

2009

Immigration  
detention and  
offshore processing  
on Christmas Island



**Australian  
Human Rights  
Commission**

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*everyone, everywhere, everyday*

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# Part A:

## Introductory sections

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### 1. Introduction

This report contains a summary of observations by the Australian Human Rights Commission (the Commission) following its July 2009 visit to Australia's immigration detention facilities on Christmas Island. It follows the Commission's 2006, 2007 and 2008 annual reports on inspections of immigration detention facilities.<sup>1</sup>

The Commission provided an advance copy of this report to the Department of Immigration and Citizenship (DIAC). Their response is available on the Commission's website at [http://www.humanrights.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island\\_response.html](http://www.humanrights.gov.au/human_rights/immigration/idc2009_xmas_island_response.html).

### 2. Summary

In early 2008, the Commission commended the Australian Government for ending the so-called 'Pacific solution' by closing the offshore immigration detention centres on Nauru and Manus Island. Since then, the government has initiated further positive reforms, in particular the July 2008 announcement of 'New Directions' for Australia's immigration detention system.<sup>2</sup>

However, despite these positive changes, the Commission has ongoing concerns – one of the most critical being the mandatory detention and offshore processing of asylum seekers on Christmas Island.

While there are clearly significant efforts being put into the detention and offshore processing system on Christmas Island, those efforts cannot overcome the fundamental problems with the system itself. The Commission's major concerns can be summarised as follows:

#### **Excision and offshore processing**

- Asylum seekers who arrive in excised offshore places such as Christmas Island are barred from the refugee status determination system that applies on the mainland under Australian law. Instead, they go through a 'non-statutory' process governed by guidelines that are not legally binding. They have no access to the Refugee Review Tribunal and very limited access to the Australian courts. They must rely on a non-compellable and non-reviewable Ministerial discretion to be allowed to apply for a protection visa.

#### **Mandatory detention, without judicial oversight**

- Asylum seekers (including children) who arrive by boat without a valid visa in an excised offshore place are mandatorily detained on Christmas Island despite the fact that the *Migration Act 1958* (Cth) (Migration Act) does not require this. Further, the Migration Act purports to bar them from challenging the lawfulness of their detention in the Australian courts.<sup>3</sup>

#### **Detention of unaccompanied minors and families with children**

- Some children (including unaccompanied children) are detained in a closed immigration detention facility on Christmas Island – the 'construction camp'. The Commission considers this a concerning regression from the 2005 changes to the Migration Act which affirmed the principle that children should only be detained as a last resort.
- There is a conflict of interest created by having the Minister for Immigration and Citizenship or DIAC officers act as the legal guardian for unaccompanied minors detained on Christmas Island. There is also a lack of clarity about responsibilities and procedures relating to child welfare and protection for children in immigration detention on the island.

### **Detention in a small, remote community**

- Asylum seekers on Christmas Island are detained in a small community in a remote location where their access to appropriate services including health and mental health care, legal advice, cultural and religious support, and community-based advocacy and support networks is more limited than it would be on the mainland.
- The remote location and limited facilities and infrastructure on Christmas Island make it a difficult place in which to ensure implementation of some key aspects of the government's New Directions – in particular the intention to use immigration detention centres only as a last resort, and the presumption that unauthorised arrivals will be released into the community once their health, identity and security checks are completed. The shortage of community-based accommodation appears to be preventing the release of some detainees from closed detention facilities into community detention.
- The remote location of Christmas Island makes the immigration detention operations there less visible and transparent to the Australian public, and less accessible for external scrutiny bodies.

### **Conditions and treatment of detainees**

- The immigration detention facilities on Christmas Island are not appropriate for detaining asylum seekers, particularly those with a background of torture or trauma. The Christmas Island Immigration Detention Centre (IDC) is a high security detention centre that looks like a prison. The construction camp facility is not appropriate for unaccompanied minors or families with children.
- While some detainees on Christmas Island expressed positive views about their treatment, others expressed frustration about the restrictions placed on them during the initial 'separation detention' phase, the length of time they had been detained, their lack of access to external excursions, and difficulties accessing interpreters and translated documents.

Under the Refugee Convention, asylum seekers should not be penalised because of their method of arrival. Regardless of how or where they arrive in Australia, all people are entitled to protection of their fundamental human rights, including the right to seek asylum.

The excision and offshore processing regime establishes a two-tiered system for determining refugee status. Asylum seekers who arrive in excised offshore places such as Christmas Island have fewer legal safeguards than those who arrive on the mainland. In the Commission's view this undermines the core principles of the Refugee Convention, jeopardises asylum seekers' human rights and increases the risk that a refugee may be sent back to a place where their life or freedom would be threatened.

Further, the policy of detaining all unauthorised boat arrivals in a place as small and remote as Christmas Island restricts asylum seekers' access to essential services and support networks, and limits the ability of the Australian Government to ensure that those people are treated in accordance with key aspects of its own New Directions policy.

The Commission therefore reiterates its past recommendations that the provisions of the Migration Act relating to excised offshore places should be repealed; people should not be held in immigration detention on Christmas Island; and all unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

### 3. Recommendations

<p><b>Recommendation 1:</b> The Australian Government should repeal the provisions of the Migration Act relating to excised offshore places.</p>
<p><b>Recommendation 2:</b> The Australian Government should abandon the policy of processing some asylum claims through a non-statutory refugee status assessment process. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.</p>
<p><b>Recommendation 3:</b> The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention.</p>
<p><b>Recommendation 4:</b> If the Australian Government intends to continue using Christmas Island for immigration detention purposes, it should abolish the policy of mandatorily detaining all unauthorised boat arrivals on the island. The Migration Act does not require detention in excised offshore places.</p>
<p><b>Recommendation 5:</b> Section 494AA of the Migration Act, which bars certain legal proceedings in relation to offshore entry persons, should be repealed. The Migration Act should be amended to accord with international law by requiring that a decision to detain a person, or a decision to continue a person’s detention, is subject to prompt review by a court.<sup>4</sup></p>
<p><b>Recommendation 6:</b> Legislation should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia’s immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.</p>
<p><b>Recommendation 7:</b> The Australian Government should accede to the <i>Optional Protocol to the Convention against Torture</i> and establish an independent National Preventive Mechanism to conduct regular inspections of all places of detention. This should include all immigration detention facilities, including those located in excised offshore places.</p>
<p><b>Recommendation 8:</b> If the Australian Government intends to continue the practice of holding children in immigration detention on Christmas Island, children should be accommodated with their family members in community-based accommodation. They should not be detained in the construction camp immigration detention facility, the secure compound of the Phosphate Hill immigration detention facility, or the Christmas Island IDC.</p>
<p><b>Recommendation 9:</b> The Australian Government should implement the outstanding recommendations made by the Commission in the report of its national inquiry into children in immigration detention, <i>A last resort</i>.<sup>5</sup> These include that Australia’s immigration detention laws should be amended, as a matter of urgency, to comply with the <i>Convention on the Rights of the Child</i>. In particular, the new laws should incorporate the following minimum features:</p>

- There should be a presumption against the detention of children for immigration purposes.
- A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- All courts and independent tribunals should be guided by the following principles:
  - detention of children must be a measure of last resort and for the shortest appropriate period of time
  - the best interests of the child must be a primary consideration
  - the preservation of family unity
  - special protection and assistance for unaccompanied children.

**Recommendation 10:**

If the Australian Government intends to continue the practice of holding children in immigration detention on Christmas Island it should, as a matter of priority:

- clarify the applicable laws and jurisdiction of relevant state and federal bodies
- clarify through formal Memoranda of Understanding the respective roles and responsibilities of state and federal authorities with regard to the welfare and protection of children in all forms of immigration detention on Christmas Island
- clearly communicate these roles and responsibilities to all relevant state and federal authorities, and to unaccompanied minors and their carers or representatives
- ensure that there are clear policies and procedures in place regarding child welfare and protection concerns that may arise in respect of children in immigration detention on Christmas Island, and communicate these policies and procedures to all relevant staff.

**Recommendation 11:**

The Australian Government should, as a matter of priority, implement the recommendations made by the Commission in *A last resort* that:

- Australia's laws should be amended so that the Minister for Immigration and Citizenship is no longer the legal guardian of unaccompanied children.
- An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

**Recommendation 12:**

If the Australian Government intends to continue to use the Christmas Island IDC, it should implement the recent recommendation of the Joint Standing Committee on Migration that all caged walkways, perspex barriers, and electrified fencing be removed and replaced with more appropriate security infrastructure.<sup>6</sup>

**Recommendation 13:**

DIAC should ensure that all immigration detainees on Christmas Island, upon entering detention, are provided with up-to-date induction materials with information on:

- how to request an interpreter, including the phone number for the Translating and Interpreting Service (TIS)
- how to lodge a complaint with DIAC or the detention service provider, and how soon that complaint will be responded to. It should include contact phone numbers so that detainees do not have to rely solely on submitting a written complaint or request form
- how to lodge a complaint with the Commonwealth Ombudsman or the Australian Human Rights Commission. Current contact details, including phone and fax numbers, should be included

- current contact details for the local police, including a phone number
- what medical, dental and mental health services are available to detainees, and how a detainee can access those services
- how to request an external excursion
- what facilities are available for religious purposes
- contact details for Legal Aid, the United Nations High Commissioner for Refugees (UNHCR), Australian Red Cross, major refugee and asylum seeker information and advice groups, and Immigration Advice and Application Assistance Scheme (IAAAS) providers.

These induction materials should be translated into the main languages spoken by the detainee population. Each detainee should be provided with a copy in a language they can understand. If this is not possible, or a detainee cannot read, an interpreter should be provided in person to go through the materials with the detainee in their preferred language.

**Recommendation 14:**

DIAC should ensure that all immigration detainees are provided with clear information on their arrival in immigration detention informing them of:

- their right to seek asylum
- their right to access independent legal advice and assistance
- the scope of the IAAAS assistance that will be provided to them
- the non-statutory refugee status assessment process, including the steps in the process and the approximate estimated timeframes for each of those steps. This should include information about what will be expected of the detainee during each step in the process, and who will make the decision at each step. It should also clearly indicate any timeframes that detainees are expected to comply with.

While this information may initially be provided verbally, detainees should also be provided with a written copy in a language they can understand. If this is not possible, or a detainee cannot read, an interpreter should be provided in person to go through the written information with the detainee in their preferred language.

**Recommendation 15:**

If DIAC intends to continue to use the separation detention system, it should ensure that all detainees are able to:

- make an initial phone call to contact their family members
- access communication facilities if they wish to contact a lawyer or migration agent.

DIAC should consider allowing detainees to have more regular communication with family members while they are in separation detention.

**Recommendation 16:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees are provided with adequate access to phones, and that detainees can make and receive phone calls in privacy.

**Recommendation 17:**

Wherever possible, DIAC should ensure that official letters and documents are provided to a detainee in a language the detainee can understand. Where this is not possible, the detainee should be offered the assistance of an interpreter to translate the contents of the letter or document. This should include documents relating to decisions, and reasons for decisions, at the primary and independent review stages of the non-statutory refugee status assessment process for offshore entry persons; and the primary and Refugee Review Tribunal stages of the refugee status determination system for detainees who are not offshore entry persons.

**Recommendation 18:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that detainees on the island are provided with access to appropriate health and mental health care services. These should be no less than the services available to detainees on the mainland.

**Recommendation 19:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees, including those at the construction camp, are provided with a range of recreational facilities and activities. All detention facilities should have open grassy space for sports and recreation.

**Recommendation 20:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that:

- detainees have access to appropriate educational activities, including ESL classes
- each detention facility has an adequate supply of reading materials in the principal languages spoken by detainees.

**Recommendation 21:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should:

- adopt minimum standards for the conduct of regular external excursions from immigration detention facilities, including for detainees in separation detention
- include these standards in the contract with the detention service provider
- monitor compliance with these standards on an ongoing basis and take appropriate remedial action when they are not being complied with
- ensure that the detention service provider is allocated sufficient resources to provide escorts for regular external excursions.

**Recommendation 22:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees are provided with access to regular religious services conducted by qualified religious representatives.

## 4. Background

### 4.1 Conduct of visit

The Commission visited Christmas Island from 13 to 18 July 2009. The visit was conducted by Catherine Branson QC (President of the Commission and Human Rights Commissioner), Graeme Innes AM (Race Discrimination Commissioner and Disability Discrimination Commissioner), and two staff members from the Human Rights Unit.

During the visit the Commission undertook the following activities:

- inspection of the Christmas Island IDC, the construction camp immigration detention facility and the Phosphate Hill immigration detention facility
- meetings with detainees at the Christmas Island IDC, the construction camp immigration detention facility and in community detention
- meetings with DIAC and G4S Australia management and staff
- meetings with staff members of health and mental health service providers, Australian Red Cross and Life Without Barriers

- meetings with representatives of the Attorney-General’s Department, Christmas Island Shire Council, Christmas Island District High School, local religious groups and other community representatives.

**4.2 Purpose of visit**

For more than a decade, the Commission has raised significant concerns about Australia’s immigration detention system. During this time, the Commission has investigated numerous complaints from individuals in immigration detention and conducted two national inquiries into the mandatory detention system.<sup>7</sup> The Commission has concluded that this system breaches fundamental human rights.<sup>8</sup>

Because of its ongoing concerns, the Commission has undertaken a range of activities aimed at ensuring that the immigration detention system complies with Australia’s international human rights obligations.<sup>9</sup> One of these activities has been monitoring conditions in immigration detention. The Commission has conducted numerous visits to Australia’s immigration detention facilities, including annual inspections of mainland facilities over the last three years. In 2008, these inspections also included the detention facilities on Christmas Island.

This year the Commission conducted a stand-alone visit to Christmas Island due to the significant number of people being held in immigration detention on the island; the limited access those people have to the Australian legal system; and the lack of publicly available information about the detention operations on the island.

The overarching purpose of the Commission’s visit was to assess the extent to which the immigration detention operations on Christmas Island comply with internationally accepted human rights standards.

**4.3 Relevant human rights standards**

Conditions in immigration detention should comply with Australia’s international human rights obligations. These are contained in a range of treaties the Australian Government has voluntarily become a party to, including:

- the *International Covenant on Civil and Political Rights* (ICCPR)<sup>10</sup>
- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)<sup>11</sup>
- the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (Convention against Torture)<sup>12</sup>
- the *Convention Relating to the Status of Refugees* and *Protocol Relating to the Status of Refugees* (Refugee Convention)<sup>13</sup>
- the *Convention on the Rights of the Child* (CRC).<sup>14</sup>

These treaties protect a wide range of fundamental rights and freedoms. Those most relevant to people in immigration detention include the following:

Everyone has the right to liberty and security of the person. No one should be subjected to arbitrary arrest or detention. <sup>15</sup>
Anyone deprived of his or her liberty has the right to challenge the lawfulness of his or her detention before a court. <sup>16</sup>
Anyone detained should have access to independent legal advice and assistance. <sup>17</sup>
All persons deprived of their liberty should be treated with humanity and respect for the inherent dignity of the human person. <sup>18</sup>
No one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment. <sup>19</sup>

The detention of a child should be used only as a measure of last resort and for the shortest appropriate period of time.<sup>20</sup>

In all actions concerning children, the best interests of the child should be a primary consideration.<sup>21</sup>

Everyone is entitled to respect for their human rights without discrimination.<sup>22</sup>

The principle of *non-refoulement* prohibits Australia from returning a refugee to a country where his or her life or freedom would be threatened.<sup>23</sup>

In addition, there are a range of international guidelines relating specifically to the treatment of persons in detention. These include:

- the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*<sup>24</sup>
- the *Standard Minimum Rules for the Treatment of Prisoners*<sup>25</sup>
- the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*<sup>26</sup>
- UNHCR guidelines, including the *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* and the *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*.<sup>27</sup>

In 2000, the Commission used these human rights standards and international guidelines as a basis for developing the *Immigration Detention Guidelines*.<sup>28</sup> These guidelines are intended to act as a minimum benchmark against which conditions in Australia's immigration detention facilities can be measured.

One of the overarching principles of the guidelines is that, because immigration detention is administrative detention not a correctional sentence, the treatment of immigration detainees should be as favourable as possible and in no way less favourable than that of untried or convicted prisoners.<sup>29</sup> People in immigration detention are detained under the Migration Act because they do not have a valid visa.<sup>30</sup> They are not detained because they are under arrest, or because they have been charged with or convicted of a criminal offence.

## 5. Snapshot: immigration detainees on Christmas Island

### 5.1 Where is Christmas Island?

Christmas Island is a remote territory of Australia, located in the Indian Ocean. It is approximately 2650km north-west of Perth, 2800km west of Darwin and 360km south of Java. The island is three hours behind Australian Eastern Standard Time. It consists of approximately 135 square kilometres of land, more than 60 percent of which is national park. The current local population is around 1100 people.



