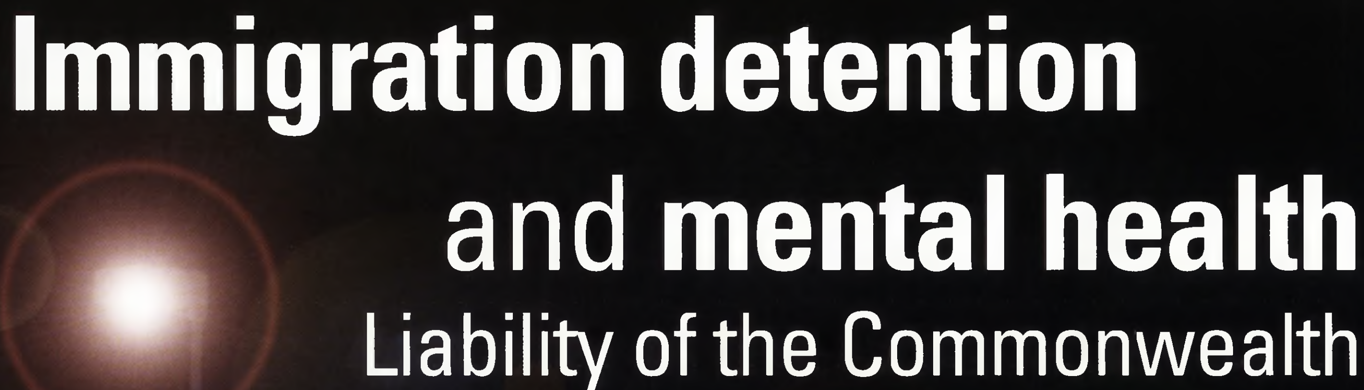
Immigration detention and mental health

Liability of the Commonwealth

By Claire O'Connor



A study completed this year and published in the *Medical Journal of Australia* by Green and Eager, of the University of Wollongong, found that:[1]

> *'People in immigration detention are frequent users of health services and* ***there is a clear association between the time in detention and the rates of mental illness.'*** *(My emphasis)*[2]

Photo © Bill Madden

The authors point out that government records show that between 1999 and 2006 (inclusive) at least 6,000 people were detained in immigration detention centres each year. Detention centres were located in isolated parts of Australia and, when the *Pacific Solution* (sic) was introduced by the Howard government, many detainees were held in offshore detention centres using poor nations,[3] or were detained in the remote facility built on Christmas Island.[4]

The Commonwealth contracted the provision of services in the detention centres on the mainland and on Christmas Island to private companies who, in turn, subcontracted the medical facilities to local and national general, psychological and psychiatric services. While it is clear that academics, including those who wrote the recent study referred to

above, agree that there is a link between time and duration of detention and the onset and severity of mental illnesses, the legal impact on the Commonwealth for such harm has, so far, been found in only a trickle of cases that have gone to court or been settled to date.

From the study of Green and Eager, it is clear that the mental health of those detained will have an ongoing impact on their lives and those around them.

> '(The data) show that mental health was a significant health issue for people in detention. The reason for detention was found to have a significant additional effect on the rate of new mental health problems after allowing for time spent in detention … Similarly, time in detention was found to have a significant additional effect after allowing for the reasons for detention… People detained for (longer than) 24 months had rates of new mental illness 3.6 (95% CI, 1.1-11.0) times higher than those who were released within 3 months.'[5]

Most lawyers are aware of the compensation payments made to Vivian Alvarez Solon and Cornelia Rau. While their payments were primarily for mistakes made by the Commonwealth about *Migration Act* decisions, a component of the payment made for Ms Rau included an acknowledgement that she had been mentally ill in detention and that her illness had gone undiagnosed and untreated. She had been detained at a women's prison in Queensland, then transferred to the Baxter Detention Centre in South Australia.

Some publicity was given to the case of Shayan Badraie, who took action against the Commonwealth for causing and failing to treat his mental health problems while in Woomera and Villawood Detention Centres. After the trial commenced, and the Bedraie family gave evidence in the Supreme Court in NSW, the Commonwealth settled the case for $400,000. Shayan, who was between four and six years of age at the time of his detention, and who had been assessed by mental health workers, was very ill. The report, written by those who had medically assessed him, said:

> *'…the ideal situation would be for the family to be together outside the detention environment'.* [6]

This recommendation was included in a report that was sent to the then Minister for Immigration, Philip Ruddock. Next to this recommendation the Minister had written '*Bucklies*' (sic).

By the time of this recommendation, Shayan had been admitted to hospital seven times. On each occasion, he had stopped eating or become comatose and would recover when treated outside detention sufficiently to be returned to Villawood, where he would again deteriorate quickly.[7]

Another case involving the liability of the Commonwealth for causing mental harm to a detainee was that of Amin Mastipour. Amin was held in Baxter Detention Centre with his daughter. He had fled Iran hoping for a better life for himself and his daughter, and she had been in his care since a toddler. He had been removed to the Management Unit of the Centre after an incident where he refused to be strip-searched in front of his daughter.

Shockingly, his daughter was then removed back to Iran while he was in the Management Unit, without his authorisation or knowledge. He was lied to by those detaining him, including a psychiatrist then treating him. Proceedings were issued in the Federal Court for Amin to be transferred out of the Management Unit and back to the mainstream detention facility at Baxter or, preferably, another detention centre. The Full Federal Court reviewed the interlocutory decision made in Amin's favour by the trial judge. On appeal, the Court agreed that the trial judge had been correct in finding that the Commonwealth owed a duty of care to Amin, and that the condition in the Management Unit could, arguably, be in breach; therefore, there was a serious question to be tried.[8]

The order made on appeal prevented the Commonwealth from holding Amin at Baxter or Port Headland detention centres. Medical evidence showed that the conditions, including being in a centre where he had been with his daughter and would trigger painful memories, were inappropriate and potentially harmful.

