



Australian  
Human Rights  
Commission

# Immigration detention on Christmas Island

OBSERVATIONS FROM VISIT TO  
IMMIGRATION DETENTION FACILITIES  
ON CHRISTMAS ISLAND • 2012



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# 1. Introduction

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This report contains a summary of observations arising from the Australian Human Rights Commission visit to immigration detention facilities on Christmas Island in October 2012.

Commission President, Professor Gillian Triggs, visited Christmas Island from 9-12 October, assisted by two Commission staff members. The purpose of the visit was to assess the conditions of detention against internationally accepted human rights standards.

The Commission acknowledges the assistance provided by the Department of Immigration and Citizenship (DIAC) in organising and facilitating the visit, and the positive cooperation received from DIAC officers and detention service provider staff members during the visit.

The Commission provided a copy of this report to DIAC in advance of its publication, in order to provide DIAC with an opportunity to prepare a response. DIAC's response is available on the Commission's website at [www.humanrights.gov.au/human\\_rights/immigration/idc2012\\_christmasisland\\_response.html](http://www.humanrights.gov.au/human_rights/immigration/idc2012_christmasisland_response.html).

# 2. Background

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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 detention and has conducted two national inquiries into the mandatory detention system.<sup>1</sup> The Commission has concluded that Australia's system of mandatory detention breaches fundamental human rights.<sup>2</sup>

Because of these concerns, the Commission undertakes a range of monitoring activities, including making periodic visits to Australia's immigration detention facilities to assess whether conditions of detention meet internationally-accepted human rights standards.<sup>3</sup>

The Commission has visited immigration detention facilities on Christmas Island on three prior occasions in recent years, in 2008, 2009 and 2010; and published detailed reports regarding the 2009 and 2010 visits.

The Commission's 2009 and 2010 reports found that Christmas Island is not an appropriate place in which to hold people in immigration detention, for a range of reasons including the nature of the detention facilities, the limited infrastructure, the lack of community-based accommodation options and the restrictions on asylum seekers' access to essential services and support networks.<sup>4</sup>

In addition, the 2010 report found that concerns about detaining asylum seekers on Christmas Island were compounded by severe overcrowding and a consequent deterioration in many aspects of the conditions of detention.<sup>5</sup>

## 3. Summary



Christmas Island IDC.

The Commission's 2012 visit to Christmas Island was shorter than previous visits and, due to the time available, the Commission did not set out to monitor comprehensively all aspects of conditions of detention in the immigration detention facilities there. Consequently, this report provides a summary of some of the key aspects of the conditions of detention in immigration detention facilities on Christmas Island. It also provides some commentary on key aspects of Australia's current policy regarding asylum seekers who arrive in Australia by boat as it relates to people in detention on Christmas Island.

DIAC officers and staff members of detention service providers are clearly working under considerable pressures on Christmas Island, caused by a range of factors.

These include the large number of people in detention, the uncertainty amongst the detention population due to the prospect of transfer to a third country for processing of their asylum claims, and infrastructure constraints and logistical difficulties resulting from the small size and remoteness of the island. The Commission acknowledges the efforts made by staff to ensure that people in detention are treated appropriately despite the challenging circumstances.

There have been some significant developments in law, policy and practice relating to asylum seekers who have arrived in Australia without authorisation, since the Commission's 2010 report regarding conditions in immigration detention facilities on Christmas Island.

### 3. Summary

Specifically:

- From late 2010 onwards, a significant number of asylum seekers have been transferred into community-based arrangements on the mainland, either into community detention or onto a bridging visa. The Commission has welcomed this initiative.
- From March 2012, a single refugee status determination process was resumed, governed by the *Migration Act 1958* (Cth) (Migration Act), and allowing merits review by the Refugee Review Tribunal of primary decisions regarding refugee status, regardless of whether an asylum seeker arrived by air or by sea, or with or without prior authorisation. This single process applied to all asylum seekers who arrived in Australia from this time until 13 August 2012.