.....  
Location of Christmas Island relative to the Australian mainland<sup>31</sup>

## 5.2 Who is detained on Christmas Island?

The current policy of the Australian Government is that all people who arrive by boat without a valid visa (unauthorised boat arrivals) are taken into immigration detention on Christmas Island.<sup>32</sup> This includes people who arrive by boat in excised offshore places such as Christmas Island, the Ashmore and Cartier Islands, the Cocos (Keeling) Islands and others.<sup>33</sup> It also includes people who arrive by boat on the mainland or in any non-excised part of Australia. For example, in November 2008 a group of people was detained on Christmas Island after arriving at Shark Bay on the Western Australia coast.

Almost all detainees on Christmas Island are asylum seekers. At the time of the Commission’s visit, the vast majority were from Afghanistan or Sri Lanka. The other two major nationalities were Iraqi and Iranian. Six detainees were stateless.<sup>34</sup>

At any given time, there may also be a small number of crew members in immigration detention awaiting removal from Australia, or waiting while Australian Federal Police (AFP) investigations are ongoing.

## 5.3 How many people are detained?

The number of people in immigration detention on Christmas Island varies at any given time, as some detainees may be granted visas and resettled on the mainland, while others may arrive in the meantime.

When the Commission visited in August 2008, there were only four people in immigration detention on Christmas Island. At the time of the Commission’s July 2009 visit, this had increased significantly to 733 people, including 82 children, 28 women and 623 men. Of the 82 children, 54 were unaccompanied.

At the time of writing, there had been 828 new arrivals since the Commission’s visit.

## 5.4 How long are people detained?

Of the 733 immigration detainees on Christmas Island at the time of the Commission’s visit, the majority had been there for less than three months. However, 114 detainees (16 percent) had been there for more than three months, and 15 had been there for six months or longer.

Of the 82 detained children, 16 of them (20 percent) had been there for more than three months. This included seven children under ten years of age. One 17 year old boy had been there for more than six months.

## 5.5 Where are people detained?

People in immigration detention on Christmas Island may be held in a range of places including:

- The Christmas Island IDC, a high security detention centre used for adult males. During the Commission's visit there were 590 detainees in the IDC.
- The construction camp, a low security immigration detention facility used primarily for groups including unaccompanied minors or families with children. When the Commission visited, there were 99 detainees including 25 men, 21 women, 17 accompanied children and 36 unaccompanied children.
- The Phosphate Hill immigration detention facility, which includes the secure bravo compound for adult males and the open alpha compound for people in community detention. When the Commission visited, there were five men in community detention in the alpha compound. No one was detained in the bravo compound at that time.<sup>35</sup>
- Duplex houses in the community, used for people in community detention. When the Commission visited, there were 39 people in community detention in the duplexes including 3 men, 7 women, 11 accompanied children and 18 unaccompanied children.

Section 12 of this report contains detailed observations and concerns about the Christmas Island IDC and the construction camp facility. Comments about the Phosphate Hill facility and community detention accommodation are set out in section 13.

At the time of the Commission's visit, the detention facilities on the island were being operated by G4S Australia. However, the new service provider, Serco Australia, was due to take over at the beginning of October 2009.

## Part B:

# Excision and offshore processing

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### 6. What are excised offshore places?

In 2001, the Migration Act was amended to designate a number of islands, including Christmas Island, as ‘excised offshore places’.<sup>36</sup> A person who becomes an unlawful non-citizen (a non-citizen without a valid visa) by entering Australia at such a place is referred to as an ‘offshore entry person’.<sup>37</sup>

The purpose of these amendments was to bar offshore entry persons from being able to apply for a visa, unless the Minister for Immigration and Citizenship (the Minister) determines that it is in the public interest to allow them to do so.<sup>38</sup> The Migration Act also purports to bar them from taking certain legal proceedings in the Australian courts, including in relation to the lawfulness of their detention.<sup>39</sup>

Further, under the Migration Act, an offshore entry person can be removed to a ‘declared country’ using ‘such force as is necessary and reasonable’.<sup>40</sup> Previously, asylum seekers were transferred to immigration detention centres on Nauru and Manus Island as part of the Howard Government’s ‘Pacific solution’.

The Commission commended the current Australian Government for closing those detention centres in 2008. However, the government has stated its commitment to retaining the excision of offshore islands, and to detaining unauthorised boat arrivals on Christmas Island.<sup>41</sup>

### 7. What is the offshore processing system?

The Australian Government’s current policy is that unauthorised boat arrivals in excised offshore places are taken into immigration detention on Christmas Island and their refugee claims are processed through a ‘non-statutory’ refugee status assessment process (the non-statutory RSA process).<sup>42</sup> This is an administrative process which applies only to asylum seekers who arrive in excised offshore places. The process is not governed by the Migration Act. It is governed by draft policy guidelines developed by DIAC.<sup>43</sup>

The key steps in this process are as follows:

- The person arrives in an excised offshore place and is taken into immigration detention on Christmas Island, initially in separation detention. An initial entry interview is conducted. If the person raises fears of returning to their country of origin, a full entry interview is conducted and the person is moved from separation detention into the general detainee population. After the full entry interview, the interviewing officer submits details about the case to a senior DIAC officer.
- That senior DIAC officer assesses whether the person has raised claims that may engage Australia’s protection obligations. If they have not, DIAC can commence arrangements for the person to be removed from Australia. If they have, the person is provided with IAAAS assistance to lodge a statement of claims and request for refugee status assessment.
- The person is interviewed by a DIAC officer, who assesses their refugee claims and makes a determination as to whether they are a refugee.
- If the person is assessed as being a refugee, DIAC prepares a submission to the Minister seeking his or her agreement to ‘lift the bar’ in section 46A of the Migration Act. If the Minister does so, the person is permitted to apply for a protection visa.
- If the person is assessed as not being a refugee, they can request a review of that assessment by an Independent Reviewer. The Independent Reviewer considers the person’s refugee claims and recommends to the Minister whether he or she should consider lifting the section 46A bar to allow the person to apply for a protection visa.

The Commission has significant concerns about the non-statutory RSA process, as discussed below.

## 8. What are the Commission's concerns about excision and offshore processing?

### 8.1 A two-tiered system for determining refugee status

The provisions of the Migration Act relating to excised offshore places create a two-tiered system for determining whether an asylum seeker is a refugee.

An asylum seeker who arrives on the mainland or in another non-excised part of Australia has access to the refugee status determination system regulated by the Migration Act. This means that they:

- are able to submit a valid application for a protection visa<sup>44</sup>
- have access to independent merits review by the Refugee Review Tribunal (RRT), or in some circumstances the Administrative Appeals Tribunal (AAT), if they are refused a protection visa<sup>45</sup>
- have limited access to judicial review by the Federal Magistrates Court and the Federal Court of decisions made by the RRT or the AAT.<sup>46</sup>

However, an asylum seeker who arrives in an excised offshore place does not have access to this system. Instead, they go through the non-statutory RSA process described above. These people:

- are barred by the Migration Act from submitting a valid application for any visa, including a protection visa – this only becomes possible if the Minister exercises his or her discretion to allow an application to be submitted<sup>47</sup>
- do not have access to independent merits review by the RRT or the AAT –instead they have access to an Independent Reviewer who conducts a review of the initial RSA decision and makes a non-binding recommendation to the Minister
- have very limited access, if any, to judicial review of a decision made by a DIAC officer or an Independent Reviewer that the person is not a refugee.<sup>48</sup>

In the Commission's view, this two-tiered system undermines Australia's obligations under the Refugee Convention and jeopardises fundamental human rights.

In particular, article 31 of the Refugee Convention prohibits state parties from penalising asylum seekers on account of their unlawful entry where they are coming directly from a territory where their life or freedom was threatened.<sup>49</sup> Australia's differential treatment of asylum seekers based on their place and method of arrival arguably breaches this obligation, as well as the right to equality and non-discrimination in article 26 of the ICCPR.<sup>50</sup> The lack of legal safeguards under the non-statutory RSA process also increases the risk of *refoulement*, as discussed in section 8.2 below.

Further, the CRC affirms the right of child asylum seekers and refugees to receive appropriate protection and assistance.<sup>51</sup> The principle of non-discrimination in the CRC means that all children seeking asylum are entitled to the same level of assistance and protection of their rights, regardless of how or where they arrive.<sup>52</sup> In *A last resort*, the Commission found that Australia was breaching these obligations by providing children arriving in excised offshore places with inferior access to legal assistance and review procedures compared to those arriving on the mainland.<sup>53</sup>

In April 2009, the United Nations (UN) Human Rights Committee raised concerns about Australia's excision regime. The Committee recommended that the Australian Government should 'enact in legislation a comprehensive immigration framework' in compliance with the ICCPR, and that it should implement the recommendations made by the Commission in its *2008 Immigration detention report*.<sup>54</sup> Those recommendations included repealing the provisions of the Migration Act relating to excised offshore places.<sup>55</sup>

#### **Recommendation 1:**

The Australian Government should repeal the provisions of the Migration Act relating to excised offshore places.

## 8.2 Lack of legal safeguards

The Commission has previously raised concerns about processing the refugee claims of people who arrive in excised offshore places through a separate non-statutory process.<sup>56</sup> In his July 2008 New Directions speech, the Minister acknowledged that there has been ‘strong criticism’ of offshore processing.<sup>57</sup> The Minister announced several key reforms, including providing asylum seekers on Christmas Island with access to the Immigration Advice and Application Assistance Scheme (IAAAS), independent review of negative RSA decisions, and an external scrutiny role for the Commonwealth Ombudsman.<sup>58</sup>

The Commission welcomes these reforms, and considers them indispensable. However, even with these reforms, the Commission has serious concerns about the non-statutory RSA process. These primarily relate to the lack of transparent and enforceable procedures for decision-making, and the failure to provide sufficient legal safeguards for asylum seekers. The Commission’s key concerns are as follows:

- The non-statutory RSA process is governed by draft policy guidelines. The guidelines are neither legally binding nor publicly available. Decision-makers are not bound by the Migration Act, the Migration Regulations or Australian case law regarding the definition of a refugee.
- Asylum seekers who arrive in excised offshore places are barred by the Migration Act from applying for a protection visa.<sup>59</sup> They must rely on the Minister exercising his or her personal discretion to lift that bar.<sup>60</sup> This discretion is non-compellable and non-reviewable. Even if a DIAC officer or an Independent Reviewer assesses that a person is a refugee, the Minister is under no obligation to consider exercising the discretion.
- While the provision of independent review is a positive reform, it is not a sufficient safeguard. The Independent Reviewers operate under draft guidelines which are neither legally binding nor publicly available. Unlike the RRT and the AAT, the Independent Reviewers do not have the power to overturn a DIAC decision or to grant a protection visa. Their recommendations to the Minister are not binding.
- The Commission welcomes the fact that the majority of asylum seekers on Christmas Island currently appear to be moving through the non-statutory RSA process relatively quickly.<sup>61</sup> However, the Commission is concerned that this situation is vulnerable to change, as there are no binding timeframes under the process.

These various weaknesses increase the risk of people being held in immigration detention on Christmas Island for prolonged or indefinite periods, which could lead to breaches of Australia’s obligations under article 9 of the ICCPR. They also undermine Australia’s *non-refoulement* obligations under the Refugee Convention by increasing the risk of a refugee being returned to a place where their life or freedom would be threatened.

Further, the non-statutory RSA process fails to adequately implement Australia’s *non-refoulement* obligations under the ICCPR, CRC and CAT. Those obligations prohibit the return of people who do not fit the definition of ‘refugee’, but who may nevertheless face significant human rights abuses such as torture if returned to their country of origin. Currently, such people must rely on the Minister exercising his or her discretion to grant them a protection visa. The Commission has previously recommended the introduction of a legislative system of complementary protection to implement Australia’s *non-refoulement* obligations under the ICCPR, CRC and CAT.<sup>62</sup> The Commission therefore welcomed the recent introduction of the Migration Amendment (Complementary Protection) Bill 2009 (Cth). However, the system proposed by the Bill will not provide statutory protection for offshore entry persons.

Under the non-statutory RSA process, people seeking Australia’s protection are essentially reliant on the Minister’s personal discretion. A system based on the exercise of a non-compellable and non-reviewable Ministerial discretion does not provide adequate legal safeguards for such people. As stated recently by the Parliamentary Secretary for Multicultural Affairs and Settlement Services, Laurie Ferguson:

[D]ecisions may only be made by the minister personally; no-one can compel the minister to exercise the powers; there is no specific requirement to provide natural justice; there is no requirement to provide reasons if the minister does not exercise the power; and there is no merits review of decisions by the minister.

While there can be no doubt that ministers take very seriously their obligations to consider whether a visa should be granted to meet Australia’s human rights obligations, the very nature of ministerial

intervention powers is such that they do not provide a sufficient guarantee of fairness and integrity for decisions in which a person's life may be in the balance.<sup>63</sup>

The UN Human Rights Committee recently raised concerns about Australia's non-statutory decision-making process for refugee claims, and recommended that the Australian Government should implement the recommendations made by the Commission in its *2008 Immigration detention report*.<sup>64</sup> These included ending the offshore processing of asylum seekers.<sup>65</sup>

**Recommendation 2:**

The Australian Government should abandon the policy of processing some asylum claims through a non-statutory refugee status assessment process. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

## Part C: Immigration detention on Christmas Island

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The current policy of the Australian Government is that all unauthorised boat arrivals (in both excised offshore places and non-excised places) are taken to Christmas Island and held in immigration detention until they have been granted a visa or removed from Australia.<sup>66</sup>

At the time of the Commission's visit, there were 733 people detained on Christmas Island. The Commission was pleased to observe that DIAC is making efforts to manage the immigration detention operations on the island in a positive way, given the considerable constraints they are working within.

However, in the Commission's view, those constraints are created primarily by the Australian Government's decision to detain people in a community as small and remote as Christmas Island. The key constraints include the following:

- the remote location and limited infrastructure and facilities make Christmas Island a difficult place in which to comply with some key aspects of the government's New Directions
- the remote location makes detention operations on the island less visible, transparent and accessible to public scrutiny
- the immigration detention facilities on the island are not appropriate for detaining asylum seekers, particularly those with a background of torture or trauma
- the remote location and the small size of the local community mean that detainees have limited access to appropriate services including health and mental health care, legal advice, and cultural and religious support.

In the Commission's view, those constraints make Christmas Island an inappropriate place in which to hold people in immigration detention.

The Commission also has concerns about the manner in which the immigration detention system is currently being operated on Christmas Island, including the following:

- asylum seekers who arrive in excised offshore places are mandatorily detained even though the Migration Act does not require this, and the Migration Act purports to bar them from challenging the lawfulness of their detention in the Australian courts<sup>67</sup>
- some children are detained in a closed immigration detention facility, the construction camp
- there is a conflict of interest created by having the Minister or DIAC officers act as the legal guardian for unaccompanied minors detained on the island, while also being the detaining authority and the visa decision-maker
- there is a lack of clarity surrounding responsibilities and procedures relating to child welfare and protection for children detained on the island
- some detainees express frustrations about issues including restrictions during 'separation detention', their length of detention, their lack of access to external excursions, and difficulties accessing interpreters and translated documents.

The remaining sections of this report discuss each of the above issues in further detail. Where appropriate, recommendations are made for improving the current conditions for detainees on Christmas Island. This should not be construed as an endorsement of holding people in immigration detention on Christmas Island. Rather, it reflects the fact that, if the Australian Government intends to continue this practice, conditions for detainees should comply with Australia's international obligations.

**Recommendation 3:**

The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention.

## 9. Implementation of the New Directions on Christmas Island

In July 2008, the Minister announced the government's New Directions for the immigration detention system, based on seven key values.<sup>68</sup> The Commission welcomed the New Directions policy and most of the key values.<sup>69</sup>

However, the Commission is concerned that two of the key values retain the use of mandatory detention – including for all unauthorised arrivals.<sup>70</sup> The implementation of this policy on Christmas Island is particularly concerning given that the Migration Act does not require detention in excised offshore places.<sup>71</sup>

Further, while the Commission supports the remainder of the key values and the broader New Directions policy, it is concerned that the policy is not being fully implemented on Christmas Island. In the Commission's view the island's remoteness and limited infrastructure make it a difficult place in which to ensure that detention operations comply with some key aspects of the New Directions policy. This contributes to the Commission's view that Christmas Island is not an appropriate place in which to hold people in immigration detention.

The Commission's key concerns on these issues are set out below.

### 9.1 Mandatory detention of unauthorised arrivals

According to the Minister, the New Directions reforms were intended to 'fundamentally change the premise underlying detention policy'.<sup>72</sup> Under these reforms, 'persons will only be detained if the need is established', 'the department will have to justify a decision to detain – not presume detention', and the key values commit to 'detention as a last resort'.<sup>73</sup> The Commission welcomes this.