The Commonwealth settled a damages claim by Amin for an undisclosed amount.

On the Immigration Department's website, information about another payment for harm done to detainees appears in a media release:

> 'Compensation will be offered to five immigration detainees who were mistreated while being transported by detention services contractor GSL nearly four years ago.

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A Human Rights and Equal Opportunity Commission (HREOC) report recommended payment of $20,000 compensation to two of the detainees and $15,000 to the three others for the distress, indignity and humiliation they suffered.

'Although this incident occurred more than three years ago, it was extremely unsatisfactory and regrettable,' Department of Immigration and Citizenship Secretary, Andrew Metcalfe, said today.

'HREOC has recommended that compensation be paid to the five detainees and we support that.

'These people were mistreated and they deserve to be compensated.'

Detention services contractor GSL was responsible for arranging and carrying out the transfer of five detainees from Maribyrnong Immigration Detention Centre to Baxter Immigration Detention Centre in September 2004.

HREOC found the detainees suffered abuse of human rights in the journey between Maribyrnong and Mildura.

'GSL will pay for the compensation to the five people on the escort – this is in addition to the substantial fine the company paid in 2005 as provided for in its contract with the Commonwealth,' Mr Metcalfe said.

'This sad incident took place well before the department's transformation following the Palmer Report...'[9]

Another case settled in NSW for a detainee who sued for the failure to treat mental illness for over $500,000.

The Commonwealth, it is clear, was alerted to the effect that detention was having on the mental health of detainees during this time. Various medical and human rights groups were raising concerns with the press and the Commonwealth in the period from 2001 until the policy changes prompted by such concerns; cases proceeding through the courts also raised the conditions.[10]

Many detainees were harming themselves while in detention, cutting themselves, and sewing their lips together. All activities that, if your neighbours were doing them, would result in their immediate hospitalisation.

Furthermore, the conditions in immigration detention centres such as Baxter and Woomera would be illegal in prisons in South Australia. Both the cases of *S v Secretary DIMIA*[11] and *DIMIA v Mastipour*[12] referred to conditions in the Management Units. The Management Units were used to punish detainees for not behaving. Many were simply showing signs of mental harm and, as such, needed care and attention. Instead, they were held in conditions where:

- A light was left on 24 hours a day;
- Detainees were isolated in the cell for up to 23.5 hours;
- No reading, writing or personal effects were allowed;
- No radios, televisions or views of the outside world were permitted;
- No visitors were permitted;
- Detainees were watched on closed circuit TV in the cells, which included the toilet and shower area; and
- No beds were installed; mattresses were placed on the floor.[13]

WHERE TO FROM HERE?

While those who were wrongfully detained continue to trouble our community and cause concern to human rights advocates, it is clear that there were, and probably continue to be, severe breaches of the duty to care for the health of lawful detainees held in the detention centres from 1999 until the present day. The paucity or lack of adequate services and appropriate treatment for dealing with men, women and children who have often come to Australia seeking sanctuary from wartorn and conflicted countries, many of whom arrived here suffering the effects of torture and trauma that led them to leave the countries of birth were, and continue to be, negligent.

Further, the housing of detainees in jail-like conditions (or worse) caused many who were already fragile to suffer further. Many who were well when they arrived in Australia are now so unwell that they cannot work or form meaningful relationships. The *Green and Eager* study confirms that the longer a detainee is held, the more likely this will be.

Unfortunately, many are too unwell to seek legal advice and support to obtain their files and consider initiating litigation. Fortunately, however, health services dealing with migrants are becoming more aware of the need to get some legal support for detainees, but the numbers so far seeking to take action are very low. Many come from countries where taking on the government would have devastating results, and many are still so traumatised that they don't want to relive their detention time, especially in a courtroom. Furthermore, many, perhaps understandably, are fearful of a government that has treated them in this way and would not take on the Commonwealth in litigation.

It is my hope that Australian Lawyer Alliance lawyers across the country begin acting for detainees who are suffering the effects of the lack of care afforded them. ■

Notes: **1** See http://www.mja.com.au/public/issues/192_02_180110/gre10973_fm.html. **2** *Ibid*, Abstract p1. **3** Nauru and Papua New Guinea. **4** Christmas Island is still being used to house asylum-seekers, but there is a commitment from the government that the maximum time spent there will be three months. It is my view that health services at the Centre could not meet the needs of the numbers presently being housed there. **5** Supra, p4. **6** The author has a copy of the original report. **7** For the story of the Bedraie family, see *The Bitter Shore* by Jacquie Everitt, McMillan, Australia. **8** *Secretary of DIMIA v Mastipour* (2004) FCAFC 93. **9** http://www.newsroom.immi.gov.au/media_releases/preview?item=59&page=17&. **10** Re the application made by the Baktiyari children to be removed from immigration detention because the conditions were causing them harm, see *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA; re the conditions at Woomera when detainees escaped, see *Behrooz v Secretary, Dept of Immigration and Multicultural Affairs and Ors* (2004) 208 ALR 271; re the failure to deliver mental health services, see *S v Secretary DIMIA* (2005) 216 ALR 252 (a case that the author argued). **11** (2005) 216 ALR 252. **12** (2004) FCAFC 93. **13** Many detainees spent days and weeks in this part of Baxter – even Cornelia Rau was held here when she was thought to be misbehaving, but was in fact exhibiting signs of mental illness.

Claire O'Connor *is a barrister at Anthony Mason Chambers in Adelaide.* **PHONE** *(08) 8228 0008*
EMAIL *coconnor@anthonymasonchambers.com.au*