THE IMPACT OF DETENTION ON THE MENTAL HEALTH OF IMMIGRATION DETAINEES:

IMPLICATIONS FOR FAILURE TO DELIVER ADEQUATE MENTAL HEALTH SERVICES — WHO CARES?

'Throughout the history of mankind people have been uprooted against their will. Time and time again, lives and values built from generation to generation have been shattered without warning ... But throughout history mankind has also reacted to such upheavals and brought succour to the uprooted. Be it though individual gestures or concerted action and solidarity, those people have been offered help and shelter and a chance to become dignified, free citizens again. Through the ages, the giving of sanctuary had become one of the noblest traditions of human nature ... Communities, institutions, cities and nations have generously opened their doors to refugees.'

Poul Hartling, UNHCR, acceptance lecture when honoured with Nobel Prize 1981

'The voice of dissent is the bell of freedom'

Amanda Vanstone May 2005

Claire O'Connor*

This paper provides an overview of legal implications of detention of refugee applicants in detention centres in conditions that cause or contribute to mental illness and the failure of the Government to recognise and treat that illness.

Since about 2000 there have been many cases involving refugees before states and federal courts and the High Court of Australia.

These cases can be grouped into broad categories:

- Challenges to findings that particular persons or groups were or were not refugees within the definition in the *Migration Act*.
- Challenges to the lawfulness of legislative limitations on the right to appeal or review decisions at various levels (e.g. privative clauses challenges).
- Challenges to the conditions in detention (e.g. to keeping children in detention in circumstances not in their best interest; to failure to deliver mental health services in breach of a duty of care) and claims that conditions of detention are unlawful.or cases claiming that conditions of detention are unlawful).
- Challenges to the constitutionality of the interpretation of the

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legislation leading to breaches of human rights e.g. indefinite detention of persons not refugees but stateless, and non-refoulement cases.

- Suits against the Minister for detaining in conditions which caused harm, whether or not the detention itself was lawful.

This paper deals with the consequences of the judgements arising from many of these categories in determining whether the detention breached a duty of care. The relevant authorities have held that

a) Conditions of detention, even if torturous, could not of themselves render the detention unlawful.[1]
b) A child may be confined in detention conditions even if those conditions are causing harm, until the child is removed or given a visa.[2]
c) The Minister and his or her officers are permitted to detain persons without visas for as long as is necessary to remove them, even if removal is impossible because they are stateless.[3]
d) Breaches of international treaties and protocols have little or no relevance to refugees or persons detained in immigration detention who are stateless, even if Australia is a signatory to those treaties and protocols, because of the interpretation of the aliens power in the Constitution.[4]
e) The Minister for Immigration owes a duty of care to non-citizens in immigration detention.[5]
f) It is the Minister's duty to determine whether someone is an unlawful non-citizen before detaining that person in immigration detention.[6]
g) The duty of care extends to ensuring the mental wellness of a detainee.[7]
h) If a duty of care is breached and harm results an action in tort may lie.[8]

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1 *Behrooz v Secretary DIMA* (2004) 208 ALR 271; *Hassan and Ors v ACS and Ors* [2002] SASC 127.
2 *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20; *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49
3 *Al Kateb v Godwin and Ors* (2005) 208 ALR 124.
4 Eg, *The Universal Declaration on Human Rights*, article 9: 'No one shall be subjected o arbitrary arrest, detention or exile.'
International Covenant on Civil and Political Rights, article 7: 'No on shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment'; article 23 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'
Convention on the Rights of the Child, article 3: 'The best interests of the child shall be the primary consideration ... (and state parties are) to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her ...'. *Ruddock and Vadarlis* [2001] FCA 1329.
5 *S v Secretary DIMIA* (2005) 216 ALR 252.
6 *Ruddock v Taylor* [2005] HCA 48.
7 *S v Secretary DIMIA* (2005) 216 ALR 252.
8 *Behrooz v Secretary, Dept of Immigration and Multicultural Affairs and Ors* (2004) 208 ALR 271.

i) Prohibition against removal from Australia of a non-citizen may lie where the act of removal would cause harm to a detainee.[9]

j) Prohibition against removal of a non-citizen does not exist where the country being returned to might cause death or serious harm to the person removed.[10]

In 2004 the High Court delivered a number of significant decisions about detainees. Some were of a high profile nature, for example, the case of the Baktiyari children;[11] others have become definitive cases in the argument for a bill of rights because of failure by the High Court to interpret the *Migration Act* consistently with international treaties and protocols.

For many years those who worked for refugees, those who conducted inquiries into immigration centres and those worked in detention centres, in particular in the health area, had reported on systemic problems resulting in failure to deliver adequate mental health services to detainees in immigration detention centres.