However, on Christmas Island, detention is not used as a last resort and it is not based on an individualised assessment of the need to detain each person. Rather, all unauthorised boat arrivals are mandatorily detained upon their arrival on the island. This is because the New Directions also include two key values that retain the use of mandatory detention for specified categories of people, including 'all unauthorised arrivals, for management of health, identity and security risks to the community'.<sup>74</sup>

The Commission has long opposed the use of mandatory immigration detention for broad categories of people because it is based on a blanket approach, rather than an assessment of the need to detain in each person's case.

Under UNHCR guidelines, there should be a presumption against the detention of asylum seekers – it should be the exception rather than the norm. Detention should only be resorted to if there is evidence to suggest that other alternatives (for example, reporting requirements) will not be effective in the individual case.<sup>75</sup> The detention of asylum seekers should only be resorted to if necessary:

- to verify identity
- to determine the elements on which the claim to refugee status or asylum is based
- to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum
- to protect national security or public order.<sup>76</sup>

In assessing whether detention is necessary, considerations should include whether it is reasonable and whether it is proportional to the objectives to be achieved.<sup>77</sup>

The Australian Government's policy of mandatory detention for all unauthorised arrivals fails to comply with these UNHCR guidelines. While the policy also applies to unauthorised arrivals on the mainland, it is particularly concerning on Christmas Island given that the Migration Act does not require mandatory detention in excised offshore places – legally it is a matter of discretion.<sup>78</sup> Further, detainees on Christmas Island have fewer legal safeguards than detainees on the mainland; and

there are significantly fewer alternatives to being held in a closed detention facility on Christmas Island compared to the mainland.

**Recommendation 4:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, it should abolish the policy of mandatorily detaining all unauthorised boat arrivals on the island. The Migration Act does not require detention in excised offshore places.

## 9.2 Prohibition of indefinite or otherwise arbitrary detention

The Commission has consistently called for the repeal of Australia’s mandatory detention system because it leads to breaches of Australia’s obligations to ensure that no one is arbitrarily detained.<sup>79</sup> The Commission therefore welcomed the inclusion of a key value in the New Directions acknowledging that indefinite or otherwise arbitrary detention is not acceptable, and committing to the length and conditions of detention being subject to regular review.<sup>80</sup> However, in the Commission’s view the government has not implemented sufficient reforms to ensure that this value is realised in practice.

The government has introduced two new review mechanisms under the New Directions: a three-monthly review by a senior DIAC officer; and a six-monthly review by the Commonwealth Ombudsman. The Commission welcomes these reforms, but considers that they are not sufficient to prevent arbitrary detention. The three-monthly DIAC reviews are not conducted by an independent body, a concern also raised by the Joint Standing Committee on Migration.<sup>81</sup> And while the six-monthly Ombudsman reviews are conducted by an independent body, the Ombudsman does not have the power to enforce its recommendations.

The essential safeguard required to ensure that arbitrary detention does not occur is access to review by a court of any decision to detain or to continue a person’s detention. Currently, in breach of its international obligations, Australia does not provide this.<sup>82</sup>

This is an ongoing concern with Australia’s immigration detention system generally. However, it is particularly concerning on Christmas Island given that the Migration Act purports to bar offshore entry persons from taking legal proceedings relating to the lawfulness of their detention.<sup>83</sup> In addition, offshore entry persons detained on Christmas Island go through the non-statutory RSA process which provides fewer safeguards than those available to asylum seekers on the mainland. And the remoteness of Christmas Island makes it more difficult for external bodies to monitor the situation of detainees held there.

These factors increase the risk that people may be held in immigration detention on Christmas Island for prolonged or indefinite periods. This would be inconsistent with the government’s New Directions, and could also lead to breaches of Australia’s international obligations to ensure that no one is subjected to arbitrary detention.<sup>84</sup>

**Recommendation 5:**

Section 494AA of the Migration Act, which bars certain legal proceedings in relation to offshore entry persons, should be repealed. The Migration Act should be amended to accord with international law by requiring that a decision to detain a person, or a decision to continue a person’s detention, is subject to prompt review by a court.<sup>85</sup>

## 9.3 Detention only for initial health, identity and security checks

Under the New Directions, an asylum seeker should only be held in a closed detention facility for as long as it takes to conduct their initial health, identity and security checks. After this, the presumption is that they will be released into the community unless a specific risk justifies their continued detention in a facility.<sup>86</sup>

During its visit to Christmas Island, the Commission had significant doubts as to whether detainees were being released into community detention once their initial checks had been completed. This concern was also raised by local community representatives.

DIAC informed the Commission that, generally, detainees on Christmas Island are not held in a detention facility once their initial checks have been completed. DIAC acknowledged that various factors could delay the release of a detainee into community detention, including the availability of accommodation and the need to arrange carers for unaccompanied minors. However, in their view, the major cause of delay was usually that a detainee's security clearance had not been finalised.

According to DIAC, the ASIO security clearance process is often not finalised until the non-statutory RSA process is at, or nearing, completion. Further, if a detainee's initial RSA decision is negative, ASIO suspends their security check. If the detainee later receives a positive decision through independent review, the ASIO security clearance process must be re-started. This could lead to people being held in closed detention facilities for six months or more rather than being released into the community while their immigration status is resolved, as is intended under the New Directions.

In the Commission's view, the shortage of community-based accommodation on Christmas Island is also likely to be a key factor in preventing the release of some detainees from a closed detention facility into community detention. At the time of the Commission's visit, DIAC had capacity to accommodate up to 60 people in community detention in the duplex houses. Of the 733 detainees on the island at the time, only 44 were in community detention. Even for child detainees, who are given priority consideration, only 35 percent were in community detention rather than a detention facility.<sup>87</sup>

During the Commission's visit, DIAC was taking steps to increase the community detention capacity on the island.<sup>88</sup> However, given the small size of the community and the significant number of detainees, the Commission has doubts about the feasibility of securing enough community-based accommodation to fully implement the New Directions presumption that detainees will be released into the community once their health, identity and security checks are completed. This concern contributes to the Commission's view that Christmas Island is not an appropriate place in which to hold immigration detainees.

#### 9.4 Use of immigration detention centres only as a last resort

The New Directions include a key value that '[d]etention in Immigration Detention Centres is only to be used as a last resort and for the shortest practicable time'.<sup>89</sup> The Commission supports this, having observed the negative physical and mental impacts of holding people in immigration detention centres, particularly for prolonged periods.<sup>90</sup>

However, on Christmas Island the IDC is not used as a last resort – it is used as the first and only resort for virtually all adult males arriving without immediate family members. At the time of the Commission's visit, there were 590 adult male detainees in the IDC, compared to 25 in the construction camp and only eight in community detention.

In the words of the Minister, the Christmas Island IDC represents a 'maximum security environment'.<sup>91</sup> Under the New Directions risk-based approach, immigration detention centres are intended to be used for high risk detainees.<sup>92</sup> As far as the Commission is aware, the detainees in the Christmas Island IDC are not there because they have been individually assessed as posing a high risk to the community. Rather, it appears that virtually all single adult males are placed in the IDC because there are not enough alternative places on Christmas Island in which to accommodate them.

The Commission acknowledges that DIAC is working within considerable constraints in terms of the infrastructure and accommodation options available on Christmas Island. However, these constraints have been imposed by the Australian Government's decision to detain people in a community as small and remote as Christmas Island.

The lack of appropriate alternatives on the island makes it a difficult place in which to comply with the New Directions requirement that immigration detention centres should only be used as a last resort. This contributes to the Commission's view that Christmas Island is not an appropriate place in which to hold immigration detainees.

## 10. Monitoring detention conditions on Christmas Island

The Australian Government's New Directions include the following key values:

Value 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.

Value 6: People in detention will be treated fairly and reasonably within the law.

Value 7: Conditions of detention will ensure the inherent dignity of the human person.<sup>93</sup>

Having raised ongoing concerns about conditions in Australia's immigration detention facilities for a decade, the Commission supports these values and hopes to see them translated into legislation.

While these values are critical for immigration detainees on the mainland as well, the Commission is particularly concerned about their implementation on Christmas Island, as the remote location makes the detention operations less visible, transparent and accessible. This concern contributes to the Commission's view that Christmas Island is not an appropriate place in which to hold people in immigration detention.

### 10.1 Minimum standards

The Commission has repeatedly raised concerns about the lack of transparent and enforceable standards for conditions in immigration detention, and has called numerous times for minimum standards to be codified in legislation.<sup>94</sup> This concern is heightened on Christmas Island, as the remote location makes it more difficult for external bodies to monitor detention conditions there.

It is not clear what standards the incoming detention service provider will be required to comply with on Christmas Island, or how the Australian Government intends to ensure that values 6 and 7 (above) will be implemented. Serco Australia was due to take over management of the three detention facilities on the island at the beginning of October 2009. According to DIAC, the five-year contract with Serco 'encompasses a stronger focus on the rights and well-being of people in detention and provides a comprehensive framework for ongoing quality improvement, including effective performance management systems'.<sup>95</sup>

However, while the Commission was consulted early in the tender documentation development, the Commission and other stakeholders have not yet been provided with a copy of the final contract or details about the standards contained within it.

This lack of transparency has also been raised as a concern by the Joint Standing Committee on Migration, which recently recommended that DIAC should make the current standards available on its website, provide a copy to all detainees, and report on the detention service provider's compliance in the DIAC annual report.<sup>96</sup>

The Commission supports measures to increase transparency of existing detention standards. However, the most appropriate way to ensure that standards for detention conditions are adequately and consistently implemented over the longer term is to embed minimum standards in legislation. This would be in line with UNHCR guidelines that require conditions of detention for asylum seekers to be prescribed by law.<sup>97</sup>

#### **Recommendation 6:**

Legislation should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

### 10.2 Independent monitoring

Independent monitoring of immigration detention facilities is essential in order to increase accountability and transparency, and thereby guard against human rights abuses. In the past, the Commission has emphasised the need for a more comprehensive monitoring mechanism to ensure that conditions in immigration detention facilities meet human rights standards.<sup>98</sup> The need for such a mechanism is enhanced on Christmas Island due to the limited transparency surrounding the detention operations there, and because the remote location makes it less accessible to external scrutiny bodies.

The Commission has generally received positive cooperation from DIAC in response to requests for information about the detention operations on Christmas Island. However, there is a significant lack of publicly available information. The weekly DIAC statistics do not indicate the length of time people are detained on Christmas Island, or (with the exception of men in the IDC), exactly where on the island people are detained. There is also very little information on the DIAC website about the

detention facilities on the island – in particular, there appears to be no mention of the construction camp facility.

Further, while various bodies play either a formal or informal role in monitoring detention conditions on Christmas Island, the remote location makes the detention facilities there much less accessible than those on the mainland. For groups based on the east coast of Australia, travelling to Christmas Island is time consuming and expensive.<sup>99</sup> This limits the ability of bodies such as the Commission to visit the detention facilities on a regular basis, and makes the trip virtually impossible for most NGOs and community groups.

In addition, there is no monitoring body with all of the key features necessary to be fully effective: independence from DIAC; the capacity to maintain an ongoing or regular presence on Christmas Island; a specific statutory power to enter immigration detention facilities; public reporting for transparency; and power to either enforce its recommendations or to require a public response from government.

In the Commission's view, there is a need for a more comprehensive monitoring mechanism to ensure that immigration detention conditions on Christmas Island meet human rights standards. One means of achieving this would be through the Australian Government ratifying the *Optional Protocol to the Convention against Torture* (OPCAT).<sup>100</sup> As a party to OPCAT, the Australian Government would be required to establish an independent National Preventive Mechanism (NPM) to conduct regular inspections of all places of detention.

In 2008, the Commission released a report of research it commissioned into options for implementing OPCAT in Australia.<sup>101</sup> The report suggests a mixed NPM model, with separate NPMs in each state and territory and a national coordinating NPM. The report suggests that the Commission should be the national coordinating NPM. The Joint Standing Committee on Migration recently noted that, as the Commission 'already conducts inspections of immigration detention facilities, it would therefore be the logical body in which to entrust any compliance responsibilities associated with the OPCAT'.<sup>102</sup>

#### **Recommendation 7:**

The Australian Government should accede to the *Optional Protocol to the Convention against Torture* and establish an independent National Preventive Mechanism to conduct regular inspections of all places of detention. This should include all immigration detention facilities, including those located in excised offshore places.

## **11. Children in detention on Christmas Island**

When the Commission visited Christmas Island in July 2009, there were 82 children in immigration detention on the island, including 14 girls and 68 boys. The majority were 16 or 17 years old, but a significant number were much younger – including 12 aged between zero and five years.<sup>103</sup> Twenty nine of the children were in community detention in the duplex houses, but 53 were in the construction camp immigration detention facility. Of the 82 children, 54 were unaccompanied.

Of the Commission's various concerns about the immigration detention operations on Christmas Island, concerns relating to the detention of families with children and unaccompanied minors are among the most significant. These include the following:

- Families with children and unaccompanied minors are mandatorily detained on Christmas Island despite the fact that the Migration Act does not require the detention of unlawful non-citizens in excised offshore places.<sup>104</sup>
- Some families with children and unaccompanied minors are detained in a closed immigration detention facility – the construction camp – instead of community detention. The construction camp is not an appropriate environment for families with children or unaccompanied minors.
- There is a lack of accurate public information surrounding the detention of families with children and unaccompanied minors at the construction camp facility.
- The Migration Act purports to bar offshore entry persons, including children, from challenging the lawfulness of their detention in the Australian courts.<sup>105</sup>

- There is a lack of clarity surrounding responsibilities and procedures relating to child welfare and protection for children in immigration detention on Christmas Island.
- There is a conflict of interest created by the Minister or a DIAC officer acting as the legal guardian of unaccompanied minors detained on Christmas Island, while also being the detaining authority and the visa decision-maker.

For the reasons discussed throughout Part C of this report, the Commission is of the view that Christmas Island is not an appropriate place in which to hold people in immigration detention, especially children.

### 11.1 Relevant human rights

Australia is a party to the CRC, which protects the human rights of all children. Human rights of particular importance for asylum-seeking children and other children who may be subject to immigration detention include the following:

The best interests of the child should be a primary consideration in all actions concerning children. <sup>106</sup>
The detention of a child should be used only as a measure of last resort and for the shortest appropriate period of time. Children must not be deprived of their liberty unlawfully or arbitrarily. <sup>107</sup>
No child should be subjected to torture or cruel, inhuman or degrading treatment or punishment. <sup>108</sup>
Children in detention have the right to be treated with humanity and respect for their inherent dignity. <sup>109</sup>
Detained children must be able to challenge the legality of their detention before a court or other competent, independent and impartial authority. <sup>110</sup>
Asylum-seeking and refugee children are entitled to appropriate protection and assistance. <sup>111</sup>
Children are not to be separated from their parents against their will, except when competent authorities subject to judicial review determine that separation is necessary for the best interests of the child. <sup>112</sup>
Children lacking the support of their parents are entitled to special protection and assistance from the government. The government must arrange alternative care for such children. <sup>113</sup>
Children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma. <sup>114</sup>
Children have a right to non-discrimination. <sup>115</sup>

### 11.2 Mandatory detention of children on Christmas Island

In 2004, the Commission released *A last resort*, the report of its national inquiry into children in immigration detention. The inquiry found that Australia’s mandatory immigration detention system was fundamentally inconsistent with the CRC, including the requirement that a child only be detained as a measure of last resort, for the shortest appropriate period of time, and subject to effective independent review.<sup>116</sup>

As noted in section 9.1 above, the Migration Act does not require the mandatory detention of unauthorised arrivals in excised offshore places – legally, it is a matter of discretion.<sup>117</sup> Despite this, the Australian Government’s current policy is that unauthorised boat arrivals, including families with children and unaccompanied minors, are mandatorily detained on Christmas Island.<sup>118</sup>

This policy is inconsistent with Australia’s obligations under the CRC to only detain a child as a measure of last resort.<sup>119</sup> By requiring the detention of children on arrival on Christmas Island, the policy uses detention as the first resort, rather than the last. In order to comply with its obligations under the CRC, the government should consider any less restrictive alternatives available to a child in deciding whether that child is detained. A child should only be detained in exceptional cases.<sup>120</sup>

The Australian Government’s policy also undermines section 4AA of the Migration Act, which ‘affirms as a principle that a minor shall only be detained as a measure of last resort’, and is contrary to UNHCR guidelines which state that child asylum seekers should not be detained, particularly in isolated areas.<sup>121</sup>

In the Commission’s view, children should not be held in immigration detention on Christmas Island at all. However, if the Australian Government intends to continue using Christmas Island for immigration detention purposes, it should implement the recommendation in section 9.1 above, to abolish the policy of mandatorily detaining all unauthorised boat arrivals, including children.

