarded $400,000 for harm caused to him while a child in detention, settled during the trial. Aside from the Bedraie matter, and a sprinkling of other cases, awards have been made only in a context where the Commonwealth has insisted on a confidentiality clause in relation to the quantum.

For historical claims for persons suing when they are no longer in detention, it is of interest to note:

1. The Commonwealth created the detention centres in remote and isolated parts of Australia. Christmas Island, Woomera, Curtin and Port Headland were far removed from major cities where access to medical assistance was irregular – in particular, access to psychiatric services. Woomera and Baxter housed thousands of detainees over the years – the former housing children as well as adults for the whole time; the latter holding only adult males after a change in policy. None had psychiatrists contracted to provide ongoing care – visiting psychiatrists mostly attended irregularly – a few hours a month, if that. During 2004, a psychiatrist visited Baxter for only a few hours in three visits for the whole year. By then, most of the detainees at Baxter had been in detention for more than three years. Most were suffering >>

depression, many had post-traumatic stress disorders and some, like Rau, who was detained there during this period, had major psychiatric conditions.

2. By mid-2005, over 20 detainees from Baxter were transferred to a psychiatric hospital in Adelaide (including Rau) following court actions or threats of court actions. The Commonwealth was then required to have the detainees assessed properly and given adequate treatment. Some were transferred to other detention centres in less isolated parts of Australia, which would be less harmful.[20] An example of the latter is the case of Amin Mastipour. Amin had arrived in Australia some years before with his young daughter who was in his custody – the mother still residing in Iran. Following an incident where Amin protested about guards trying to strip-search him in front of his daughter, he was placed in solitary confinement and separated from his daughter. Up to that time, they had been sharing accommodation. During his stay in isolation, his daughter was brought to him for visits. On one scheduled appointment time, he was told that his daughter was with the manager in a nearby town 'shopping'. This was a lie. The Commonwealth had removed his daughter back to Iran. He was told a few days later. He became depressed, stopped eating and demanded to be sent to another centre so he would not have the cruel memories of his daughter around him. The Commonwealth refused. The Federal Court ordered that he not be kept in Baxter or Curtin. The Full Court reviewed this decision after the Commonwealth appealed where the lower court's judgment was upheld.[21] Mr Mastipour has since settled his claim for damages against the Commonwealth (on a confidential basis) and, years later, his daughter arrived back from Iran into his care and is once again living with him.

3. In a recent paper, Professor Jon Jureidini and Julian Burnside AO QC[22] wrote:
'As of 20 May 2011, the Immigration Department was detaining 6,729 individuals, mostly asylum seekers who have arrived here by boat. Two-thirds of them have already spent more than six months in detention (sourced)...The Christmas Island detention centre is grossly over-crowded, with a standard operating capacity of 400, and a surge capacity of 800. In May 2011, it held 1,612 people...there are more children in immigration detention in early 2011 than ever before...1,082 (sourced)...Melbourne Transit Accommodation...100 teenage boys displaying depression, despair and self-harm...by May 2011 only around 25 per cent of children were in the community in ordinary dwellings without guards...200 children detained on Christmas Island at Construction Camp...not free to come and go and limited opportunities to play. There are no open grassy areas, very few indoor recreational spaces. It is claustrophobic, with significant restrictions on movement...lack of privacy...up to 90 people share one shower...young children often detained close to unaccompanied minors or adults...
While the detention environment 10 years ago was different, with children exposed to much higher levels of conflict, violence and self-harm, we are beginning to see the emergence of the same severe psychiatric disturbances that we saw then. There are reports from Darwin of children under the age of 10 self-harming (sourced) and we are beginning to see infants with severe separation anxiety, adolescents with severe depression and post-traumatic stress disorder and parents who have lost the capacity to care adequately for their children...
The present system of indefinite mandatory detention seriously harms many of the people subjected to it. The harm is predictable and foreseeable. We are still dealing with the legacy of psychiatric harm caused during the Howard years. The system will cause similar damage and cost Australia an immense amount financially. At the same time, it damages our national reputation and, more importantly, it scars our national conscience.'