Men, women and children were reported to be cutting themselves, going on hunger strikes and sewing up their lips: Many who worked in the centres or visited detaines reported that those suffering from mental illnesses were being ignored and going untreated. The discovery of Cornelia Rau, who had been in prison in Queensland then in Baxter Detention Centre in South Australia, undiagnosed and untreated, caused many in the wider community to ask, 'How did someone so unwell go unnoticed?'

The failure to recognise and treat mental illnesses of immigration detainees will be the focus of court cases in the future, not just for Ms Rau whose matter is still not resolved at the time of writing.

Immigration Detention

The Migration Act 1958 requires that all unlawful non-citizens be detained in immigration detention. The detention is to occur until the detainee is released into Australia, granted a visa or removed from Australia.[12] The relevant sections for this paper are ss 5, 36, 189, 196 and 198 which are set out below.

Section 5 defines immigration detention as

(a) being in the company of, and restrained by:
  (i) an officer; or
  (ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or

9 The case of Beyazkilinc is still before the Federal Court in relation to this matter but see *Beyazkilinc v Manager Baxter Immigration Reception and Processing Centre* [2006] FCA 16 for interim stay judgement.

10 *WAJZ, WAKA, WAGF, WAKB, WAKE and WADX v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCA 1332.

11 *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20

12 ss 189, 196 and 198 of the Act.

(b) being held by, or on behalf of, an officer:
(i) in a detention centre established under this Act; or
(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or
(iii) in a police station or watch house; or
(iv) in relation to a non-citizen who is prevented, under section249, from leaving a vessel—on that vessel; or
(v) in another place approved by the Minister in writing;

Section 36 of the Act determines who shall get protection.

Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
(i) is mentioned in paragraph (a); and
(ii) holds a protection visa.

Protection obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection(3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:
(a) a country will return the non-citizen to another country; and
(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
subsection(3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection(3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection(6) does not, by implication, affect the interpretation of any other provision of this Act.

Section 189 of the Act provides for detention.

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) Is seeking to enter the migration zone (other than an excised off shore place); and
(b) Would, if in the migration zone, be an unlawful non-citizen;
The officer must detain the person.

(3) 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.
(4) 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.
(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Section 196 provides:

Duration of detention
(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
(a) Removed from Australia under section 198 or 199; or
(b) Deported under section 200; or
(c) Granted a visa.
(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.
(4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.
(4A) Subject to paragraphs (1) (a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
(5) To avoid doubt, subsection (4) or (4A) applies:
(a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
(b) Whether or not a visa decision relating to the person detained is, or may be, unlawful.
(5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
(6) This section has effect despite any other law.

Section 198 provides:

Removal from Australia of unlawful non-citizens
(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the

person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) Who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) Who has not subsequently been immigration cleared; and

(c) Who either:

(i) Has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) Has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) an officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) The non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned

> in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
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> (10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

So, in summary, a person who arrives in Australia and does not have a valid visa must be detained until given a visa, released into Australia or removed.

There are no regulations determining the conditions of detention under the Act. This has been criticised by the Federal Court. on two occasions[13] and still regulations do not exist. The High Court has held that the conditions of detention do not make the detention unlawful.[14]

The High Court also held that detainees who cannot be removed from Australia, once refused refugee status, could be detained pursuant to the Act indefinitely,[15] in spite of international instruments against detention without trial and against torture.

DETENTION CENTRES IN AUSTRALIA ARE WORSE THAN THE PRISONS FOR CONVICTED CRIMINALS

Detainees in detention centres form three main groups; the over-stayers or persons without a visa who are kept in detention until they can be removed; the bad character persons who might have resided in Australia for many years but who are not citizens and are being deported under the character discretion of the Minister; and those who arrive seeking refuge. The detention system keeps all three groups in the same form of detention.

The Act does not prescribe the form detention is to take. Detention could occur in community housing, in hospitals, in hostels, in private homes. But Australia chose to build high security prison-like environments for persons who were seeking refuge and not surprisingly many of those held in these centres have suffered enormously. And now we learn that mistakes were made over who should be in detention. Ms Rau was not an aberration; she was one of 200 persons unlawfully detained in the last decade.[16]

Most nations do not detain those seeking refuge in detention centres that mirror prisons. Those which do have detention environments have

13 *S v Secretary DIMIA* (2005) 216 ALR 252 [198]; *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83 [2], [8] ff.

14 *Behrooz v Secretary, Dept of Immigration and Multicultural Affairs and Ors* (2004) 208 ALR 271.

15 *Al Kateb v Godwin and Ors* (2005) 208 ALR 124.