### 11.3 Detention of children in the construction camp facility



.....  
Construction camp immigration detention facility, external view



.....  
Construction camp immigration detention facility, internal view

The Commission welcomed the inclusion in the New Directions of a value stating that children, and where possible, their families, will not be detained in an immigration detention centre.<sup>122</sup> The Commission was pleased to see this was being complied with at the Christmas Island IDC. However, the Commission has significant concerns about the fact that some families with children and unaccompanied minors are held in a closed immigration detention facility – the construction camp.

On arrival on Christmas Island, families and unaccompanied minors are placed into detention at the construction camp. According to DIAC, as soon as health, security and identity checks are completed, the Minister is asked to consider placing them into community detention.<sup>123</sup> However, while some are moved after an initial period in the camp, others are not. In the Commission's view, the shortage of community-based accommodation on Christmas Island is likely to be a key factor delaying or preventing a move to community detention for some families and unaccompanied minors. This issue is discussed in section 9.3 above.

During the Commission's visit, of the 82 children in immigration detention on the island, only 29 were in community detention. The other 53 were detained in the construction camp. Of the 53 children in the camp, the majority were 16 or 17 years old, but a significant proportion were younger – including 11 children aged between zero and five years.<sup>124</sup> Thirty six of the children in the camp were unaccompanied.

The construction camp is not included among the facilities classified by DIAC as IDCs.<sup>125</sup> It has a much lower level of security – it is surrounded by a residential style fence, there are no alarms and there is no CCTV surveillance. The Commission welcomes this, particularly in comparison to the excessive level of security at the Christmas Island IDC.

However, DIAC's classification of the construction camp facility as 'alternative temporary detention in the community' is misleading.<sup>126</sup> The construction camp is not community-based accommodation. It is a closed facility being used as a place in which to hold immigration detainees. People detained in the camp are not free to come and go – they are only permitted to leave under escort. Thus, while they are in a low security facility, their liberty is severely restricted.

Furthermore, the construction camp is not an appropriate environment for children. It is a claustrophobic facility consisting of demountables linked by covered walkways. There is little open space, there are virtually no trees, and there is no open grassy area for children to play. The bedrooms are very small, with beds that are not appropriate for babies or young toddlers.

During its 2008 visit to the island, the Commission was informed by DIAC that the construction camp would not be used for long term detention, but for initial processing. The Commission was told this would take a few days. However, during its 2009 visit, the Commission found that some families and unaccompanied minors are spending two or three months in the camp.<sup>127</sup>

For the first few weeks, detainees are kept in 'separation detention'. They are restricted to their own accommodation block – a closed-in area consisting of their bedrooms, a small room with basic kitchen facilities, and a narrow undercover wooden deck area. For young children this would be a very restrictive situation.

The Commission welcomes the fact that, once they are out of separation detention, school-age children leave the camp to attend school classes on a daily basis. However, for children who are not yet old enough to attend school, there are very limited activities and opportunities for creative play inside the camp.

In the Commission's view, the detention of families with children and unaccompanied minors in a closed detention facility on Christmas Island represents a regression from the changes introduced to the Migration Act in 2005, under which the intention was that families with children and unaccompanied minors would be placed in community detention under a Residence Determination.<sup>128</sup> This concern was recently raised by Mr Petro Georgiou MP, a member of the Joint Standing Committee on Migration.<sup>129</sup>

The Commission is of the view that children should not be held in immigration detention on Christmas Island at all. However, if the Australian Government intends to continue this practice, it must comply with its obligations under the CRC and the Migration Act to only detain children as a last resort. This requires consideration of any less restrictive alternatives before deciding to place a child in a detention facility such as the construction camp. DIAC has access to some community-based accommodation on Christmas Island, including duplex houses. These are less restrictive alternatives, and should be used to accommodate families with children and unaccompanied minors.

If the community-based accommodation on the island is full, the Australian Government still has an obligation to consider less restrictive alternatives before placing a child in the construction camp – this includes alternatives on the mainland.

**Recommendation 8:**

If the Australian Government intends to continue the practice of holding children in immigration detention on Christmas Island, children should be accommodated with their family members in community-based accommodation. They should not be detained in the construction camp immigration detention facility, the secure compound of the Phosphate Hill immigration detention facility, or the Christmas Island IDC.

#### 11.4 Lack of accurate information about the detention of children

The Commission is concerned that, on occasions, Australian Government statements about detention arrangements for children do not accurately reflect the current reality for children on Christmas Island. For example, an August 2009 press release stated:

It is Rudd Government policy that no child be held in an immigration detention centre and there are no children detained in the Christmas Island facility or any other detention centre. Children and where possible their families are housed in community accommodation.<sup>130</sup>

As a further example, the DIAC website states:

Detention policy is administered with flexibility, fairness and in a timely manner. Arrangements introduced in 2005 provide for these requirements:

- the detention of families with children is to take place in the community under community detention rather than in immigration detention centres...<sup>131</sup>

Statements such as these convey the impression that children are not held in closed immigration detention facilities, but are accommodated in community detention in community-based accommodation. They may have also contributed to recent media reports which wrongly state that children are no longer held in immigration detention.<sup>132</sup> For many children on Christmas Island, that is not the case.

As discussed in section 11.3 above, many children are detained in a closed detention facility – the construction camp. DIAC’s classification of the construction camp as ‘alternative temporary detention in the community’ is misleading.<sup>133</sup> The camp is not community-based accommodation. It is a closed facility from which detainees are not free to come and go.

#### 11.5 Lack of judicial oversight of children’s detention

The Commission has long been concerned that Australia’s immigration detention system breaches article 37 of the CRC by failing to provide for child detainees to challenge their detention in a court or another independent authority.<sup>134</sup> This is particularly concerning for children in detention on Christmas Island because:

- if they arrived in an excised offshore place, the Migration Act purports to bar them from challenging the lawfulness of their detention in the Australian courts<sup>135</sup>
- they go through the non-statutory RSA process which provides fewer legal safeguards than those available to asylum-seeking children on the mainland
- they are detained in a remote place that is less accessible to external scrutiny bodies.

In *A last resort*, the Commission found that, in order to comply with the CRC’s requirement that children only be detained as a measure of last resort and for the shortest appropriate period, the need for and period of detention of a child should be closely supervised by an independent body.<sup>136</sup>

The Commission recommended that Australia’s law should require independent assessment of the need to detain a child within 72 hours of their initial detention. Similar to bail application procedures in the juvenile justice system, if DIAC was unable to complete its checks within 72 hours, it could ask a tribunal or court to order continuing detention of a particular child and their parents until those checks were completed.<sup>137</sup>

Further, article 37(d) of the CRC provides that every child has the right to challenge the legality of their detention before a court or other competent, independent and impartial authority.<sup>138</sup> In the

Commission's view, such review is most appropriately provided by a court. Therefore, in *A last resort*, the Commission recommended that in addition to a prompt independent assessment of the initial need to detain a child, Australia's law should provide for periodic and ongoing judicial review of the continuing detention of any child.<sup>139</sup>

**Recommendation 9:**

The Australian Government should implement the outstanding recommendations made by the Commission in the report of its national inquiry into children in immigration detention, *A last resort*.<sup>140</sup> These include that Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*. In particular, the new laws should incorporate the following minimum features:

- There should be a presumption against the detention of children for immigration purposes.
- A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- All courts and independent tribunals should be guided by the following principles:
  - detention of children must be a measure of last resort and for the shortest appropriate period of time
  - the best interests of the child must be a primary consideration
  - the preservation of family unity
  - special protection and assistance for unaccompanied children.

### 11.6 Child welfare and protection responsibilities

In *A last resort* and previous annual inspection reports, the Commission raised concerns about the lack of coordination between DIAC and state child welfare authorities regarding responsibilities for the welfare and protection of children in immigration detention – particularly unaccompanied children.<sup>141</sup>

This is especially concerning in the case of children detained on Christmas Island, as there is an apparent lack of clarity regarding which laws apply, and which state and/or federal authorities are responsible for their welfare and protection. This leaves those children, particularly the unaccompanied minors, in a very vulnerable position.

The Commission has suggested on previous occasions that the respective roles and responsibilities of DIAC and state child welfare authorities should be formally clarified and clearly communicated to relevant parties.<sup>142</sup> This issue has gone unaddressed for too long. The Commission considers this a significant priority on Christmas Island, given the number of children, including unaccompanied minors, being detained on the island.

**Recommendation 10:**

If the Australian Government intends to continue the practice of holding children in immigration detention on Christmas Island it should, as a matter of priority:

- clarify the applicable laws and jurisdiction of relevant state and federal bodies
- clarify through formal Memoranda of Understanding the respective roles and responsibilities of state and federal authorities with regard to the welfare and protection of children in all forms of immigration detention on Christmas Island
- clearly communicate these roles and responsibilities to all relevant state and federal authorities, and to unaccompanied minors and their carers or representatives
- ensure that there are clear policies and procedures in place regarding child welfare and protection concerns that may arise in respect of children in immigration detention on Christmas Island, and communicate these policies and procedures to all relevant staff.

### 11.7 Supervision and care of unaccompanied minors

Because unaccompanied minors are considered to be particularly vulnerable, the CRC requires that the government provide them with special protection and assistance.<sup>143</sup> In addition, UNHCR guidelines provide that unaccompanied minors should not be detained, particularly in isolated areas, and specify measures that should be taken to protect unaccompanied minors.<sup>144</sup>

When the Commission visited in August 2008, there were no unaccompanied minors in detention on Christmas Island. However, the Commission raised concerns that there did not appear to be arrangements in place to provide appropriate support to unaccompanied minors if any did arrive.<sup>145</sup> Since then, a considerable number have arrived and been detained. During the Commission's July 2009 visit, there were 54 unaccompanied minors in immigration detention on the island. Of these 54, only 18 were in community detention. The other 36 were in the construction camp facility.

Unaccompanied minors detained in the construction camp are supervised by detention officers employed by the detention service provider (which was G4S at the time of the Commission's visit). They are not provided with carers. They must remain in the camp unless they are at school under the supervision of a teacher, or on an excursion under escort.

In contrast, unaccompanied minors in community detention are not under the direct supervision of DIAC or the detention service provider. They live in community-based accommodation under the supervision of a carer. Generally, one carer lives in each house with four or five unaccompanied minors of the same ethnic background.

The carer is not the legal guardian of the unaccompanied minors. Their role is to provide 24 hour supervision, care and support with the minors' daily needs and activities. This includes assisting with grocery shopping and cooking meals, helping with homework, taking minors to medical appointments, and arranging recreational activities. The minors are required to stay under their carer's supervision at all times, except when they are at school.

The carers are recruited from the mainland by Life Without Barriers, a national organisation contracted by DIAC.<sup>146</sup> The carers are required to undergo a 'working with children check'. Life Without Barriers recruits carers from the same ethnic group, or who can speak the same language as the minors they are supervising.

### 11.8 Guardianship of unaccompanied minors

The Commission has raised concerns over the past five years about the fact that unaccompanied minors in the immigration detention system are not provided with an independent legal guardian to ensure that their best interests are protected.<sup>147</sup> While this is also a problem on the mainland, it is particularly concerning on Christmas Island given the number of unaccompanied minors being detained, the limited access these minors have to external scrutiny and advocacy bodies, and the shortage of accommodation options other than closed detention facilities.

DIAC has attempted to address this issue on Christmas Island by establishing an 'independent observer role', fulfilled by Life Without Barriers staff members.<sup>148</sup> An independent observer sits in on interviews involving unaccompanied minors to act as a support person. They do not provide the minor with legal or migration advice. They can interject if they feel that the minor is distressed or uncomfortable, but they do not have the power to stop the interview. The Commission welcomes the creation of this new role. However, it does not go far enough to address the Commission's long-held concerns about guardianship arrangements for unaccompanied minors.

UNHCR guidelines recommend that an independent and formally accredited organisation should appoint a guardian or adviser for each unaccompanied minor. That person should have the necessary expertise in the field of child care to ensure that the child's interests are safeguarded and their legal, social, medical and psychological needs are appropriately met.<sup>149</sup> However, in Australia, the Minister for Immigration is the legal guardian of all unaccompanied children seeking asylum.<sup>150</sup> The Minister can delegate those powers to DIAC officers.<sup>151</sup> Neither the Minister nor the Minister's delegates are required to have any child care qualifications.

In the Commission's view, the appointment of the Minister or a DIAC officer as the legal guardian creates a fundamental conflict of interest. Article 18 of the CRC requires that the best interests of the child be the 'basic concern' of the child's legal guardian.<sup>152</sup> This suggests that the best interests of an unaccompanied minor must not only be a primary consideration (as required by article 3 of the CRC), but *the* primary consideration for his or her legal guardian. The ability of the Minister or a DIAC officer to ensure that the best interests of an unaccompanied minor are the primary

consideration is seriously compromised by the fact that they are simultaneously the child's guardian, the detaining authority and the visa decision-maker.

The Commission considered this issue in *A last resort* and concluded that an independent guardian should be appointed for unaccompanied minors.<sup>153</sup> The Commission discussed possible guardianship models, and suggested that the role of the guardian might involve:

- advocating that an unaccompanied minor not be detained, or if detained, for the shortest possible period of time in the best possible conditions
- ensuring suitable legal representation and other assistance regarding an unaccompanied minor's claim for asylum
- ensuring suitable care, accommodation, education, language support and health care provision
- assisting in tracing the parents of an unaccompanied minor
- advocating on behalf of an unaccompanied minor regarding any other issue concerning him or her.<sup>154</sup>

More than five years later, the Commission's recommendations have not been implemented. The importance of this issue was recently acknowledged by the Senate Legal and Constitutional Affairs Legislation Committee, which stated that the provision of an independent guardian was an 'important safeguard which the Government should consider implementing as soon as possible.'<sup>155</sup>

The Commission is aware that legal guardianship is one of a range of issues currently under consideration by DIAC. The Commission encourages urgent action on this issue.

**Recommendation 11:**

The Australian Government should, as a matter of priority, implement the recommendations made by the Commission in *A last resort* that:

- Australia's laws should be amended so that the Minister for Immigration and Citizenship is no longer the legal guardian of unaccompanied children.
- An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

## 12. Conditions and services in detention facilities

As noted above, for a range of reasons the Commission is of the view that Christmas Island is an inappropriate place in which to hold people in immigration detention. Some of these reasons relate to the nature of the detention facilities on the island, and others to the fact that the remote location and small community limit detainees' access to services including health and mental health care, legal advice, and cultural and religious support.

Further, while the Commission was pleased to observe that DIAC is making efforts to manage the detention facilities on the island in a positive way, some detainees expressed frustrations about issues including restrictions during separation detention, the lack of external excursions, and difficulties accessing interpreters and translated documents.

These issues are discussed below, focusing on conditions and services for detainees in the Christmas Island IDC and the construction camp facility. The Phosphate Hill facility was not in use at the time of the Commission's visit, except to the extent that five adult males were in community detention in the alpha compound.<sup>156</sup> Brief comments about their conditions are included in section 13 on community detention.

### 12.1 Detention infrastructure and environment

The Commission is concerned that the immigration detention facilities on Christmas Island are not appropriate for detaining asylum seekers, particularly those with a background of torture or trauma. This contributes to the Commission's view that Christmas Island is not an appropriate place in which to hold people in immigration detention.

(a) *Christmas Island IDC*



.....  
Entrance to the  
Christmas Island IDC



.....  
Caged walkways,  
Christmas Island IDC



.....  
External fences,  
Christmas Island IDC

The Christmas Island IDC is a high security, purpose-built facility that was completed in 2008. The IDC is located in a national park area at North West Point, about 17 kilometres from the island's small town centre. It is currently the most remote of Australia's immigration detention facilities. The IDC is massive, with a surge capacity of 800. It is used to detain adult males.

In 2008 the Commission visited the Christmas Island IDC before it had been used. After the visit, the Commission raised concerns about the IDC, in particular the excessive security measures. The Commission expressed the view that the IDC was not an appropriate place for accommodating asylum seekers, particularly those fleeing situations of torture or trauma. Given those concerns, the Commission recommended that the IDC should not be used.<sup>157</sup>

Nevertheless, the Minister opened the IDC in December 2008. At the time of the Commission's 2009 visit, there were 590 detainees in the IDC. Following this visit, the Commission maintains its view that the Christmas Island IDC – a high security detention centre in an extremely isolated location – is not an appropriate place for accommodating asylum seekers.

The Commission acknowledges that, within the constraints of the existing infrastructure, DIAC is making positive efforts to lessen the harsh impacts of the IDC. In particular, the accommodation compounds are being opened up during the day, allowing detainees (with the exception of those in separation detention) to have some freedom of movement within the internal centre of the IDC. Further, efforts have been made to soften the look of the IDC by planting additional greenery. In addition, some detainees commented favourably on the attitudes of certain DIAC and G4S staff members. The Commission welcomes these positive efforts.