The most significant development, however, is the passage of legislation in August 2012, requiring the transfer of asylum seekers who arrive in Australia by boat to a 'regional processing country' for the processing of their protection claims.<sup>6</sup> Almost all of the asylum seekers detained on Christmas Island at the time of the Commission's visit arrived in Australia either on or after 13 August 2012, and as such are liable to transfer to a third country.

The Commission recognises that in some areas conditions of detention on Christmas Island have improved since the Commission's last visit in 2012, including:

- the introduction of monthly visits of one week each by a psychiatrist to Christmas Island
- the installation of dental facilities on Christmas Island and regular visits by a dentist to Christmas Island
- the establishment of children's play equipment within the Construction Camp facility.

However, following this visit to immigration detention facilities on Christmas Island, the Commission continues to hold serious concerns about the appropriateness of holding asylum seekers in immigration detention on Christmas Island.

The Commission's major concerns are summarised below and discussed in further detail throughout this report.

#### Overarching legislative and policy concerns

- The Migration Act now requires that all people who arrive in excised offshore places without authorisation are subject to mandatory detention.
- Asylum seekers who have arrived in Australia since 13 August 2012, including families with children and unaccompanied minors, are required to be transferred to a 'regional processing country' as 'soon as reasonably practicable'. In the Commission's view, transfer of asylum seekers to a third country for processing of their protection claims could lead to serious human rights breaches.<sup>7</sup>
- At the time of the Commission's visit, those asylum seekers liable to transfer to a third country for processing of their protection claims did not know how long they might remain in immigration detention in Australia, when they might be transferred to a third country, or precisely when the processing of their protection claims might commence. The Commission has welcomed the subsequent announcement that some asylum seekers liable for transfer to a third country will be granted bridging visas and will have their claims processed in Australia. The Commission urges the transfer of asylum seekers currently in detention into community-based arrangements as soon as possible.

#### Transfer of asylum seekers to third countries for processing of their protection claims

- DIAC officers on Christmas Island face significant difficulties in providing adequate information to people in detention about the potential transfer of asylum seekers to third countries for processing of their protection claims.
- The restrictive high security compound, the Support Unit, is currently used for the processing of people whose transfer to a third country is imminent.

## Detention of unaccompanied minors and families with children

- Children continue to be subjected to mandatory detention on Christmas Island, in breach of Australia's obligations under the *Convention on the Rights of the Child* (CRC).
  - Families with children and unaccompanied minors are detained in closed immigration detention facilities on Christmas Island (the Construction Camp, Aqua Compound and Lilac Compound). In the Commission's view, none of these facilities provide an appropriate environment for families with children or unaccompanied minors.
  - At the time of the Commission's visit, a mix of single adult men and families with children were being detained in the Aqua Compound. This co-location of different groups of people poses a risk to safety and may lead to a breach of Australia's obligations under the CRC.
  - There remains a conflict of interest in the Minister for Immigration and Citizenship or DIAC officers, under delegation, acting as the legal guardian of unaccompanied minors detained on Christmas Island.
- The very large number of people detained in immigration detention facilities on Christmas Island has placed strain on access to facilities and services in all immigration detention facilities, including communication facilities, recreational facilities, educational activities and opportunities for people to leave the detention environment on external excursions.

## Access to mental health care

- The Commission heard that there has been a substantial increase in demand for mental health services on Christmas Island, and is concerned that the mental health service currently operating there may not be able to meet this increased level of demand.

## Conditions and services in detention

- The immigration detention facilities on Christmas Island are not appropriate for asylum seekers. The Commission has ongoing concerns about the prison-like nature of the Christmas Island Immigration Detention Centre (IDC), the harsh conditions in the Aqua and Lilac compounds, and the inappropriateness of the Construction Camp as a place for accommodating families with children and unaccompanied minors.
- The Commission found that there was significant overcrowding in immigration detention facilities on Christmas Island, most noticeably in Aqua Compound and the Construction Camp. Overcrowding has a significantly negative impact on the living conditions for many people, particularly those accommodated in dormitory bedrooms.