16 'Wrongful Detention: 200 Cases go to Inquiry', *Sydney Morning Herald* (Sydney) 25 May 2005, 1.

controls on the duration of detention, unlike Australia. Australia did not formerly detain applicants in such environments either. It is only since 1992 that such detention facilites have existed for refugee applicants and only since 1999 that they have spent more than twelve months in detention.

Health services in detention have proved to be a difficult matter for the service providers. Often the centres is a long way from a major city; often detainees arrive suffering from torture or trauma and often they have become traumatised and depressed because of the indefinite nature of their detention and uncertainty about their future.

During the last eight years most of those seeking refuge have been from Iran, Iraq and Afghanistan; countries which the West has invaded or threatened to invade. Many have developed serious mental health problems during the time in custody. Of those who arrived seeking treatment 80% – 85% were found eventually to have genuine claims under the Act for protection.[17]

For any person in Australia in need of mental health treatment hospitals and mental health services exist. Every state has mental health services for its population including those in prison. The mental health services that existed in detention centres were haphazard and failed to diagnose and treat mental illnesses and this will result in many who are now released having ongoing mental health problems.

Mental Health Legislation

In South Australia, where Baxter and Woomera Detention Centres, two of the largest and most isolated detention centres, were located, as in other states, mental health legislation exists to support the mentally ill and to provide for hospitalisation and treatment of persons at risk either to themselves or to others because of their illness. (In fact some jurisdictions don't require a mental illness, just that a person has a mental disorder).

Section 12 of the Mental Health Act (SA), which was the mental health legislation applicable in some of the cases mentioned below, says,

Orders for admission and detention

(1) If, after examining a person, a medical practitioner is satisfied—

(a) that the person has a mental illness that requires immediate treatment; and

(b) that such treatment is available in an approved treatment centre; and

(c) that the person should be admitted as a patient and detained in an approved treatment centre in the interests of his or her own health and safety or for the protection of other persons.

17 ABC Television, 'About Woomera', *Four Corners*, 19 May 2005; and Refugee Action Committee and *'Alternatives to Mandatory Detention'* <http://www.refugeeactoin.org> May 2005.

However for many years those in detention who were clearly ill and needing hospital treatment remained in detention centres, monitored by psychologists and general practitioners and if receiving any psychiatric treatment received it irregularly.

The Detention Enviroment—Mental Health Issues and the Growing Concerns

The growing concern of advocates opposing immigration detention about mental health issues came to a head with the discovery of Cornelia Rau in early 2005, languishing untreated and unwell in Baxter. Ms Rau was an Australian resident. She had left a psychiatric hospital in New South Wales in 2003 and had headed to Queensland. When behaving oddly and questioned by police she gave a false name and maintained that name during most of her immigration detention. She did this to avoid her real identity being discovered which would have resulted in her being readmitted to a psychiatric hospital.

Ms Rau's case was not unique. Vivian Alvarez Solon, an Australian citizen had been deported some years earlier to the Philippines by the Department of Immigration while unwell. She was discovered in a hospice unwell and distressed.

Before these cases mental health services in detention had been the subject of inquiries, both national and international, which were highly critical of the conditions for those who were ill.[18]

Gradually more and more staff of detention centres have and continue to come forward and speak out about the failure to provide adequate care for detainees. A doctor employed at Woomera spoke on the ABC 'Lateline' program in 2004. In his interview with Margot O'Neill, Dr Simon Lockwood said,

> I think I was myself very depressed.... I think from the sheer volume of distress that I saw and the experiences that I witnessed and just the nonsensical nature of it all, and the fact that I couldn't rationally explain it all.[19]

He said that he kept a diary of matters that were significant during his three years in Woomera. Some of his entries are grim reminders of his working life. On *Lateline* he read out the following entries: '7 April 2002, a 12 year old boy tried to kill himself today. 6 June 2002 a female detainee signed a suicide note in blood.'

He went on to decribe a meeting in Canberra where he was explaining his concerns about the degree of mental illness at Woomera to Department of Immigration and Multicultural Affairs (DIMIA) management—

18 Report of Justice Bhagwati, Regional Adviser for Asia and the Pacific for the United Nations High Commission for Human Rights; Mission to Australia, 24 May to 2 June 2002 and HREOC Report on Visit to Immigration Detention Facilities by the Human Rights Commissioner 2001 <http://www.humanrights.gov.au>.

19 <www.abc.net.au/lateline/content/2004/s1229335.htm>.