However, the Commission has ongoing concerns about the inappropriate nature of the Christmas Island IDC, as follows:

- The IDC looks and feels like a prison. The Minister himself acknowledges that it represents a 'maximum security environment.'<sup>158</sup> The security measures are excessive and inappropriate for accommodating asylum seekers. In any event, they seem unnecessary given the isolated location, and they are inconsistent with the government's policy of detaining people in the least restrictive form of detention appropriate to an individual's circumstances.<sup>159</sup> The IDC is surrounded by a series of high wire fences. Within the facility, each compound is enclosed by another high fence, and many of the walkways into the compounds are enclosed within cage-like structures. Most areas of the facility are under CCTV surveillance. Within the compounds, officers' stations are situated within metal-reinforced booths behind security screens.
- The highest security compound, the management support unit (MSU), looks and feels extremely harsh and punitive. The building is enclosed within its own cage-like structure. The bedrooms are like small cells, with solid metal doors and grills on the windows that obscure any view. All furniture is hard and bolted to the floor. There is no outdoor space where detainees have an open view of the sky. DIAC informed the Commission that the MSU has not been used to date. The Commission hopes it will never be used – it is entirely inappropriate for holding asylum seekers who have committed no crime and who may have experienced torture or trauma.
- The bedrooms in the accommodation compounds are small, dim and claustrophobic. The windows are covered with metal grills which don't appear to serve any practical purpose, but add to the prison-like feeling. When numbers increase over normal capacity, detainees sleep in 'surge' areas, which are shared dormitories with no privacy.

The Joint Standing Committee on Migration recently raised similar concerns about the security measures at the IDC. The Committee stated that it was 'appalled at the extraordinarily high level of security', and considered it to be 'inappropriate and inconsistent with the current immigration principles'.<sup>160</sup> In the Committee's view, the level of security was 'excessive and inhumane and bordering on ludicrous'.<sup>161</sup> The Committee recommended that:

[A]ll caged walkways, perspex barriers, and electrified fencing be removed from the North West Point immigration detention centre and replaced with more appropriate security infrastructure.<sup>162</sup>

In the Joint Standing Committee's view, the excessive security measures in combination with the 'extraordinary ongoing maintenance costs' require 'careful consideration as to whether this type of facility is still an appropriate part of a contemporary immigration framework'.<sup>163</sup> DIAC has stated that the IDC design was based on 'correctional architecture and immigration policy dating back to 2002', and has acknowledged that such accommodation would not be appropriate for a 'Sydney metropolitan location' or for the 'detention values applying today'.<sup>164</sup>

Earlier this year, both the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights recommended that the Australian Government should implement the recommendations made by the Commission in its *2008 Immigration detention report*.<sup>165</sup> These included that the Christmas Island IDC should not be used to hold people in immigration detention.<sup>166</sup>

In the Commission's view, people should not be held in immigration detention on Christmas Island, and the Christmas Island IDC should not be used. However, if the Australian Government intends to continue this practice, it should at least take steps to modify the security measures at the IDC to make it a more appropriate environment for the asylum seekers held there.

**Recommendation 12:**

If the Australian Government intends to continue to use the Christmas Island IDC, it should implement the recent recommendation of the Joint Standing Committee on Migration that all caged walkways, perspex barriers, and electrified fencing should be removed and replaced with more appropriate security infrastructure.<sup>167</sup>

(b) *Construction camp immigration detention facility*



.....  
Construction camp  
immigration detention  
facility

The construction camp is a low security immigration detention facility. It was not built for immigration detention purposes – the site was formerly used to accommodate construction workers building the Christmas Island IDC. It is located across the road from the community recreation centre and the Phosphate Hill immigration detention facility, about five kilometres from the island's town area. It is unclear what DIAC considers the capacity of the camp to be – conflicting sources put it between 100 and 350.<sup>168</sup> The camp is generally used to detain groups that include families with children and/or unaccompanied minors.

As discussed in section 11.3 above, DIAC classifies the construction camp as 'alternative temporary detention in the community'.<sup>169</sup> In the Commission's view this is misleading. While the level of security is low, it is still a closed detention facility from which detainees are not free to come and go unless they are under escort.

After its 2008 visit to Christmas Island, the Commission raised significant concerns about the nature of the facilities at the construction camp.<sup>170</sup> Some improvements have been made over the past year including the planting of some greenery along the fence line, and the construction of wooden decks between the demountables used as bedrooms. The Commission welcomes these improvements.

However, the Commission's concerns about the construction camp have increased because significant numbers of people – including children – are being detained there, some for months at

a time.<sup>171</sup> When the Commission visited, there were 99 detainees at the camp including 25 men, 21 women, 17 accompanied children and 36 unaccompanied children.

The Commission's major concerns about the construction camp facility include the following:

- The construction camp is a claustrophobic facility consisting of demountables linked by covered walkways. There is little open space. While the covered walkways provide protection from the rain, they also block the view of the sky and add to the feeling of being closed in.
- There is no open grassy space for sports or recreation. There is only one open recreation area – it is an undercover area with a concrete floor.
- The construction camp is not an appropriate environment for families with children or unaccompanied minors, as discussed in section 11.3 above.
- The lack of space makes the construction camp a difficult environment in which to mix people of various ages, ethnicities, religions, cultures and genders. This can be a particular problem for women from particular cultural or religious groups.

## 12.2 Provision of information to detainees

### (a) Induction information about accessing services while in detention

In past years the Commission has recommended that written induction materials should be provided to detainees on their arrival in an immigration detention facility.<sup>172</sup> This is a current concern on Christmas Island. During its visit, the Commission spoke with detainees who claimed they had not been told how they could access basic services – for example, how to request a medical appointment, or how to request an interpreter in order to make a phone call to their migration agent.

DIAC does not provide written induction materials to detainees. During its visit, the Commission was informed that G4S officers do a verbal induction with detainees on their arrival. However, information should also be provided in writing so that detainees can refer to it later. Information provided verbally can be quickly forgotten, particularly if it is provided on arrival in detention, when many detainees are likely to be distressed. The failure to provide written information can also lead to the informal verbal exchange of inaccurate information among detainees.

#### **Recommendation 13:**

DIAC should ensure that all immigration detainees on Christmas Island, upon entering detention, are provided with up-to-date induction materials with information on:

- how to request an interpreter, including the phone number for the Translating and Interpreting Service (TIS)
- how to lodge a complaint with DIAC or the detention service provider, and how soon that complaint will be responded to. It should include contact phone numbers so that detainees do not have to rely solely on submitting a written complaint or request form
- how to lodge a complaint with the Commonwealth Ombudsman or the Australian Human Rights Commission. Current contact details, including phone and fax numbers, should be included
- current contact details for the local police, including a phone number
- what medical, dental and mental health services are available to detainees, and how a detainee can access those services
- how to request an external excursion
- what facilities are available for religious purposes
- contact details for Legal Aid, UNHCR, Australian Red Cross, major refugee and asylum seeker information and advice groups, and IAAAS providers.

These induction materials should be translated into the main languages spoken by the detainee population. Each detainee should be provided with a copy in a language they can understand. If this is not possible, or a detainee cannot read, an interpreter should be provided in person to go through the materials with the detainee in their preferred language.

*(b) Information on arrival about the refugee status assessment process*

When unauthorised boat arrivals are taken into immigration detention on Christmas Island, they are told that they have been detained under the Migration Act. They are also told what to expect over the coming days in terms of medical checks and preliminary interviews. However, they are not provided with information about the non-statutory RSA process. New arrivals are placed in separation detention, partly to ensure that they do not learn about the process from other detainees who are already part-way through it.

In separation detention, they are confined to a restricted area and prevented from having contact with other detainees or with the outside world – with the exception of one brief phone call to inform their family that they are safe. New arrivals are only moved out of separation detention once they have gone through their entry interview. If they raise a claim in that interview that may engage Australia’s protection obligations, they are ‘screened in’ to the non-statutory RSA process and provided with IAAAS assistance.

The Commission raised concerns about the separation detention and ‘screening-in’ process in *A last resort*, in particular with regard to its potential effects on the rights of child asylum seekers and their families.<sup>173</sup> In the context of separation detention on Christmas Island, the Commission is particularly concerned about the following:

- Detainees are not provided with access to legal or migration advice while in separation detention – they are only provided with a migration agent under the IAAAS scheme once they have been ‘screened in’ to the non-statutory RSA process. The prohibition on the use of phones and internet limits their ability to identify a lawyer or to seek assistance in this regard from friends or family in the community. There is no legal practice or legal aid service located on Christmas Island, further limiting their chances of accessing legal assistance.
- Detainees in separation detention are not informed about their right to seek asylum, or about the assessment process they will go through if they do so. For some detainees, being isolated in separation detention will be an intimidating experience that, combined with the lack of access to legal or migration advice, may affect their ability to tell their story in a fully open and honest manner and thereby raise claims that may engage Australia’s protection obligations.

These factors create a risk that a person may be ‘screened out’ of the non-statutory RSA process and thus be removed from Australia, even though they might have a valid claim for Australia’s protection. This risk is increased by the fact that there is no review mechanism for the screening process.

**Recommendation 14:**

DIAC should ensure that all immigration detainees are provided with clear information on their arrival in immigration detention informing them of:

- their right to seek asylum
- their right to access independent legal advice and assistance
- the scope of the IAAAS assistance that will be provided to them
- the non-statutory refugee status assessment process, including the steps in the process and the approximate estimated timeframes for each of those steps. This should include information about what will be expected of the detainee during each step in the process, and who will make the decision at each step. It should also clearly indicate any timeframes that detainees are expected to comply with.

While this information may initially be provided verbally, detainees should also be provided with a written copy in a language they can understand. If this is not possible, or a detainee cannot read, an interpreter should be provided in person to go through the written information with the detainee in their preferred language.

### 12.3 Access to communication

#### (a) *Restrictions in separation detention*

As discussed in the above section, new arrivals on Christmas Island are placed in separation detention until they have gone through their entry interview. There is no set time frame for separation detention – in practice it will depend on the number of detainees on the island and other operational factors. According to DIAC, in early 2009 detainees were spending an average of around 40 days (almost six weeks) in separation detention, but by mid-2009 this had decreased to around two weeks.

During this time detainees are prevented from having contact with other detainees and with the outside world. The phones are turned off, there is no access to the internet, and television, radio and newspapers are prohibited. The one exception is that each detainee is permitted to make one brief phone call to their family. The phone call is monitored.

While on Christmas Island, the Commission spoke with detainees who raised concerns about these restrictions. The two major issues raised were as follows:

- Some detainees claimed they had not been allowed to make their one phone call to family while they were in separation detention.
- Many detainees in separation detention were extremely anxious about not being able to contact family members in their country of origin. This was a particular concern for detainees whose family members were affected by the civil conflict in Sri Lanka. For those detainees, being unable to make phone calls to try to trace their family members' whereabouts was clearly causing a significant amount of distress. The ban on television, radio, newspapers and internet added to their anxiety, as they were not able to get any news about the situation at home.

Further, as discussed above, the restrictions on communication limit detainees' ability to access legal or migration advice while in separation detention.

#### **Recommendation 15:**

If DIAC intends to continue to use the separation detention system, it should ensure that all detainees are able to:

- make an initial phone call to contact their family members
- access communication facilities if they wish to contact a lawyer or migration agent.

DIAC should consider allowing detainees to have more regular communication with family members while they are in separation detention.

#### (b) *Access to communication facilities*

After its 2008 visit to Christmas Island, the Commission raised concerns that the island's remote location and limited communications infrastructure would increase difficulties for detainees in communicating with legal representatives, family members and support networks.<sup>174</sup> These concerns have been reinforced by the Commission's recent visit. The mobile phone network on the island is very limited; the internet is generally much slower than on the mainland; the mail service can be very slow; and the three hour time difference between the island and the mainland can increase difficulties contacting legal representatives by phone during business hours.

For people who live in the community under normal circumstances, such communication difficulties might be no more than a minor annoyance. But for people in immigration detention, communicating with the outside world is critical, both to make contact with migration agents or legal representatives and to allow regular contact with family members, friends or support networks.

At the Christmas Island IDC, detainees are permitted up to 40 minutes of internet access per day. They also have access to two public phones in an open area of each accommodation compound. These phones can be used with phone cards purchased by detainees. The Commission is aware that there have been problems with these phones – both for detainees trying to call out using phone cards that get used up very quickly, and for migration agents and others trying to call in. During its visit, the Commission was informed by DIAC that these problems have been addressed.

At the construction camp facility, there have been improvements since the Commission's 2008 visit in that detainees are now provided with access to the internet and to one landline phone in a small room. However, each detainee is restricted to using the phone for ten minutes per day, and they are instructed to leave the door open while making calls.

The Commission is concerned about the limited access detainees have to phones at the construction camp in particular, but also at the Christmas Island IDC. At the time of the Commission's visit, 99 detainees in the construction camp were sharing one phone, and up to 104 detainees in each compound at the IDC were sharing two phones.

**Recommendation 16:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees are provided with adequate access to phones, and that detainees can make and receive phone calls in privacy.

(c) *Access to interpreters*

DIAC currently has a pool of interpreters on Christmas Island, each of whom stays for a few weeks at a time. This is a positive contrast to most mainland detention facilities which generally rely on the telephone Translating and Interpreting Service (TIS) instead of having interpreters based onsite.

Onsite interpreters are an indispensable part of the immigration operations on Christmas Island. Their services are under heavy demand for a range of activities including entry interviews, induction and property related matters, RSA interviews with migration agents and DIAC, identity and security related interviews with the AFP and ASIO, health and mental health appointments, and communications on daily matters arising between detainees and detention officers.

The Commission welcomes the fact that DIAC is maintaining a group of onsite interpreters on the island. The Commission does, however, have some concerns about detainees' access to interpreters:

- Some detainees told the Commission they had not been informed of how to request an interpreter. This is a particular problem for non-English speaking detainees who need to make phone calls to their migration agent. This issue is addressed in recommendation 13 in section 12.2 above.
- A significant number of detainees from Afghanistan raised concerns about not being provided with access to Hazaragi speaking interpreters, and being required to use Dari speakers instead. DIAC informed the Commission that this problem was caused by the fact that the National Accreditation Authority for Translators and Interpreters (NAATI) did not offer accreditation for Hazaragi interpreters, and that steps had been taken in order to rectify this.<sup>175</sup> The Commission encourages DIAC to ensure that this matter is addressed as soon as possible.
- The remote location of Christmas Island can cause delays in arranging for appropriate interpreters to arrive from the mainland. Transport difficulties on the island can also cause delays in moving interpreters around to their required location on a daily basis – there is no public transport and very limited access to private vehicles.
- Competing needs for interpreters on the island mean that there are instances where an activity cannot go ahead at its scheduled time. Important activities such as mental health counselling may have to be postponed as a result.

(d) *Access to translated documents*

In the past, the Commission has raised concerns about immigration detainees' lack of access to translated documents.<sup>176</sup> On Christmas Island, some detainees said they were unable to read documents relating to their negative RSA outcome because they were only provided in English.

It is particularly important that detainees are provided with information related to their refugee claim in a language they can understand. Without this, they may miss crucial deadlines, or be unable to present their best possible case. This is a particular concern for detainees on Christmas Island who are not offshore entry persons, and therefore have access to merits review in the RRT and limited access to judicial review. If a detainee is not provided with the reasons for a negative

RRT decision in a language they can understand, it will be difficult for them to put forward their best possible case if they seek judicial review of the decision.

**Recommendation 17:**

Wherever possible, DIAC should ensure that official letters and documents are provided to a detainee in a language the detainee can understand. Where this is not possible, the detainee should be offered the assistance of an interpreter to translate the contents of the letter or document. This should include documents relating to decisions, and reasons for decisions, at the primary and independent review stages of the non-statutory refugee status assessment process for offshore entry persons; and the primary and Refugee Review Tribunal stages of the refugee status determination system for detainees who are not offshore entry persons.

## 12.4 Access to legal assistance and other support

Compared to the mainland, detainees on Christmas Island have less access to groups that can provide legal and migration advice and assistance, advocacy and various forms of cultural, religious and moral support. This is the result of a range of factors including the remote location of Christmas Island, the small size of the community, and communication difficulties with the mainland. This contributes to the Commission's view that Christmas Island is not an appropriate place in which to hold people in immigration detention.