4. The recent Full Federal Court decision of *SBEG v The Commonwealth*,[23] delivered in December 2012, does not, in the author's view, affect the merit of claims for injuries that occur in the detention environment but may have an impact on claims by refugees without ASIO clearances. This case is still before the courts.

We Are Forensic Experts In
• Engineering Analysis & Reconstruction
• Traffic Crashes & Road Safety
• Workplace or Mining Incidents
• Reporting & Experts Court testimony
• Failure Analysis & Safety Solutions
• Physical, Crash, Incident & Handling Testing

Delta-V Experts
• Clarifies the facts in a situation
• Scientifically substantiates the evidence
• Strengthens your communication
• Diverse experience and expertise

03 9481 2200 03 9481 2277 www.dvexperts.net 377 St Georges Road, Fitzroy Nth VIC 3068

A GUIDE FOR THOSE ADVISING FORMER DETAINEES

Records

Records of detainees are held by the Department of Immigration and Citizenship (DIAC). An FOI request will usually produce the health records and the service-provider records (ACM and GSL were the companies formerly running detention centres; Serco now has the contract). It is rare for an FOI application for persons in current detention centres to result in the DIAC file. Historical FOI applications do, however, contain such material. In a recent police matter the author acted in, where the client was charged with an assault at Baxter some six years earlier, the police officer handling the investigation told the Court that DIAC had informed him that it has *'hundreds and hundreds of hours of video tape'* from the detention centres. It would be prudent to seek such tapes as well in a further FOI application, or even at the discovery stage if you issue. If a detainee has their paper file first, you can isolate particular events for which you require the record (for example, a suicide attempt or a protest that involved the detainee). Any broad request for video over months or years of a person's detention might attract an oppressive claim.

After you have read the records, it should be possible to advise where there is evidence of a claim. Usually an expert report will be necessary before determining if there is evidence of failures on the Commonwealth's part for claims either for physical and/or mental harm to connect a person's current ill-health with failures by the Commonwealth.

Time

It is clear that for those adults released outside of the last three years, extension of time issues will arise. This article does not cover the different state provisions, but note that for those who were harmed (and most of the historical cases involve harm) in South Australia, the *Limitation of Actions Act* 1936 (SA) requires that an action must be commenced within three years of when a plaintiff first became aware of the injury. However, an extension of time can be granted under s48, which provides for, *inter alia,* a material cause to give rise to such an application.[24] For those whose claim is for detention that occurred only in Western Australia, no extension is available.

Physical injury

Some clients have been awarded payments for the failure to diagnose or treat physical injuries while in detention. Some examples where negligence has been claimed by former detainees include the failure to diagnose and/or treat heart conditions, broken limbs, spinal injuries, etc.

It is the author's view that where a plaintiff can show he or she was unreasonably placed in isolation units, and that isolation has had an ongoing effect on the plaintiff, then the plaintiff would have a claim in damages. The isolation units were, in my opinion, cruel and amounted to torture of innocent people. In *Behrooz,* Gleeson CJ said at [21]:

> '... Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort.'

For intentional acts causing injury, see below.

Psychiatric injury

Most plaintiffs, however, have been compensated for psychiatric injuries. To bring a successful claim, the plaintiff will have to show that:

(a) They have a psychiatric injury. Different states have different definitions of this type of injury in civil liability legislation and different states have limitations on the liability of defendants unless a percentage of permanent harm can be shown for negligent actions (the same issue arises for physical injury in some jurisdictions). Once again, this article does not discuss this perspective. Further, issues involving *'choice of law'* will arise when a detainee is harmed in more than one jurisdiction.

(b) The psychiatric injury was one that arose through (either in part, or was aggravated by) the detention conditions.

(c) The said injury was preventable.