> And then towards the end of the meeting one of the bureaucrats said to me in front of everyone, That sounds all well and good to us, Simon, but we don't want to make it so nice for them in detention that they won't want to leave...The problem I had with DIMIA is that they're not doctors, they're not nurses, they're not psychologists, and yet they would do the opposite of what was recommended by an expert in child psychiatry for example.[20]

Mary Babenec, a former Baxter nurse said on the SBS programme 'Behind Closed Doors' aired on 26 April 2005,

> I worked in several detention centres and Baxter was by far the worst of all the centres and we watched people over a period of two years when I worked in detention, I watched almost everybody demonstrate illnesses that were indicative or problems associated with long term incarceration. Every day in medical clinics we had people with assorted problems that, you know, the least end of the scale we had anxieties and insomnias, right through a range of you know, symptoms of depression through to you know, we had adult bed wetters, we had a man who'd become blind...I saw people less and less able to communicate with each other, and Baxter created, or was an environment that was established almost to set up, you know, or create these problems. It was an appalling environment.[21]

Dr Malcolm Richards, who had been at Baxter in the Christmas of 2004 said on the same program:

> I sort of came up as a suburban GP to write six reports. Half way through the day I realised that I'd jumped into something very, very big and came out stunned at the state of the people I saw and really how poor their mental health (was) ... I think I saw essentially young, healthy men ground into depressed institutionalised people who only saw their future in the institution who really, and in some cases, were profoundly, profoundly unwell. As an institution one should never be judged by the easy cases, the ones that are in and out and processed in three weeks. I think that's a complete distraction. I think one should be judged by what the hard cases, the long term ones, the ones you find difficult and Baxter had failed the difficult cases absolutely.

Glenda Koutroulis, a psychiatric nurse who was employed at Woomera in 2002 for weeks, and dealt with 400 or so asylum seekers, wrote,

> As I look back on my time in Woomera Detention Centre, picturing the silver fences and razor wire mark it, entrapping all those whose implacable despair will burden Australia long after I am gone from this earth, I think about what I was involved in. It was unequivocally observation of and participation in something very indecent, devoid of the values that Mooney forwards as representing decent society. As I reflect, angry and ashamed with what I have witnessed and experienced I feel like I was unknowingly part of a perverse social experience, testing endurance in the face of deception and incongruous decisions about freedom, and the capacity to survive in those who have already struggled to survive. Seen in this light there is an urgent need for sociologists, health care workers and the public health community

20 <www.abc.net.au/lateline/content/2004/s1229335.htm>
21 ABC, *Dateline*, 26 April 2005.

> in general to take a more active political stance against a Government and its policies that actively erode the spirit, the body, and for some, even life.[22]

Lyn Bender, a psychologist who had also been at Woomera wrote in a letter in 2004 on behalf of detainees being sentenced for escaping from immigration detention, 'Daily acts of self harm were enacted, and many detainees were suffering extreme mental ill health; including severe depression and traumatic stress.'

Following the discovery of Cornelia Rau's identity the world's press became interested in what was occurring in detention centres in Australia. In an article in *Time* in February 2005 Lisa Clausan examined the detention centre system and the breakdown in the mental health of detainees. She wrote,

> Two years after he walked free from Sydney's Villawood detention centre, Mohsen Sultany should be enjoying his freedom. But the 34 years old, who fled Iran to avoid persecution for his political beliefs and is now studying surveying and writing poetry, has frequent nightmares and panic attacks: the verse he writes is always dark. He has been recognised as a refugee by the Australian government, but he can't shake free of the four years he spent in detention fighting for that recognition, or forget the attempted suicides, mental illness and mistreatment he saw there...
>
> Instituted by a Labor government in the early 1990's Australia's policy of detaining all who arrive on its shores illegally has been continued by the conservative government of John Howard since he won office in 1996... Among Australia's long-term detainees are those who have been denied refugee status; some, like Kashmiri Peter Qasim, who has been held for nearly seven years because India will not accept him without any identification papers, could spend the rest of their lives in detention.
>
> Others who have spent years in limbo are still awaiting a decision and TIME has been told that for many of these people, Australia's system for processing visa claims is not moving quickly enough. Its claimed cases are so hampered by delays, challenged decisions and inadequate legal advice that some people who are eventually deemed genuine refugees wait in detention, often with damaging psychological results, for years.[23]

Pamela Curr, a well known refugee advocate from Victoria, said on the SBS *Dateline* program,

> Right now down the road there is a nineteen year old boy sitting in his room (in Baxter) rocking backwards and forwards. He's been there for nine months. He's mentally ill, he's depressed, he's come from Kirkuk, a place that was bombed to smithereens. He's terrified of noise and he's going to still sit there until he's suicidal.[24]

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22 G Koutroulis, 'Detained Asylum Seekers, Health Care, and Questions of Human(e)ness' (2003) *Australian and New Zealand Journal of Public Health*, 267 (4) 384.
23 *Time*, 21 February 2005, 34–35.
24 Above n 21.