### (a) Access to legal and migration advice and assistance

Under international standards, every detained person should be provided with access to legal assistance.<sup>177</sup> If a detained person does not have a legal adviser of their own choice, they are entitled to have one assigned if the interests of justice require it, and without payment if they do not have sufficient means to pay.<sup>178</sup>

Until recently, immigration detainees on Christmas Island were not entitled to publicly funded advice or assistance during the refugee assessment process. In announcing the New Directions, the Minister acknowledged that this had been a cause of criticism and announced that asylum seekers in excised offshore places would be provided with migration advice and assistance through the IAAAS.<sup>179</sup>

The Commission welcomed this reform, and considers it indispensable. However, following its recent visit, the Commission has ongoing concerns about asylum seekers' access to advice and assistance with their refugee claims:

- Asylum seekers are not provided with access to legal or migration advice or assistance while in separation detention, as discussed in section 12.2 above.
- Asylum seekers on Christmas Island do not have easy access to their IAAAS migration agent. The agents are not based on the island – they fly in to assist clients, then they fly back to the mainland. Asylum seekers therefore have very limited face-to-face time with their agent. Some asylum seekers raised concerns about difficulties contacting their agent once the agent had left the island. These difficulties can be caused by limited access to phones and interpreters, the time difference with the mainland, and the fact that some migration agents are travelling between the island and the mainland on a regular basis and may not be contactable while on the island seeing other clients.
- Some asylum seekers on Christmas Island raised concerns about the level of competence of their IAAAS migration agent. While this concern is occasionally raised on the mainland, it is particularly concerning on Christmas Island since there are very few alternatives. There is no legal practice or legal aid service located on the island, and there are no independent migration agents based there.

### (b) Access to community support networks

After its 2008 visit to Christmas Island, the Commission raised concerns that the island's remoteness and the prohibitive costs of the trip would make it virtually inaccessible to community groups based on the mainland.<sup>180</sup> These concerns have been reinforced by the Commission's recent visit.

On the mainland, community groups and individuals would normally provide immigration detainees with various forms of valuable support including cultural and religious support, and advocacy and casework assistance. Such support cannot be adequately provided by the local community on Christmas Island, because of its small size and limited capacity.

In comparison with detainees on the mainland, detainees on Christmas Island have few visits from support groups. This means they have less support to alleviate the anxiety of being held in detention. They also have much less access to advocacy and casework assistance that can often be critical in assisting with refugee claims, and in addressing grievances detainees may have about their treatment in detention.

### 12.5 Access to health and mental health care

After its 2008 visit to Christmas Island, the Commission raised concerns about the availability of health and mental health care for detainees, given the island's small size and limited services. The Commission was particularly concerned about the ability of detainees to access adequate mental health care. These concerns remain after the Commission's 2009 visit.

The Joint Standing Committee on Migration recently agreed with the Commission's view that 'the local community on Christmas Island is not large enough or sufficiently resourced to be able to provide adequate health support to any significant number of immigration detainees.'<sup>181</sup>

These concerns, discussed below, contribute to the Commission's view that Christmas Island is not an appropriate place in which to hold immigration detainees, particularly asylum seekers who might have a background of torture or trauma. However, if the government intends to continue this practice, DIAC will need to ensure that detainees on the island are provided with access to adequate health and mental health care services – both by providing additional services on the island, and by bringing detainees to the mainland when services are not available on the island.

#### **Recommendation 18:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that detainees on the island are provided with access to appropriate health and mental health care services. These should be no less than the services available to detainees on the mainland.

#### (a) *Health care*

Health care services for detainees on Christmas Island are primarily provided by IHMS, a private company contracted by DIAC. The IHMS team consists of a manager, four nurses, two doctors on rotation, a psychologist and four mental health nurses. This team is responsible for providing services to detainees at the Christmas Island IDC, the construction camp facility and the Phosphate Hill facility. They do not provide services to people in community detention, who access health care services at the local hospital.

The local hospital is run by the Indian Ocean Territories Health Service (IOTHS). IOTHS provides limited services to people in the detention facilities on the island. These include any immunisations, chest X-rays, pathology tests and basic in-patient services that may be required.

The arrangements for the provision of health care to detainees on Christmas Island may change in the near future. At the time of the Commission's visit, DIAC was in ongoing discussions with IOTHS and IHMS about this matter.

All detainees go through public health screening on arrival, normally before they disembark from their boat. This screening checks for signs of tuberculosis or other serious illnesses. Within the first few days, each detainee goes through a more detailed initial health assessment. After that, any ongoing medical care is provided only if a detainee seeks it.

At the Christmas Island IDC, there is a well-equipped medical clinic. Detainees do not have free access to it – they must fill out a request form if they wish to see a nurse or doctor. These forms are only available in English. The clinic is staffed from 7am to 7pm, and a nurse is on-call overnight.

At the construction camp facility, a basic clinic has been set up in a demountable. Detainees are able to walk in to request an appointment. The clinic is open from 2pm to 5pm on weekdays. The

Commission welcomes the fact that this clinic room has been set up since its last visit, particularly given that a significant number of families with children and unaccompanied minors are being detained in the camp.

However, the Commission has ongoing concerns about detainees' access to health care services on Christmas Island, as follows:

- There are no medical specialists (such as optometrists, physiotherapists, radiologists or others) located on Christmas Island.
- Pregnant detainees do not have access to childbirth facilities on the island.
- Some detainees at the Christmas Island IDC raised concerns about the length of time they had to wait to see a nurse or doctor.
- Because of the remote location, IHMS staff work on short rotations of two to six weeks at a time. Some concerns were raised with the Commission that this constant rotation, if not accompanied by thorough handovers in between, may lead to patient needs 'falling through the cracks'.
- If there was an emergency medical situation in one of the detention facilities on the island, it could take an hour or two for an ambulance to arrive. This is a particular concern at the Christmas Island IDC, given its isolated location. The island does not have a paid ambulance service - the ambulance is staffed by local volunteers. DIAC informed the Commission that it intends to implement a three month pilot program under which a paramedic will be stationed at the IDC overnight.
- Detainees on the island have very limited access to dental care. Detainees face long waiting lists as there is only one dentist on the island to meet the needs of both the local community and detainees. Two sessions each week are set aside for detainees - one for adults and one for children. DIAC has informed the Commission that it is attempting to arrange for a mobile dental unit to be transported to the island.

These concerns contribute to the Commission's view that Christmas Island is not an appropriate location in which to hold people in immigration detention.

*(b) Mental health care*

Mental health care services for detainees on Christmas Island are primarily provided by IHMS, which has a psychologist and four mental health nurses on staff. The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) also provides services to detainees under a contract with DIAC.

IHMS does initial mental health screening for all new detainees. If there are concerns, the detainee may be placed on a management plan which includes ongoing reviews and/or suicide and self-harm (SASH) observation. They may also be referred to FASSTT for counselling.

The Commission welcomes DIAC's efforts to provide detainees on Christmas Island with access to some mental health care, in particular access to FASSTT services. However, the Commission has serious concerns about the capacity of the current services on the island to meet the needs of the hundreds of asylum seekers in detention:

- There is virtually no local capacity to meet the mental health care needs of immigration detainees on Christmas Island. The local hospital has one psychologist who provides services one day per week. There is no psychiatrist. There is no suitable place for accommodating a detainee in need of admission to a psychiatric facility.
- At the time of the Commission's visit, the IHMS mental health team, of four mental health nurses and one psychologist, was being required to provide services for 689 detainees. This equates to more than 135 detainees each.
- While the Commission fully supports the work undertaken by FASSTT on Christmas Island and welcomes the support provided to FASSTT by DIAC, the level of support provided is not sufficient to ensure that all detainees are provided with access to torture and trauma services. At the time of the Commission's visit, FASSTT was being contracted to provide an initial psychosocial assessment for each detainee, and ongoing counselling to detainees in need of further assistance. However, with three staff members on the island and over 700 detainees, this appeared to be an overwhelming task. At the time, there were around 500 detainees who had not yet been through the initial assessment.

- Access to FASSTT services has been restricted on occasions because of the limited availability of interpreters, transport and escorts. These restrictions have led to FASSTT being required to conduct counselling sessions with detainees inside the Christmas Island IDC in rooms that are not private or soundproofed. On the mainland this would not be the case – there, torture and trauma counselling is conducted outside the detention environment.
- Detainees on Christmas Island have less access to psychiatric care than detainees on the mainland. There is no local psychiatrist, and no psychiatrist on the IHMS team. In comparison, on the mainland the detention health contract requires that each IDC have a mental health clinic with specialist psychiatric services available to detainees, including onsite consultations.<sup>182</sup>
- The shortage of community-based accommodation on Christmas Island and the lack of local mental health care services may lead to detainees with mental health concerns or a background of torture or trauma being held in a closed detention facility, rather than being placed in community detention. If those detainees were on the mainland, it would be possible to release them into community detention in a location where they would have access to appropriate support services.
- The immigration detention facilities on Christmas Island are not appropriate for detainees at risk of self-harm. As discussed in section 12.1 above, the Christmas Island IDC is a high security facility with excessive amounts of wire fencing and cage-like structures. The clinic contains a secure room for detainees considered ‘at risk’. It is a bleak room with a metal grill obscuring the view from the window, and a small outdoor courtyard enclosed in wire caging. According to DIAC, it is rarely used. The construction camp facility does not have observation rooms for detainees at risk of self-harm.

These concerns contribute to the Commission’s view that Christmas Island is not an appropriate place in which to hold people in immigration detention, particularly asylum seekers who might have a background of torture or trauma.

It is well established that holding people in immigration detention, particularly for indefinite periods, can have devastating effects on their mental health. It is therefore critical to ensure that, if people must be held in detention, they are in a location which allows them access to adequate mental health care and support services.

The Commission has been informed that there have been isolated instances in which detainees have been taken to the mainland for psychiatric treatment they were not able to access on Christmas Island. The Commission welcomes this. However, detainees should be provided with access to appropriate mental health care services from their arrival in detention, rather than waiting to provide access once their condition has already deteriorated.

## 12.6 Recreation and education

The 2000 *Immigration Detention Guidelines* provide that immigration detainees should have access to materials and facilities for exercise, recreation, cultural expression and intellectual and educational pursuits to utilise their time in detention in a constructive manner, and for the benefit of their physical and mental health.<sup>183</sup>

Recreational and educational opportunities are particularly important for child detainees. The CRC protects the right of all children to education, to engage in play and recreational activities appropriate to their age, and to participate in cultural and artistic activities.<sup>184</sup> UNHCR guidelines state that if a child is detained, ‘[p]rovision should be made for their recreation and play which is essential to a child’s mental development and will alleviate stress and trauma.’<sup>185</sup>

The Commission acknowledges that DIAC is making some efforts to provide recreational and educational activities for Christmas Island detainees. However, the Commission has concerns about the following:

- The recreational facilities at the construction camp are inadequate, particularly for children.
- There are very few reading materials provided for detainees, and adult detainees have not been provided with adequate access to educational activities.
- There are very few external excursions for detainees, in particular those in the Christmas Island IDC.

The Commission's concerns are summarised below.

(a) *Recreational facilities in detention*

There are a range of recreational and educational facilities for detainees at the Christmas Island IDC. Along one side of the IDC there are three large compounds containing facilities including a gym, a library room, classrooms, an art room and computer rooms. For detainees allowed to move around the internal centre of the IDC (after being released from separation detention), there is a significant amount of open grassy space including a small soccer pitch. During the Commission's visit, it was clear that these facilities were beneficial to detainees in terms of providing them with positive ways in which to pass their time in detention.

In contrast, the construction camp immigration detention facility does not have adequate recreational or educational facilities. This is a particular concern given that a significant number of children are detained in the facility. While the school-aged children leave the camp to attend school classes on weekdays, younger children are left with very few age-appropriate recreational or play opportunities inside the camp.

As noted in section 12.1 above, the construction camp is a claustrophobic facility with little open space and no grassy area for sport or recreation. There is only one open recreation area – it is an undercover area with a concrete floor, containing a pool table. There are two small indoor recreation rooms with table tennis and another pool table, a few toys and some basic sewing materials. There is no classroom for educational activities. The inadequate recreational facilities at the construction camp contribute to the Commission's view that it is not an appropriate facility in which to hold immigration detainees, particularly families with children and unaccompanied minors.

**Recommendation 19:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees, including those at the construction camp, are provided with a range of recreational facilities and activities. All detention facilities should have open grassy space for sports and recreation.



.....  
Outdoor recreation  
area, construction camp  
immigration detention  
facility

(b) *Educational activities for detainees*

The Commission welcomes the fact that, once they are out of separation detention, school-age children are permitted to leave the construction camp to attend school classes on a daily basis. Younger children attend classes at the local school. DIAC informed the Commission that children are escorted to school by an officer in plain clothes, and supervision of the children is handed over to a teacher once they reach the outer school gate. Older unaccompanied minors attend classes

taught by one of the local school teachers in a classroom in the alpha compound at the Phosphate Hill detention facility.

However, some concerns were raised about the inadequacy of the educational activities provided for adult detainees. In particular, it was suggested that activities have been run on a haphazard basis, and that the teaching materials provided for English classes are inadequate. The 2000 *Immigration Detention Guidelines* state that opportunities for English language instruction and further education, including technical and vocational education should be provided for immigration detainees where possible.<sup>186</sup> DIAC should ensure that this is implemented for all detainees on Christmas Island, including those detained in the construction camp.

Further, the Commission is concerned about the lack of reading materials available in the detention facilities on the island. There are very few books at the construction camp. The Christmas Island IDC has a library room with some books in it – a positive addition since the Commission’s previous visit. However, the books are mostly old books donated to the centre; they are almost all in English; and many of them are school books meant for use by young children. There are very few books appropriate for adult detainees who speak a language other than English.

Internet access is important, as it can alleviate the need for recreational reading materials and hardcopy reference materials. It is positive that detainees at the IDC and the construction camp are provided with internet access, as noted in section 12.3 above. However, internet access is strictly time limited and not all detainees are able to, or wish to read materials online. The internet is therefore not an adequate substitute for having reading materials available in hardcopy.

**Recommendation 20:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that:

- detainees have access to appropriate educational activities, including ESL classes
- each detention facility has an adequate supply of reading materials in the principal languages spoken by detainees.

(c) *Excursions*

In past reports the Commission has emphasised the importance of providing detainees with regular opportunities to leave the detention environment through organised external excursions.<sup>187</sup> This is critical for the physical and mental wellbeing of detainees, particularly those held for prolonged periods. On Christmas Island, the Commission is particularly concerned about the following:

- The high number of detainees combined with the limited availability of transport and escorts is significantly restricting detainees’ access to external excursions. Recent media reports suggesting that detainees are taken on regular excursions to locations such as the beach, the movies or picnics are misleading and inconsistent with what detainees told the Commission.<sup>188</sup>
- At the time of the Commission’s visit, there were virtually no excursions taking place from the Christmas Island IDC. There were 590 detainees in the IDC. Only three or four detainees were being taken out of the centre on a weekly excursion to attend a church service.
- DIAC informed the Commission that people detained in the construction camp are generally taken on an escorted excursion once each afternoon. This is usually to the oval across the road, although it occasionally includes a visit to the community recreation centre. The Commission welcomes this. However, the Commission is concerned about people in separation detention at the camp. G4S informed the Commission that it aims to take these detainees across the road to the oval three times a week. However, several groups of detainees told the Commission they had not been taken on any excursions while in separation detention. This is particularly concerning given that there are often young children detained in the camp, and they are restricted to a very confined area during separation detention.
- There are very few organised visits between unaccompanied minors and their adult friends who arrived on the same boat. This was raised as a concern by several unaccompanied minors the Commission spoke with. If the adults are single males,

they are detained in the Christmas Island IDC, while unaccompanied minors are in the construction camp or community detention. The lack of organised visits on Christmas Island can be contrasted with the practice in Darwin, which has been to arrange regular combined excursions between unaccompanied minors and adult members from the same boat.<sup>189</sup> This can help to alleviate the isolation and distress unaccompanied minors may experience while in detention.

The Commission is aware that since its visit, DIAC has approved three Christmas Island locals as ‘designated persons’. These people can now take small groups of detainees out on supervised excursions. The Commission welcomes this development and encourages DIAC to make greater use of the ‘designated persons’ mechanism. However, this will only benefit a very small number of detainees and is not an adequate substitute for regular group excursions organised by the detention service provider.

**Recommendation 21:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should:

- adopt minimum standards for the conduct of regular external excursions from immigration detention facilities, including for detainees in separation detention
- include these standards in the contract with the detention service provider
- monitor compliance with these standards on an ongoing basis and take appropriate remedial action when they are not being complied with
- ensure that the detention service provider is allocated sufficient resources to provide escorts for regular external excursions.

## 12.7 Religion

Under the ICCPR, all people have a right to practise their religion, either individually or in community with others.<sup>190</sup> The 2000 *Immigration Detention Guidelines* recognise that all detainees have the right to profess and practise the religion of their choice in community with other members of their religion where possible.<sup>191</sup>

After its 2008 visit to Christmas Island, the Commission raised concerns that detainees on the island may not be able to access adequate religious support and services. These concerns were solidified by the Commission’s recent visit, when the issue was raised both by detainees and local representatives.