## 4. Activities undertaken during the visit



Accommodation tent, Phosphate Hill Bravo Compound.

During its visit the Commission undertook the following activities:

- entry and exit meetings with DIAC and Serco management
- meetings with staff members of health and mental health service providers
- tours of Christmas Island IDC, Aqua Compound, Lilac Compound, the Construction Camp immigration detention facility and the Phosphate Hill Processing Centre
- individual and group meetings with people detained at the Christmas Island IDC, Aqua Compound, Lilac Compound and the Construction Camp immigration detention facilities
- a meeting with a representative from Maximus Solutions, an organisation contracted by DIAC to provide independent observers to sit in on official interviews undertaken with people who say that they are under 18 years of age
- a meeting with representatives from the International Organisation for Migration.



## 5. Overview:

# Immigration detention on Christmas Island

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The vast majority of the people in immigration detention on Christmas Island are asylum seekers. A small number of crew members are also detained on Christmas Island. At the time of the Commission's visit almost all of the asylum seekers in detention on Christmas Island had arrived on or after 13 August 2012, and are therefore liable to be transferred to a third country for processing of their protection claims.

During the Commission's visit, there were 1989 people in detention on Christmas Island, including 315 children.<sup>8</sup>

DIAC informed the Commission that at the time of the Commission's visit, the majority of people detained on Christmas Island were Sri Lankan (944 people) or Iranian (415 people). Other major nationalities included Afghani (267 people), Pakistani (121 people), Iraqi (111 people) and Burmese (68 people). In addition, 38 people reported that they were stateless.<sup>9</sup>

The majority of people in detention on Christmas Island at the time of the Commission's visit arrived in Australia on or after 13 August 2012. There were 212 people who arrived in Australia during August, 1593 people who arrived during September and 181 people who arrived during October.

There are five immigration detention facilities on Christmas Island:

- Christmas Island IDC, a high security detention centre used for adult males, with an operational capacity of 400 and a contingency capacity of 850. When the Commission visited, there were 975 adult men detained in the IDC.
- Lilac Compound, a secure immigration detention facility adjacent to the Christmas Island IDC, which at the time of the Commission's visit was primarily used for unaccompanied minors. Lilac Compound has an operational capacity of 150 and a contingency capacity of 200. When the Commission visited, there were 114 people detained in Lilac Compound, including 101 unaccompanied minors and 13 adult men.

- Aqua Compound, a secure immigration detention facility adjacent to Lilac Compound, which at the time of the Commission's visit was used to accommodate a mix of single adult men, families with children and unaccompanied minors. Aqua Compound has an operational capacity of 200 and a contingency capacity of 400. When the Commission visited, there were 415 people detained in Aqua Compound, including 347 men, 33 women and 35 children.
- The Construction Camp immigration detention facility, a low security detention facility, which at the time of the Commission's visit was primarily used to accommodate family groups, including families with children. The Construction Camp has an operational capacity of 200 and a contingency capacity of 310. When the Commission visited, there were 485 people detained in the Construction Camp, including 144 men, 162 women and 179 children.

At the time of the Commission's visit, the detention facilities were being operated by Serco Australia, the detention service provider contracted by the Australian Government.

## 6. Third country processing of asylum seekers' protection claims

In August 2012 the Commonwealth Parliament passed legislation that requires that asylum seekers who arrive in Australia's excised offshore places without authorisation are sent to a 'regional processing country' as soon as is 'reasonably practicable'.<sup>10</sup> In August and September 2012 respectively, the Australian Government formalised memoranda of understanding with the governments of Nauru and Papua New Guinea. In September and October 2012 respectively, Nauru and Papua New Guinea were designated as 'regional processing countries' under the Migration Act. On 13 September 2012, the first group of asylum seekers were sent from Christmas Island to Nauru.