As Lynda Crowley-Cyr, in her article in the *University of Western Sydney Law Review* on mental illness and immigration detention, points out that the Royal Australian and New Zealand College of Physicians submission to the Senate Legal and Constitutional References Committees into the Administration and Operation of the Migration Act (29 July 2005) included the statement that, 'We are also concerned that the environment of the detention centre creates a culture which perceives disturbed behaviour as deliberately disruptive rather than a symptom of illness.'[25]

The article goes on to confirm that there are a number of areas where the treatment of psychiatric illnesses in detention was inappropriate.

The number of detainees who have suffered mental health problems may never be known without a proper inquiry but those who were eventually transferred to hospital may give an indication. In August 2006 *The Advertiser* reported on 50 detainees from Baxter transferred to Glenside Hospital:

> More than 50 mentally ill detainees at Baxter Detention Centre have been transferred to Glenside Hospital over the past four years, figures tabled in Parliament show. Immigration Minister Amanda Vanstone provided figures to Parliament showing more than half those transferred to Glenside had been detained for more than 2 years. The number of detainees transferred from Baxter, near Port Augusta, peaked in 2005 with 37 admitted to Glenside.
>
> The previous year there were only two according to Greens Senator, Kerry Nettle. Six have been admitted to Glenside so far this year.
>
> Of the 53 detainees admitted to Glenside, 20 received permanent protection visas while 17 received temporary protection visas.[26]

Some Cases Examining Mental Illness in Detention and the Consequences

In the middle of 2004 Julian Burnside QC argued a case for Ahmin Mastipour seeking orders that Mr Mastipour not be detained at Baxter or Port Headland detention centres. Mr Mastipour had been a single parent of his daughter who was aged seven when the case was first in the Federal Court.

The case concerned the punishment of Mr Mastipour who was suffering from a mental condition because of what had occurred to him in detention.

Mr Mastipour had been ordered in July 2003, while in Baxter, to take off his clothes in front of his daughter. He refused, was handcuffed then placed in the Management Unit in Baxter. He was then confined in that unit until the case challenging his placement some months later.

In the Federal Court hearing evidence was given that the cell he was confined in in the management unit at Baxter was three metres square, contained a mattress and no other furniture, had bare walls, and contained

25 Lynda Crowley-Cyr, 'Mental Illness and Indefinite Detention at the Minister's Pleasure' (2005) 9 *UWSLR* 53.

26 *The Advertiser*, 10 August 2006.

a close circuit TV which observed him, was always lit with fluorescent lighting, had no views as the windows were treated, and contained none of the personal property of Mr Mastipour. He was locked in the cell for 23 hours each day. While there his daughter had been deported back to Iran without his knowledge and with lies being told to Mr Mastipour about why she hadn't visited on one particular day. The manager of Baxter, Greg Wallis, had visited Mr. Mastipour in the unit the following day, and told him that his daughter had been returned to Iran. When Mr Mastipour said he didn't believe Mr. Wallis a phone call to Iran was arranged and Mr Mastipour spoke to his distressed daughter. Mr Mastipour then realised for the first time that she had in fact been deported.

His daughter had been in the sole custody of Mr Mastipour since 1998 by a court order in Iran (when she was two years old).

The Full Court of the Federal Court found that the Mr. Mastipour was owed a duty of care by the Minister. The evidence that had been before the Court was from a number of psychiatrists who advised the court that the grief and post-traumatic stress disorder that Mr. Mastipour was suffering from were exacerbated by his being detained in the management unit conditions listed above and by his being detained away from a capital city where better treatment would be available to him. The orders prohibiting his being held at Baxter and Port Headland mentioned above were granted by the Full Court after an appeal by the Minister against the original court's orders granting similar relief.

The Federal Court and full Federal Court decisions resulting from Mr Mastipour's matter were among the first to challenge the conditions of immigration detention.[27]

By the end of 2004 the mental health of many of the long term detainees in Baxter had deteriorated. Many had been in detention for over three years. They had arrived prior to 11 September 2001 and had watched as the world turned against persons of a Middle Eastern background regardless of whether they supported the repressive regimes in their home country or not. The level of psychiatric support was appallingly low; many working in the centre were claiming that in the absence of appropriate diagnosis signs of illness were just treated as instance of detainees acting up. Evidence before the Palmer Inquiry[28] and before the Federal Court in *Mastipour* and other cases, confirmed that psychiatric care was often not available at Baxter. There was one psychiatrist who visited irregularly; he had visited in April, August, then November 2004, for one day, and not seeing many detainees. He was not scheduled to visit again until February 2005.

Ms Rau arrived at Baxter in about October of 2004, having been initially detained in Queensland Women's Prison. She was seen by medical

27 See reference to *Behrooz* above.
28 The Inquiry into the Unlawful Detention of Cornelia Rau by Mick Palmer, 2005.

staff, she saw the psychiatrist who on his November visit—and was being 'cared for' by the psychologist who was part of the private health company contracted to deliver medical services.