According to the DIAC website, immigration detainees are able to practise their religion on an individual or communal basis, and ‘[e]xternal clergy provide services for most major faiths’. The website also states that people in immigration detention have access to ‘qualified religious representatives’ and ‘appropriate religious books and materials’.<sup>192</sup>

At the time of the Commission’s visit, this was not the case on Christmas Island. The Commission’s major concerns are as follows:

- Very few detainees on Christmas Island are provided with regular access to ‘qualified religious representatives’ or services run by ‘external clergy’.
- There are no religious services conducted on a regular basis inside the detention facilities. Occasional services are held at the IDC or the construction camp by two local Catholic representatives.
- Very few detainees are provided with access to religious services outside the detention facilities. At the time of the Commission’s visit, only three or four detainees were being taken to a weekly church service in the community. Local religious groups informed the Commission that they would be happy to have detainees attend their services. G4S informed the Commission that it focuses on providing religious services inside detention, as it does not have adequate resources to take detainees out to services in the community. However, regular services were not being provided to detainees inside detention either.

- Some detainees do not have access to ‘appropriate religious books and materials’. Concerns were raised about detainees not being able to access copies of the Bible or the Koran in languages other than English.

These concerns arise for two major reasons. First, the small size and limited capacity of the Christmas Island community mean that local religious groups are not able to meet the needs of hundreds of immigration detainees on the island. For example, there is no Catholic priest on the island, and the small Christian fellowship does not have a church or a Minister.

Secondly, the remote location and high cost of travelling to Christmas Island make it very difficult for mainland-based religious groups to visit on a regular basis. It is also logistically difficult and expensive for DIAC or the detention service provider to facilitate such visits.

These concerns contribute to the Commission’s view that Christmas Island is not an appropriate location in which to hold people in immigration detention. Detainees on the mainland have access to a much higher level of religious support.

#### **Recommendation 22:**

If the Australian Government intends to continue using Christmas Island for immigration detention purposes, DIAC should ensure that all detainees are provided with access to regular religious services conducted by qualified religious representatives.

## **13. Community detention**

Under the Migration Act, the Minister has the power to issue a Residence Determination permitting an immigration detainee to live at a specified location in the community.<sup>193</sup> This is known as community detention.

There are significant advantages for people in community detention compared to those in a detention facility. They live in a designated house or apartment in the community; they are generally free to come and go; and they are not under physical supervision. This means they have a much higher degree of freedom, privacy and autonomy than people detained in a closed facility such as the construction camp or the IDC. They are also free to interact with the local community, for example children can play with their school classmates outside of school hours.

During its visit, the Commission met with most of the people in community detention on Christmas Island. All of those people said they were much happier in community detention than they had been while detained in a facility on the island. One unaccompanied minor expressed his relief upon being released into community detention after being detained in the construction camp for more than two months:

In the construction camp it was like we were in prison. Now it is good – we feel freedom.

In the Commission’s view people should not be held in immigration detention on Christmas Island at all. However, if the Australian Government intends to continue this practice, community detention is the most appropriate arrangement, as bridging visas are generally not available to detainees on the island.

The Commission therefore has significant concerns about the limited availability of community detention housing on Christmas Island. The Commission is also concerned about the challenges facing people in community detention in such a small and remote community – particularly in terms of accessing appropriate services, support and community-based activities. The Commission’s major concerns are summarised below. These concerns contribute to the Commission’s view that Christmas Island is not an appropriate location in which to hold immigration detainees.

### **13.1 Availability of community detention**

The remote location and small size of the Christmas Island community create challenges with community detention that either do not arise on the mainland, or are much more pronounced than they would be on the mainland. The Minister recently acknowledged this:

There is a serious issue about community detention on the island because of the small number of services, the small population. There are challenges for community detention that you don’t face in the city ... we cannot operate on Christmas Island in the same way that you might operate on the mainland.<sup>194</sup>

The Commission's most significant concern is that the shortage of community-based accommodation on Christmas Island is likely to be a key factor in preventing the release of some detainees from a closed detention facility into community detention. At the time of the Commission's visit, of the 733 detainees on the island, only 44 (six percent) were in community detention. This included 15 adults and 29 children – 18 of whom were unaccompanied.

As discussed in section 9.3 above, DIAC is taking steps to increase the community detention capacity on the island. However, given the small size of the community and the significant number of detainees, the Commission has doubts about the feasibility of securing enough community-based accommodation to fully implement the New Directions presumption that detainees will be released into the community once their health, identity and security checks are completed.

### **13.2 Access to support services and community activities**

Australian Red Cross and Life Without Barriers provide contracted support services to people in community detention on Christmas Island. Life Without Barriers provides carers for unaccompanied minors, as discussed in section 11.7 above. Red Cross provides support to other people in community detention on the island. This includes, for example, assisting with making and getting to medical appointments, organising occasional recreational outings, and referring detainees to appropriate community-based activities. The Commission recognises the important role played by Red Cross, and welcomes the fact that DIAC provides funding to make this possible.

However, in the Commission's view, providing support to people in community detention in such a small and remote community is a very challenging task. Any group undertaking that task faces a broad range of logistical challenges that would not be anywhere near as difficult to manage on the mainland. These range from overarching issues such as limited access to appropriate office space, transport and communications, to daily issues such as trying to help detainees find culturally appropriate clothing on a small island with very few shops.

On the mainland, people in community detention would have access to a much broader range of community level services that either don't exist at all, or are very limited on Christmas Island. They would also have access to more community-based recreational and educational activities, and cultural and religious support networks.

In addition, many of the issues discussed in section 12 above with regard to people in the detention facilities on Christmas Island also apply to people in community detention – these include limited access to health and mental health care services, and the absence of locally based lawyers, legal aid, migration agents, community organisations and advocacy groups.

### **13.3 Transport**

Lack of transport is a major problem for people in community detention on Christmas Island. Unlike the mainland, where people in community detention would normally be located near a major city with access to public transport, on Christmas Island they are virtually stranded. Getting around the island is very difficult without a car – there are steep hills and winding roads without safe walking paths. There is only one taxi and it operates on a haphazard basis. There are very few hire cars and they are expensive.

There is no public transport system on Christmas Island. One community bus was operating during early 2009. However, it was not operating at the time of the Commission's visit. According to DIAC, the bus service would resume in the near future.

The transport situation has been eased to some extent by the fact that the Life Without Barriers carers have access to cars and can provide transport for the unaccompanied minors in community detention. In addition, Red Cross has two cars, and provides some transport assistance to families in community detention. However, in the Commission's view, with a small team of staff and only two vehicles, they do not have the capacity to meet the ongoing transport needs of the various family groups in community detention.

### **13.4 Curfew**

At the time of the Commission's visit, some of the people in community detention on Christmas Island had been placed under a curfew. As a condition of their Residence Determination they were required to remain within 500 metres of their designated residence between the hours of 7pm and

6am. This restricted their freedom of movement and their ability to have normal social interactions. A number of detainees the Commission spoke with raised this concern.

As far as the Commission is aware, this type of restriction has never been imposed on people in community detention on the mainland. They are normally required to sleep at their designated place of residence each night. However, there is no specified time restriction on when they must be at home.

DIAC explained the curfew on Christmas Island as a way of addressing concerns raised by some members of the local community about having ‘strangers’ wandering around the community at night. The Minister has acknowledged that this type of restriction would not be necessary on the mainland.<sup>195</sup>

The Commission is concerned that people in community detention on Christmas Island are being subjected to restrictions on their freedom of movement that would not be applied to them on the mainland. This differential treatment does not appear to be based on anything of the detainees’ own doing; rather it has come about as a result of the government’s decision to detain people in a very small community.

The Commission encourages the Minister and DIAC to reconsider the necessity of the curfew.

### 13.5 Accommodation

People in community detention on Christmas Island are generally accommodated in one of ten duplex houses located at Drumsite, one of the small suburbs on Christmas Island. Of the immigration detention options on the island, they provide the best standard of accommodation and are the closest to the school and the town area.

The duplexes are generally used for families with children and unaccompanied minors. According to DIAC, the capacity of the duplexes is between 45 and 60, depending on the composition of the groups to be accommodated. When the Commission visited, there were 39 people in the duplexes including three men, seven women, 11 accompanied children and 18 unaccompanied children.

At the time of the Commission’s visit, there were also five adult males living in community detention in the alpha compound at the Phosphate Hill immigration detention facility.<sup>196</sup> This facility is located five kilometres from the town, across the road from the construction camp. It consists of two discrete areas. The bravo compound is a secure area, surrounded by high wire fences. It has capacity for 48 people. It was not in use at the time of the Commission’s visit, but has been used to hold adult male detainees since then.<sup>197</sup> The alpha compound is a low security area, surrounded by a residential style fence. It has capacity for around 50 people. During the Commission’s visit, DIAC was arranging for additional demountables to be installed in this area, increasing the capacity to around 90 people.

The Commission met with the five detainees living in the alpha compound at the time, and had concerns about the inappropriate nature of their accommodation. They had no access to an indoor kitchen or dining area; just a large outdoor cabana with very basic cooking facilities and picnic tables. That area was not weather-proof. They each had one small bedroom in a row of demountables. The toilets and showers were in another demountable, located across an open area that was not protected from the rain. The Commission was informed by DIAC that this group would soon be relocated to alternative accommodation in the community.

If DIAC intends to accommodate people in community detention in the alpha compound at the Phosphate Hill facility, it needs to ensure that those people have access to adequate accommodation as well as indoor kitchen, dining and recreation areas. DIAC will also need to address the issue of transport for these people, who will be even more isolated than people currently on community detention in the duplexes.

## Endnotes

- 1 The Commission's immigration detention inspection reports are available on the Commission's website at [http://humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html#9\\_4](http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_4).
- 2 See C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 27 July 2009).
- 3 Section 494AA(1)(c) of the Migration Act states that: 'The following proceedings against the Commonwealth may not be instituted or continued in any court: (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen'. Note, however, that section 494AA(3) states that nothing in section 494AA is intended to affect the jurisdiction of the High Court under section 75 of the Constitution. For further discussion of the High Court's original jurisdiction under section 75 of the Constitution, see note 48 below.
- 4 To comply with article 9(4) of the ICCPR, the court must have the power to order the person's release if their detention is not lawful. The lawfulness of their detention is not limited to domestic legality – it includes whether the detention is compatible with the requirements of article 9(1) of the ICCPR. See, for example, United Nations Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.5. At <http://www.unhcr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument> (viewed 31 August 2009).
- 5 Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004) (A last resort). At [http://humanrights.gov.au/human\\_rights/children\\_detention\\_report/report/PDF/alr\\_complete.pdf](http://humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf) (viewed 25 September 2009).
- 6 Joint Standing Committee on Migration, *Immigration detention in Australia: Facilities, services and transparency* (2009), p 57. At <http://www.aph.gov.au/house/committee/MIG/detention/report3/fullreport.pdf> (viewed 25 September 2009).
- 7 The Commission's national inquiry reports are A last resort, note 5, and *Those who've come across the seas – Detention of unauthorised arrivals* (1998) (Those who've come across the seas), at [http://humanrights.gov.au/human\\_rights/immigration/seas.html](http://humanrights.gov.au/human_rights/immigration/seas.html) (viewed 25 September 2009). The Commission's reports of complaints about alleged human rights breaches in immigration detention are available on the Commission's website at <http://humanrights.gov.au/legal/humanrightsreports/index.html>.
- 8 See, for example A last resort, note 5; *Those who've come across the seas*, note 7.
- 9 The Commission's activities have included two national inquiries; inspections of immigration detention facilities; developing minimum standards for the protection of human rights in immigration detention; submissions to parliamentary inquiries; investigating complaints from individuals in immigration detention; examining proposed legislation and commenting on government policies; and raising public awareness. Details are available on the Commission's website at [http://humanrights.gov.au/human\\_rights/immigration/index.html](http://humanrights.gov.au/human_rights/immigration/index.html).
- 10 *International Covenant on Civil and Political Rights* (1966) (ICCPR). At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 24 August 2009).
- 11 *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR). At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 24 August 2009).
- 12 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) (Convention against Torture). At <http://www2.ohchr.org/english/law/cat.htm> (viewed 24 August 2009).
- 13 *Convention Relating to the Status of Refugees* (1951) and *Protocol Relating to the Status of Refugees* (1967) (Refugee Convention). At <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (viewed 24 August 2009).
- 14 *Convention on the Rights of the Child* (1989) (CRC). At <http://www2.ohchr.org/english/law/crc.htm> (viewed 24 August 2009).
- 15 ICCPR, art 9(1); CRC, art 37(b).
- 16 ICCPR, art 9(4); CRC, art 37(d).
- 17 CRC, art 37(d); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), principle 17, at <http://www2.ohchr.org/english/law/bodyprinciples.htm> (viewed 25 September 2009).
- 18 ICCPR, art 10(1); CRC, art 37(c).
- 19 ICCPR, art 7; CRC art 37(a).
- 20 CRC, art 37(b).
- 21 CRC, art 3.
- 22 ICCPR, art 2(1), 26; CRC art 2(1).
- 23 Refugee Convention, note 13, art 33(1). This obligation is also implied in ICCPR, art 6 and 7; Convention against Torture, art 3; and CRC, art 6 and 37.
- 24 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, note 17.
- 25 *Standard Minimum Rules for the Treatment of Prisoners* (1955). At <http://www2.ohchr.org/english/law/treatmentprisoners.htm> (viewed 24 August 2009).
- 26 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990). At [http://www2.ohchr.org/english/law/res45\\_113.htm](http://www2.ohchr.org/english/law/res45_113.htm) (viewed 24 August 2009).
- 27 UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999), at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> (viewed 24 August 2009); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), at <http://www.unhcr.org/3d4f91cf4.html> (viewed 25 September 2009).

- 28 Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (2000). At [http://humanrights.gov.au/pdf/human\\_rights/asylum\\_seekers/idc\\_guidelines.pdf](http://humanrights.gov.au/pdf/human_rights/asylum_seekers/idc_guidelines.pdf) (viewed 25 September 2009).
- 29 As above, section 1.1.
- 30 *Migration Act 1958* (Cth), ss 13, 14, 189.
- 31 Map sourced from Christmas Island Tourism Association website. At <http://www.christmas.net.au/about.html> (viewed 24 August 2009).
- 32 See, for example Minister for Immigration and Citizenship, 'Rudd Government committed to Christmas Island detention' (Media Release, 18 August 2009). At <http://www.minister.immi.gov.au/media/media-releases/2009/ce09074.htm> (viewed 25 August 2009).
- 33 *Migration Act 1958* (Cth), s 5(1); *Migration Amendment Regulations 2005* (No. 6) (Cth), reg 5.15C.
- 34 DIAC provided the Commission with statistics showing that as of 6 July 2009, there were 723 detainees on Christmas Island. Of these 723 people there were 357 from Afghanistan, 277 from Sri Lanka, 60 from Iraq, 13 from Iran, 4 from Pakistan, 2 from Somalia, 2 from Indonesia, 1 from Palestine and 1 from India. Six were stateless.
- 35 On 23 September 2009 the Commission was informed by DIAC that the bravo compound is currently in use for single adult male detainees.
- 36 See *Migration Act 1958* (Cth), s 5(1). The amendments were made pursuant to the *Migration Amendment (Excision from the Migration Zone) Act 2001* (Cth). Further islands were excised by the *Migration Amendment Regulations 2005* (No. 6) (Cth), reg 5.15C.
- 37 *Migration Act 1958* (Cth), s 5(1).
- 38 *Migration Act 1958* (Cth), s 46A.
- 39 See note 3.
- 40 *Migration Act 1958* (Cth), ss 198A(1), 198A(2)(d).
- 41 See, for example C Evans, note 2, p 2; Minister for Immigration and Citizenship, 'Rudd Government committed to Christmas Island detention', note 32.
- 42 Note that unauthorised boat arrivals on the mainland or in any other non-excised part of Australia are also taken to immigration detention on Christmas Island. However, unlike offshore entry persons, these people have access to the refugee status determination system that applies on the mainland under the Migration Act.
- 43 The Commission was provided with a copy of the draft guidelines, referred to as the Refugee Status Assessment Procedures Manual.
- 44 *Migration Act 1958* (Cth), s 46.
- 45 *Migration Act 1958* (Cth), ss 411(1)(c), 500(1)(b), 500(1)(c), 501(1).
- 46 *Migration Act 1958* (Cth), ss 476, 476A. The High Court has held that the privative clause in section 474(1) of the Migration Act does not preclude judicial review of decisions affected by jurisdictional error: *Plaintiff S157/2002 v Godwin* (2003) 211 CLR 476 at 506.
- 47 *Migration Act 1958* (Cth), ss 46A(1), 46A(2).
- 48 No provision is made in the non-statutory RSA process for judicial review of a decision made by a DIAC officer or an Independent Reviewer (prior to the point at which the Minister decides to lift the section 46A bar). The High Court's original jurisdiction in section 75(v) of the Constitution, however, remains available to compel compliance by officers of the Commonwealth with their statutory or common law duties. An asylum seeker who arrived in an excised offshore place may seek a remedy of mandamus, prohibition or injunction in the High Court pursuant to section 75(v) of the Constitution, but would have to establish that the Commonwealth officer had a relevant statutory or common law duty.
- 49 Under UNHCR guidelines, this provision covers 'a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured.' It also covers 'a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there.' UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (1999), para 4. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844> (viewed 27 August 2009).
- 50 See further J von Doussa, 'Human Rights and Offshore Processing' (2007) 9 *UTS Law Review* 41, pp 45, 48-49; J McAdam and T Garcia, *Submission on Refugees and Asylum Seekers to the National Human Rights Consultation* (2009), pp 33-39, at [http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/7D3822576B6ABCf2CA2576070019EBD9/\\$file/Gilbert\\_+\\_Tobin\\_Centre\\_of\\_Public\\_Law\\_Jane\\_McAdam\\_AGWW-7SW85E.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/7D3822576B6ABCf2CA2576070019EBD9/$file/Gilbert_+_Tobin_Centre_of_Public_Law_Jane_McAdam_AGWW-7SW85E.pdf) (viewed 27 August 2009).
- 51 CRC, art 22.
- 52 CRC, art 2. See further A last resort, note 5, pp 272-274.
- 53 A last resort, note 5, p 276.
- 54 United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), para 23. At <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc> (viewed 26 August 2009).
- 55 Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2009), pp 71-72. At [http://humanrights.gov.au/human\\_rights/immigration/idc2008.pdf](http://humanrights.gov.au/human_rights/immigration/idc2008.pdf) (viewed 25 September 2009).
- 56 See, for example 2008 Immigration detention report, above; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), paras 40-45, at [http://www.humanrights.gov.au/legal/submissions/2008/20080829\\_immigration\\_detention.html](http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html) (viewed 25 September 2009); Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, at <http://humanrights.gov.au/legal/submissions/migration20060522.html> (viewed 29 September 2009).