(d) The harm or injury was reasonably foreseeable and/or the injury was intentional. On the 8 July 2003, *The Age* contained the following article about a group of Vietnamese boat people who were transferred to >>

Christmas Island – then an unused detention centre – quoting from an interview with the then prime minister, John Howard, on ABC Radio earlier that day. *The Age* reported that he had said:

"We decided they should go to Christmas Island because we believe that if they were processed in Port Hedland that would run the risk of sending a message to the rest of the world that it was still possible to get to the Australian mainland and that in some way our policy on that had been changed," Mr Howard told ABC Radio..... He said it was worth spending any amount of money to ensure people smugglers and asylum seekers knew they could not make it on to the mainland."

Similar comments about the use of detention centres to send messages to others contemplating the journey here by boat give rise to an argument, in the author's view, that the Commonwealth intends to harm detainees. Consideration of whether to plead an intentional act then arises. Further, some detainees have been the victim of actual assaults by guards. If such an assault was an intentional act and has had an impact on the detainee's psychiatric condition, and/or caused harm, this could also give rise to a claim for damages.

(e) The injury resulted from a failure by the Commonwealth. An expert opinion would be needed to show that there was a failure by the Commonwealth to provide appropriate health and welfare services, and/or to treat a client's medical conditions and/or to negligently or intentionally isolate and/or detain the detainee in the conditions intending to cause him/her harm. The expert would have to say that such harm would not have resulted but for the negligent and/or intentional acts.

It is interesting to note that even now, with the knowledge that exists about the impact that detention has on the mental health of detainees, Christmas Island still has no resident psychiatrist. This was a problem for the detainees following the sinking of the SIEV 221 off the shores of Christmas Island in December 2010; many of the survivors who lost either parents or children spent months on the island – some never receiving any psychiatric intervention despite the trauma they had endured. The adults say the children, especially the orphans, were inconsolable during storms, as the sounds mimicked the conditions when the boat crashed.

Detention centres contain facilities far worse than many of the harshest prisons in Australia, and have done so since the late 1990s. The Commonwealth knows this.

For example, there were two sections at Baxter used for disciplining detainees (mainly for self-harm events): Red One and Management Unit (MU) were punishment units. They had conditions that would not be permitted in mainstream prisons.[25] The MU had:

- A mattress on the floor.
- Windows painted over.
- Camera surveillance 24 hours a day inside the cells.
- A shower and toilet area visible on the camera and no shower curtain.
- 24-hour neon lighting.
- No reading materials or writing materials permitted.
- No change of clothes or any personal effects permitted.
- No recreational facilities.
- Detainees were locked alone in their cell between 20 and 23.5 hours per day and allowed out into a tiny recreation area where there might be other detainees to talk with and only for the short period permitted. Some detainees were held in total isolation.
- No statutory, contractual or regulated maximum period – some detainees were kept for weeks in this unit.

Many detainees were kept in the MU for *behavioural problems*. Many of the behaviours exhibited by these detainees, and for which they were punished, were symptoms of mental illness.

DX Express is a new, quick and reliable service for DX Members

any street address
Urgent documents are delivered to any street address next business day to most locations in Australia.

simple to lodge
Simply lodge your DX Express at any DX Exchange or organise a regular pickup to make it easier for you.

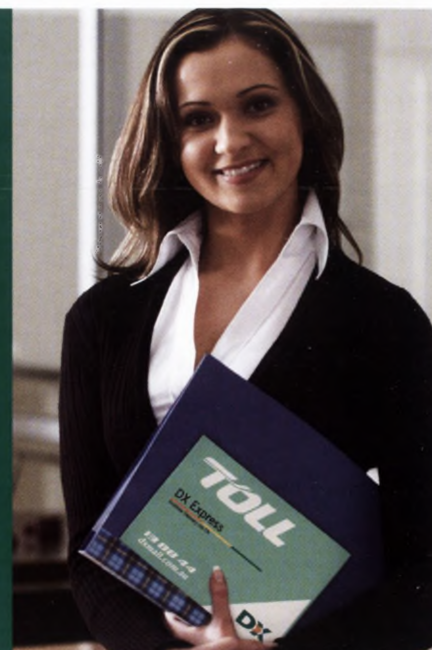
flexible product options
There are a range of options to choose from, starting at DLX envelopes to 5kg satchels.

price competitive
DX Express is price competitive compared to other document delivery services.

delivery confirmation
Real-time delivery confirmation is easy to access on our website.

customer service support
Enjoy the assistance of your account manager and our professional customer service team.