By the end of November of 2004 Ms Rau was in the management unit that Ahmed Mastipour had been in. She had personal property, a mattress on the floor, twenty four hour camera surveillance, no window to look out, nothing to read or write and no TV or radio to listen to.

At that time there were about twenty detainees on hunger strike, and three detainees had climbed onto the roof on the gym. One who was refusing food and had stitched his lips together was Abdul Hamidi. I had been acting for Mr Hamidi since he had escaped from Woomera in 2001. I had asked a psychologist to prepare a report for sentencing submissions for his guilty plea for the escape charge. The psychologist, Richard Balfour, reported that he was concerned for the mental health of Mr Hamidi and thought Mr Hamidi should be transferred immediately to a hospital. As he was a psychologist he did not have the authority to commit him under the South Australian *Mental Health Act*.

After making submissions in the Magistrates Court in October 2004 for Mr Hamidi I learnt that Mr. Hamidi had not seen a psychiatrist in detention except one brief visit in August 2004 and that although on medication, he was not being treated. He had harmed himself many times; his stomach was so ribboned with scar tissue that he could no longer be stitched when he cut himself, and he had to have sterile strips instead. Both arms had cuts from the armpit to the wrist and his neck was similarly scarred. He had tried to hang himself in detention, had swallowed shampoo on one occasion, and had cut his feet.

I sought a judicial review seeking *only* that a psychiatrist be permitted to see him. I had a psychiatrist, (the wonderful Dr Jon Jureidini), who was willing to travel the 300 km to Baxter and visit for no cost. DIMIA refused, and in court argued that it was dealing with his health issues appropriately.

The GP contracted by DIMIA and the psychologist who had seen Mr Hamidi in detention gave evidence at the Federal Court in the judicial review application. Amongst other things they both confirmed that Mr Hamidi was not eating or drinking and had sewn his lips together. They denied his medical condition was as bad as reported by Mr Balfour and said he did not need any further psychiatric treatment.

Eventually, after days of evidence, the judge asked the lawyer for the Commonwealth if it was possible for a doctor to see Mr Hamidi. On 23 December 2004 Mr Hamidi was taken to the Royal Adelaide Hospital, seen by the psychiatric registrar and immediately transferred to Glenside Psychiatric Hospital. He was diagnosed as depressed and suffering from a psychotic condition. He was hearing voices. He was detained in Glenside for months and harmed himself even while in Glenside, as a result of

these voices. He was not released from Glenside, even after he obtained a protection visa, until he had recovered sufficiently to live independently. Even in 2007, he still receives psychiatric treatment.

While Mr Hamidi was before the Federal Court the three detainees referred to above remained on the roof. The roof was a good place for detainees to be seen. Baxter has been designed so that you cannot see in and detainees cannot see out. It was hot on the roof; some days it was over 30 degrees and there was no shade. After over a week the detainees were taken to the local hospital, not seen by any psychiatrist, rehydrated, then sent back to Baxter. They learnt on their return that Mr Hamidi was being cared for in a psychiatric hospital. They asked me to get medical treatment for them as well.

In February 2005 I lodged applications in the Federal Court seeking treatment in a hospital for these detainees. All were very ill. Dr Jureidini saw them; Dr Dudley from Sydney and Dr Richards from South Australia had seen them after their return from the local hospital for reports for their migration cases. All the medical reports prepared said that all three should be receiving inpatient psychiatric treatment.[29]

In mid-2005 the Federal Court brought down its decision in relation to their applications; *S v Secretary of DIMIA*.[30] This case held that the Government had failed to exercise care in the treatment of the mentally ill detainees. Justice Finn found there was systemic failure to deal with the mental health of the detainees and that detention conditions had exacerbated their mental illnesses. It was an interesting judgement, made all the more interesting by three facts—firstly that all three were in hospital by the time the judgement was delivered, second, what all three now have visas and are living in the community and third that all three continue to receive mental health treatment. All three were refugees from Iran who developed mental illnesses while in immigration detention because of the conditions of detention.

In the judgement Justice Finn said that the applications were,

> a predictable consequence of the decisions of the High Court in *Al-Kateb v Godwin* (2004) 208 ALR 124 and *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 ... In *Behrooz* it was held that the conditions of immigration detention do not affect the legality of that detention. Nonetheless a clear majority of the court accepted,

29 There was no real interest in the press about these court cases. Those of us working in the detention environment were already aware of the cases of Mastipour and Hamidi and now three more in court questioning the conditions of detention in Baxter, pointing to cruel units where people were placed who were psychiatrically unwell. Psychiatrists employed by DIMIA rarely visited. Did the press cover this story? If true, the allegations were pretty horrific. Unwell people not being treated. Well, not really. On the first day in the Federal Court for the detainees I think one journalist for *The Australian* attended. Then a strange thing happened; the Cornelia Rau story broke. On the next day in the Federal Court for the three detainees, every TV station in Adelaide and the print press attended. Now they were interested.