- 57 C Evans, note 2, p 2.
- 58 C Evans, note 2, p 3.
- 59 *Migration Act 1958* (Cth), s 46A(1).
- 60 *Migration Act 1958* (Cth), s 46A2.
- 61 According to DIAC, as of July 2009 it was taking an average of 66 days from the lodgement of the statement of claims until notification of the immigration outcome. However, the average overall processing time (from a person's arrival on Christmas Island until their immigration outcome) was ranging from 90 days to over 120 days.
- 62 See, for example Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, note 56, paras 69-75.
- 63 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, p 5 (Mr Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services). At [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-09-09/0020/hansard\\_frag.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-09-09/0020/hansard_frag.pdf;fileType%3Dapplication%2Fpdf) (viewed 25 September 2009).
- 64 United Nations Human Rights Committee, note 54.
- 65 2008 Immigration detention report, note 55, pp 71-72.
- 66 Those who arrive on the mainland or another non-excised part of Australia have access to the refugee status determination system that applies under the Migration Act. Those who arrive in an excised offshore place do not have access to this system - instead, they go through the non-statutory RSA process, as discussed in Part B of this report.
- 67 See note 3.
- 68 See note 2.
- 69 The Commission welcomed the statement of the Australian Government's key immigration values 3 to 7. See further 2008 Immigration detention report, note 55, p 4.
- 70 Values 1 and 2 retain the use of mandatory detention. See C Evans, note 2, p 3.
- 71 Section 189(3) of the Migration Act states: 'If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.' Section 189 (4) states: 'If an officer reasonably suspects that a person in Australia but outside the migration zone: (a) is seeking to enter an excised offshore place; and (b) would, if in the migration zone, be an unlawful non-citizen; the officer may detain the person.' Compare this to sections 189(1) and 189(2) which require mandatory detention of unlawful non-citizens in, or seeking to enter, the migration zone (other than an excised offshore place).
- 72 C Evans, note 2, p4.
- 73 C Evans, note 2, pp 4-5.
- 74 See note 70.
- 75 UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, note 49, guideline 3.
- 76 As above. See also UNHCR Executive Committee, *Conclusion No. 44 (XXXVII) - Detention of Refugees and Asylum Seekers* (1986). At <http://www.unhcr.org/refworld/docid/3ae68c43co.html> (viewed 25 September 2009).
- 77 UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, note 49, guideline 3.
- 78 See note 71.
- 79 See, for example Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration*, note 56; A last resort, note 5; Those who've come across the seas, note 7.
- 80 C Evans, note 2, p 4.
- 81 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning - Criteria for release from detention* (2008), p 69. At <http://www.aph.gov.au/house/committee/mig/detention/report/fullreport.pdf> (viewed 28 September 2009).
- 82 Under Article 9(4) of the ICCPR, any person arrested or otherwise detained is to be brought before a court without delay: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.' The lawfulness of the person's detention is not limited to domestic legality - it includes whether the detention is compatible with the requirements of article 9(1) of the ICCPR. See, for example *A v Australia*, note 4, para 9.5.
- 83 See note 3.
- 84 ICCPR, art 9(1); CRC, art 37(b).
- 85 See note 4.
- 86 See C Evans, note 2, p 4.
- 87 Of the 82 children in immigration detention on the island at the time, 53 were in a detention facility and 29 were in community detention.
- 88 At the time of the Commission's visit, DIAC was increasing the capacity of the alpha compound at the Phosphate Hill immigration detention facility up to around 90 people. DIAC was also seeking to lease seven additional houses in the community.
- 89 C Evans, note 2, p 4.
- 90 See, for example A last resort, note 5.
- 91 C Evans, note 2, pp 6-7.
- 92 See, for example Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, pp 4265-4266 (The Hon Penny Wong MP, Minister for Climate Change and Water).
- 93 C Evans, note 2, p 4.

- 94 See, for example 2008 Immigration detention report, note 55, p 18; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, note 56, para 114.
- 95 DIAC, 'Immigration detention services contract signed' (Media Release, 29 June 2009). At [http://www.newsroom.immi.gov.au/media\\_releases/726](http://www.newsroom.immi.gov.au/media_releases/726) (viewed 31 August 2009).
- 96 Joint Standing Committee on Migration, note 6, pp 87-88, 98-100.
- 97 UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 49, guideline 10.
- 98 See, for example 2008 Immigration detention report, note 55, pp 18-19.
- 99 The flight from Sydney to Perth takes five hours, and the flight from Perth to Christmas Island takes another five. In practice this means flying from Sydney to Perth, spending the night, then flying to Christmas Island the following day and arriving in the late afternoon. There are four regular flights from Perth to Christmas Island each week, at an average return cost of \$1398 per person. When a return flight from the east coast and accommodation costs are added, the cost of the trip becomes substantial.
- 100 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2002) (OPCAT). At <http://www2.ohchr.org/english/law/cat-one.htm> (viewed 28 September 2009). The Australian Government has signed OPCAT, but has not yet ratified it.
- 101 Report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan, Centre for Law and Public Policy, The University of Western Australia, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008). At [http://www.humanrights.gov.au/human\\_rights/publications/opcat/index.html](http://www.humanrights.gov.au/human_rights/publications/opcat/index.html) (viewed 29 September 2009).
- 102 Joint Standing Committee on Migration, note 6, p 114.
- 103 Of the 82 children, 12 were aged zero to five years, five were aged six to ten years, 17 were aged 11 to 15 years, and 48 were 16 or 17 years old.
- 104 See note 71.
- 105 See note 3.
- 106 CRC, art 3(1).
- 107 CRC, art 37(b).
- 108 CRC, art 37(c).
- 109 CRC, art 37(a), 37(c).
- 110 CRC, art 37(d).
- 111 CRC, art 22(1).
- 112 CRC, art 9(1).
- 113 CRC, art 20.
- 114 CRC, art 6(2), 39.
- 115 CRC, art 2.
- 116 A last resort, note 5, p 5.
- 117 See note 71.
- 118 See, for example C Evans, note 2, pp 2-3; Minister for Immigration and Citizenship, 'Rudd Government committed to Christmas Island detention', note 32.
- 119 CRC, art 37(b).
- 120 See further A last resort, note 5, p 95.
- 121 UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), para 7.6-7.7, at <http://www.unhcr.org/3d4f91cf4.html> (viewed 25 September 2009). See also UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 49, guideline 6.
- 122 See C Evans, note 2, p 3.
- 123 DIAC, *Response to the Australian Human Rights Commission's 2008 Immigration detention report* (2009), p 52. At [http://humanrights.gov.au/human\\_rights/immigration/idc2008\\_DIAC.html](http://humanrights.gov.au/human_rights/immigration/idc2008_DIAC.html) (viewed 26 August 2009).
- 124 Of the 53 children detained in the construction camp, 11 were aged between zero and five years. one was aged six to ten years, 11 were aged 11 to 15 years, and 30 were 16 or 17 years old.
- 125 Currently, the Immigration Detention Centres (IDCs) in Australia are Villawood IDC, Northern IDC, Perth IDC, Maribyrnong IDC and Christmas Island IDC.
- 126 In its weekly immigration detention statistics, DIAC counts detainees being held in the construction camp facility in the category referred to as 'Alternative Temporary Detention in the Community (Christmas Island)'. See, for example Community and Detention Services Division, DIAC, *Immigration Detention Statistics Summary* (4 September 2009).
- 127 Of the 53 children detained in the camp at the time of the Commission's visit, the average time they had been there was approximately six weeks. However, five girls under the age of 12 had been there for two months or more. Two of these girls - a one year old and a two year old - had been there for more than three months. Of the 29 children in community detention at the time of the Commission's visit, the average time they spent in detention in the construction camp before being moved to community detention was nine and a half weeks.
- 128 *Migration Act 1958* (Cth), s4AA.
- 129 Dissenting Report by Mr Petro Georgiou MP in Joint Standing Committee on Migration, *Immigration detention in Australia: Facilities, services and transparency*, note 6, p 158.
- 130 Minister for Immigration and Citizenship, 'Rudd Government committed to Christmas Island detention', note 32.
- 131 See <http://www.immi.gov.au/managing-australias-borders/detention/services/community-detention.htm> (viewed 1 September 2009).

- 132 See, for example M Dodd, 'People profiteers', *The Australian*, 16 September 2009. At <http://www.theaustralian.news.com.au/story/0,,26078829-28737,00.html> (viewed 16 September 2009).
- 133 See note 126.
- 134 See, for example A last resort, note 5, chapter 6, pp 862-867.
- 135 See note 3.
- 136 A last resort, note 5, pp 860-867.
- 137 A last resort, note 5, pp 862-865.
- 138 CRC, art 37(d). See also ICCPR, art 9(4).
- 139 A last resort, note 5, pp 865-867.
- 140 A last resort, note 5, pp 5-7, chapter 17.
- 141 See, for example A last resort, note 5, pp 128-129, chapter 8; 2008 Immigration detention report, note 55, pp 85-86.
- 142 See, for example 2008 Immigration detention report, note 55, p 86.
- 143 CRC, art 20.
- 144 See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, note 121. See also UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 49, guideline 6.
- 145 2008 Immigration detention report, note 55, pp 85-86.
- 146 According to its website, Life Without Barriers is a 'national not-for-profit organisation working to support children and young people in crisis, people with a disability and those with a mental health issue.' See <http://www.lwb.org.au/> (viewed 30 September 2009).
- 147 See, for example A last resort, note 5, chapter 14, section 17.4.7; 2008 Immigration detention report, note 55, pp 85-86.
- 148 This role is separate to the role that Life Without Barriers plays in recruiting and providing carers for unaccompanied minors in community detention on Christmas Island (as discussed in section 11.7 of this report).
- 149 UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, note 121, para 5.7. See also UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 49, guideline 6.
- 150 *Immigration (Guardianship of Children) Act 1946* (Cth), s 6.
- 151 *Immigration (Guardianship of Children) Act 1946* (Cth), s 5.
- 152 CRC, art 18(1).
- 153 A last resort, note 5, chapter 14, pp 873-877.
- 154 A last resort, note 5, pp 699-701, 873-877.
- 155 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009* (2009), pp 18-19. At [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/migration\\_2009/report/report.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/report/report.pdf) (viewed 4 September 2009).
- 156 On 23 September 2009 the Commission was informed by DIAC that the bravo compound is currently in use for single adult male detainees.
- 157 2008 Immigration detention report, note 55, pp 75-76.
- 158 C Evans, note 2, p 7.
- 159 See C Evans, note 2, p 6.
- 160 Joint Standing Committee on Migration, note 6, p 42.
- 161 As above.
- 162 Joint Standing Committee on Migration, note 6, p 57.
- 163 Joint Standing Committee on Migration, note 6, p 42.
- 164 Department of Immigration and Citizenship and Department of Finance and Deregulation, *Joint Submission to the Parliamentary Standing Committee on Public Works Inquiry into Villawood Immigration Detention Facility Redevelopment* (2009), para 56. At <http://www.aph.gov.au/house/committee/pwc/villawood09/subs/sub001.pdf> (viewed 30 September 2009).
- 165 United Nations Human Rights Committee, note 54, para 23; United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. E/C.12/AUS/CO/4 (2009), para 25, at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 30 September 2009).
- 166 2008 Immigration detention report, note 55, pp 75-76.
- 167 Joint Standing Committee on Migration, note 6, p 57.
- 168 During its 2008 visit the Commission was informed by DIAC that the construction camp could be used to accommodate 100 detainees. During its 2009 visit, the Commission was informed that the capacity is 258. A May 2009 DIAC source states that the capacity is 350. See DIAC, *Supplementary submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2009), p1, at <http://www.aph.gov.au/house/committee/MIG/detention/subs/sub129w.pdf> (viewed 25 August 2009). In August 2009 a DIAC representative told a Senate Committee that the capacity is around 200. See *Evidence to the Senate Legal and Constitutional Affairs Legislation Committee*, Sydney, 7 August 2009, p 10 (Jackie Wilson), at <http://www.aph.gov.au/hansard/senate/committee/S12355.pdf> (viewed 26 August 2009).
- 169 See note 126.
- 170 See 2008 Immigration detention report, note 55, pp 76-77.
- 171 See note 127.
- 172 See, for example 2008 Immigration detention report, note 55, pp 38-39.
- 173 A last resort, note 5, chapter 7.
- 174 See 2008 Immigration detention report, note 55, p 74.

- 175 In September 2009 the Commission was informed that at the end of July 2009 NAATI established an accreditation testing panel for Hazaragi interpreters. As of September, 17 interpreters had registered to undergo the testing. The outcomes of tests were not known at the time of writing.
- 176 See, for example 2008 Immigration detention report, note 55, pp 40–42.
- 177 CRC, art 37(d); ICCPR, art 14(3)(d); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, note 17, principle 17.
- 178 ICCPR, art 14(3)(d); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, note 17, principle 17.
- 179 C Evans, note 2, pp 2–3.
- 180 2008 Immigration detention report, note 55, p 71.
- 181 Joint Standing Committee on Migration, note 6, p 100.
- 182 The one exception to this is the Northern IDC, which is generally used to accommodate alleged illegal foreign fishers. Under the detention health contract, Northern IDC is currently required to have a mental health clinic staffed by a counsellor.
- 183 Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines*, note 28, section 7.2.
- 184 CRC, art 28, 31. See further A last resort, note 5, chapters 12, 13, 15.
- 185 UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 49, guideline 6.
- 186 Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines*, note 28, section 6.6. This is based on articles 6(2) and 13(2)(c) of the *International Covenant on Economic, Social and Cultural Rights*, rule 71(5) of the *Standard Minimum Rules for the Treatment of Prisoners*, rule 42 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* and guideline 10(vii) of the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*.
- 187 See, for example 2008 Immigration detention report, note 55, pp 33–35.
- 188 See, for example P Taylor, 'No visas, boys? Welcome to Australia', *The Australian*, 3 September 2009. At <http://www.theaustralian.news.com.au/story/0,25197,26019535-601,00.html> (viewed 10 September 2009).
- 189 See further 2008 Immigration detention report, note 55, p 84.
- 190 ICCPR, art 18.
- 191 Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines*, note 28, section 5.1.
- 192 See <http://www.immi.gov.au/managing-australias-borders/detention/services/services-at-facilities.htm> (viewed 10 September 2009).
- 193 *Migration Act 1958 (Cth)*, s 197AB.
- 194 See D Marr, 'The Indian Ocean Solution' (2009) 49 *The Monthly* 18, p 29.
- 195 As above.
- 196 Because they were in community detention, these detainees were free to come and go from the facility, except to the extent that they were required to comply with a nightly curfew (as discussed in section 13.4 of this report).
- 197 On 23 September 2009 the Commission was informed by DIAC that the bravo compound is currently in use for single adult male detainees.