Call 13 88 44 **dxmail.com.au**



(Cornelia Rau spent time in the MU.)

Most remaining centres in Australia operate units similar to this unit – for example, North West Point on Christmas Island has a Red Unit whose conditions are identical to those in the Baxter MU.

Punitive detention conditions contribute to the mental illnesses that many detainees and former detainees now have.

There have been nine deaths in detention in the last two years and most of those deaths were suicides. At a recent inquest into a suicide at Villawood, the NSW Coroner said the death was contributed to by the failure to provide adequate health services and treatment.

There have been dozens of detainees in immigration detention centres in Australia over the last 13 years who have attempted to take their lives. They have tried to hang themselves, swallowed substances, cut themselves, jumped into the razor wire surrounding the centres, buried themselves in pits, refused food or water, gone on hunger strikes, and sewn their lips together. Men, women and even children have been involved.

Most of those who have exhibited, or who are exhibiting, such clear signs of mental illness, have been left untreated or, worse, have been or are being punished with isolation and deprivation in an attempt to try to prevent the conduct. Many detainees whose records show that they went untreated with such severe symptoms could have a claim for an intentional harm. Many more would have claims in negligence. ■

Notes: **1** See DIAC website: <http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>, last accessed 1 January 2013. **2** Woomera and Baxter detention centres in South Australia and Curtin and Port Hedland in Western Australia. **3** North West Point, Construction Camp and Phosphate Hill. **4** Whickam Point and the Darwin Airport Lodge. **5** Curtin (which was reopened recently), Leonora, Perth, Scherger and Yongah Hill. **6** Maribyrnong, and Melbourne. **7** Villawood. **8** For example, Inverbrackie in the Adelaide Hills and Sydney Residential Housing. **9** 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (July 2008). This speech outlined seven values that would 'guide and drive new detention policy and practice into the future'.

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

See DIAC website. <http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>, last accessed 1 January 2013. **10** *Ibid*, at p4. **11** According to the Immigration Department website from October 2012, males made up just over 80 per cent of persons seeking asylum. **12** See s197 AB of the *Migration Act* 1958. **13** DIAC website, see note 9 above. **14** (2004) 219 CLR 486. **15** *SBEG v The Commonwealth of Australia* [2012] SAFCAFC 189. **16** Discussions between the author and civil lawyers around Australia. **17** Natalie O'Brien, 'Asylum Comp Bill Tops 16 Million', <http://www.smh.com.au/national/asylum-compo-bill-tops-16m-20110611-1fy1a.html> accessed 1 January 2013. **18** Asylum Abuse Payouts Increasing by Ken McGregor <http://www.dailytelegraph.com.au/news/national/increase-in-compensation-payouts-for-asylum-seekers/story-fndo2izk-1226456090337> accessed 1 January 2013. **19** Case settled. **20** See *S v Secretary, Department of Immigration and Ethnic Affairs* (2005) 143 FCR 217. **21** *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83. **22** 'Children in Immigration Detention: A case of Reckless Mistreatment', *Australian and New Zealand Journal of Public Health*, 2011 vol. 35, no. IV at 304. **23** Unreported case which settled. **24** For an authority on the extension of time granted in a stolen generation case in SA, see *Trevorrow v State of SA* (2007) 98 SASR 136 (which was upheld on appeal on the extension point). **25** All prisons in Australia have a regulatory regime that can be reviewed by Judicial Review for non-compliance. Although the *Migration Act* enables Regulations to be drafted determining conditions in detention, none has been drafted to date in spite of both the courts in *Behrooz* and in *S* commenting on this failure.

Claire O'Connor *is a barrister at Anthony Mason Chambers, Adelaide. She practises in human rights, criminal and family law matters.* **PHONE** (08) 82280008
EMAIL coconnor@anthonymasonchambers.com.au.