30 *S v Secretary DIMIA* (2005) 216 ALR 252.

> to use the words of Gleeson J (at [21]) that, 'Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution or damages. If those who manage a detention centre fail to comply with their duty of care they may be liable in tort.'[31]

In the trial the DIMIA manager of Baxter, Kay Kannis, claimed that she had attempted to locate a psychiatrist to visit Baxter from November 2004 until February 2005. In that time in Baxter there was the twenty-five or so detainees on a hunger strike, three of them on the roof, and there was Ms Rau who by all reports was in need of psychiatric assessment.[32] Ms Kannis was disbelieved by Justice Finn. In his judgment he said,

> As to the question of whether additional psychiatric services were requested by the Commonwealth in December 2004 – January 2005 to deal with the roof top protestors/hunger strikers I am satisfied that no such request was made by Ms Kannis. I do not accept her evidence on this matter. It is not reflected in the documentary material before me. It is inconsistent with the evidence of Mr Saxon (the GSL manager). It derives no support from Ms Hinton (the manager of the psychological services). I equally do not accept that, if the concern she said she had had been communicated to Canberra, it would not have elicited a response in the circumstances. There is no evidence of any response having been made.
>
> I regard Ms Kannis' evidence as a reconstructed rationalization of what she now thinks ought to have been done. In that at least her appreciation would have been correct.[33]

The cases of *Hamidi*, *Mastipour and S* examine the evidence of psychiatrists who have long claimed that the conditions in detention centres are causing mental illness. As Justice Finn in *S* said when commenting on the evidence of Doctors Dudley and Jureidini on this point,

> Dr. Jureidini's evidence for example is that he is 'not actually sure that a psychiatrist can do anything for anybody in Baxter, but if they can, it would require that the were very present in the unit'; he was critical of the regimes both of the management unit and Red 1 and the impact placement in either would have on a person with a mental illness be that placement for observation in isolation or for behavioural modifications; he considered that the fact that these two facilities exist in Baxter 'is a significant factor in anybody's life if they live in Baxter Detention Centre, because the possibility of being sent to [either] is always available'; his view was that Baxter 'is an environment almost designed to produce mental illness'; 'there is a pervasive atmosphere of hopelessness in the environment'...
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> Dr. Richards in turn expressed like views on the atmosphere and environment of Baxter (which he contrasted with Glenside): 'Baxter itself is unwell'.[34]

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31 Ibid [1].
32 Within the next six months at least eight detainees would be sent to hospital because of serious mental health issues.
33 Ibid [161], [162].
34 *S v Sec DIMIA* [181], [183].

Justice Finn found in his judgement that there had been a breach of the duty of care owed to the applicants, that the Commonwealth could not delegate its duty of care for mental health of detainees and that the conditions had 'exacerbated the mental illnesses from which (the detainees) suffered.'[35]

In March of 2006 the Federal Government settled a claim, part way through the trial, by a child who had been detained in the Woomera and Villawood detention centres—Shayan Badraie—for $400,000 for the mental harm caused to him by his detention.[36] Shayan's case was interesting as the ABC program, *Four Corners,* had, in 2002, disclosed his mental illness while he was still in Villawood Detention Centre. Shayan was seen to have stopped eating and was preoccupied with images of other detainees harming themselves. Senator Nettle asked how much it cost to litigate against Shayan before a settlement was reached. The answer was:

> ANSWER TO QUESTION ON NOTICE
> As at 7 March 2006 the total cost incurred in support of the litigation involving Shayan Badraie was:
> Legal fees: $1,390, 661.07
> Medical Reports: $86,974.70
> Other Sundry: $67,495.51
> DIMA travel costs: $4,181.43
> DIMA accommodation costs: $4,260.00
> **TOTAL: $1,553,562.71**.[37] (my emphasis).

Where to from Here?

It is obvious that the Bedraie case is not an isolated case. Many of the thousands who were processed in detention centres then granted protection vivas and other visas from the late 1990s will have ongoing mental health problems as a result of the way that Australia detained them while they were being processed. Some spent five or more years in that environment. Some will probably never realise their full potential because of the harm immigration detention has done to them.

The case of Rau has not settled yet, the case of Solon only recently. The litigants in *S* were not seeking damages. Bedraie settled after Shayan and his family were forced to go to court, only settled after considerable evidence had been called in support of his claim. The costs mentioned above do not include the settlement or the costs of his lawyers. As was reported at the time of the settlement in an on-line news report of the case,

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35 *S v Sec DIMIA* [214], [257–62].

36 <http://www.smh.com.au/news/national/immigration-pay-boy-400000/2006/03/03/1141191820943.html>.

37 '[Greens-Media] Immigration has spent nearly $2 million so far in legal costs against refugee child' (Press Release, 31 May 2006).

The Federal Government has always argued the Badraie family's detention was lawful.

But Shayan Badraie's lawyer, Rebecca Gilsenan from the firm Maurice Blackburn Cashman, says that is not the point.

'We accept that detention is mandatory and that's what the Migration Act requires,' she said.

'What the case is about is the manner in which Shayan was detained, what he witnessed while he was in detention – the fact that he witnessed many events that no child should ever have to witness.'

His desperate parents recorded a secret video inside Sydney's Villawood detention centre documenting the boy's psychological shutdown.

In the video, Mohammad Badraie explained that his son would not drink water nor eat.

He said the boy was very fearful and anxious and that Shayan just sat in a corner not speaking.

Fleeing religious persecution in Iran, the Badraie family arrived in Australia by boat in March 2000.

They were held at South Australia's Woomera detention centre for a year and there another child—a girl—was born.

Ms Gilsenan says the family was living in a very volatile environment.

'It was overcrowded, it became a very volatile environment in which there were riots, protests, there was use of tear gas and water cannons in an attempt to control those protests,' Ms Gilsenan told ABC Radio's *AM* program.

'There were a lot of unhappy, angry and mentally ill adults.'

'There were a lot of suicide attempts, hunger strikes, conflict between detainees and between detainees and detention officers.'

Ms Gilsenan says the situation did not improve when the family was transferred to Sydney.

'At Villawood detention centre, he [Shayan] and another child found a detainee in his room who had just slashed his wrists and when they found him, he was said to be bleeding profusely from his wrists and that's something that actually figured later on in Shayan's drawings—the man who slashed his wrists,' she said.

After that event, Shayan Badraie became mute, suffered night terrors and was medicated, with several psychologists regarding his development as poor.

The boy had to be admitted to hospital and on eight occasions Shayan had to be rehydrated and drip-fed.

Ms Gilsenan says the damage is expected to be permanent.

'Given his severity of his symptoms now, the seriousness of his psychiatric diagnosis, I think that Shayan will find it very difficult to develop as a normal adult, to be able to form normal relationships and to hold down employment and interact with the world as normal adult,' she said.[38]

38 <http://www.abc.net.au/news/newsitems/200508/s1447392.htm> 27 August 2005.

Persons in immigration detention who were harming themselves directly by such means as cutting themselves, or indirectly through hunger strikes were persons who were at risk to themselves and therefore were persons who should have been treated under relevant mental health legislation.

It is interesting that lawyers don't often ask why something goes wrong, but merely try to seek compensation for those who are injured as a result of fault. It may be that the resulting numbers of cases that will arise from the harm done to detainees will begin the debate on the conditions in detention centres. Maybe it won't because coincidentally, (or not), most detainees come from the very parts of the world where to challenge authority was a dangerous thing to do and many may not want to sue the Government.

After the discovery of Rau and Solon the Federal Government announced two closed inquiries, one the Palmer Inquiry which investigated the unlawful detention of Rau, the other, the Comrie Inquiry which investigated the wrongful deportation of Solon.

Both reports made recommendations that were supposed to address what was found to be systemic failures to provide for the health and wellbeing of detainees. Further, there was additional funding granted to the Commonwealth Ombudsman's office to investigate detainees and report on the compliance with the recommendations and deal with complaints.

This is not enough.

In July 2005 the Prime Minister and Senator Vanstone apologised to both Ms Rau and Ms Solon. There has not been any apology to the three applicants in the case of *S* before Finn J, to Ahmin Mastipour whose daughter was deported without his saying goodbye or being able to instruct a lawyer to prevent the deportation, to those on the *Tampa* who were found to be refugees, to those accused of throwing their children in the ocean to ensure passage into Australia or to any of the men, women and children whose lives have been ruined by their being locked in such inhumane environments.

I am certain that most that suffered and continue to suffer will just get on with their lives, and would not contemplate litigation. They are just so grateful and thankful to those in the community who did care and who supported their release. But some will, and when they do those who act in these cases have to be aware that the Commonwealth briefs lawyers to fight these cases. One has only to look at the resources used to fight the Badraie case to understand that.

Many are calling for a Royal Commission into the detention system, not just the wrongful detention or removal of persons affected by errors. It is not the errors that cause the greatest concern but the system itself.

Any inquiry has to be extensive, open and with the aim of ensuring that the next wave of asylum seekers who come to our shores and through our airports seeking sanctuary are treated with dignity and respect.