As almost all the asylum seekers in detention on Christmas Island at the time of the Commission's visit arrived on or after 13 August 2012, the Commission considered aspects of their treatment relevant to their potential transfer to a third country. These include the extent to which they were provided information about the legislative changes, the pre-transfer risk assessment processes, and some aspects of the transfer process itself.

DIAC and Serco management reported that people in detention on Christmas Island who could be subject to transfer to a third country for processing of their protection claims face no restrictions while they are in immigration detention in Australia. For example, they have access to telephones and the internet equal to that of people previously detained on Christmas Island whose protection claims were to be processed in Australia.

### 6.1 Information about third country processing arrangements

Some asylum seekers in detention on Christmas Island said that they had not received sufficient information about the possibility that they may be transferred to a third country for processing of their protection claims. Some people expressed the view that DIAC Case Managers were not able to adequately answer any of their questions. The Commission recognises that DIAC staff, including Case Managers, have been in an extremely difficult position, as in many cases they have not been able to answer questions posed by asylum seekers relating to when they might be transferred to a 'regional processing country' or how long they might expect to stay in a 'regional processing country'.

It was clear from the Commission's visit that information is provided to all asylum seekers liable to transfer to a third country for processing of their protection claims, as part of the induction information provided on arrival at Christmas Island. The Commission was provided with the script for the statement that was read to asylum seekers at the time of the Commission's visit. The statement clearly says that 'anyone who arrived in Australia by boat on or after 13 August 2012, to seek protection, is liable to be transferred to a regional processing country to have their protection claims assessed'. The statement acknowledges that 'this information may cause uncertainty regarding your future', and explains that prior to transfer asylum seekers will have 'access to a range of services including doctors and psychological support staff'.<sup>11</sup>

However, the Commission is concerned that nowhere in the script, or the suggested answers to questions, is it stated that asylum seekers will be safe in Nauru or any other 'regional processing country'. Some people in detention on Christmas Island expressed concern about their safety following transfer.

### 6.2 Pre-transfer risk assessment processes

During the Commission's visit it was clear that DIAC, Serco and health services provider staff all took the pre-transfer risk assessment process seriously and that measures were being taken to ensure that any person with a vulnerability that they believed could not be adequately managed in a third country would be referred to the Minister with a recommendation that he exercise his discretionary power under s198AE of the Migration Act to exempt the person from transfer to a 'regional processing country'. It appeared that particular weight was being given to the health services provider's assessment of whether a person has any health-related vulnerabilities.

Following the Commission's visit, the documents relating to pre-transfer assessment processes have been made public, including:

- *Departmental guidelines for assessment of persons prior to transfer pursuant to section 198AD(2) of the Migration Act 1958* (Section 198AD(2) guidelines)
- *Minister's determination power under section 198AE of the Migration Act 1958 to determine that section 198AD does not apply* (Section 198AE guidelines).

This report will not provide a detailed analysis of these documents. However, it is worth noting a few important points:

- The Section 198AD(2) guidelines indicate that all unaccompanied minors (and other children where unusual circumstances suggest that it may not be in the child's best interests to remain with a family group) should be referred to the Guardianship Policy Section which will organise a best interest determination.<sup>12</sup> The Minister has requested that cases where the relevant officer has assessed that it would be in the best interests of an unaccompanied minor to remain in Australia are referred to him for consideration of exercise of his power to determine that they are not transferred to a third country.<sup>13</sup> The CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Consequently, it is appropriate that a best interests determination is undertaken and the results considered by the Minister. However, the Commission holds serious concerns about whether it could ever be in an unaccompanied minor's best interests to be transferred to a third country for processing of his or her protection claims.
- All of these documents consider the principle of family unity. The Section 198AD(2) guidelines indicate that there is provision in the Migration Act for dependants of people liable for transfer to a third country for processing of their protection claims to be transferred to a regional processing country with that person as a family group.<sup>14</sup> The Minister has also requested that cases where a person liable for transfer has a 'spouse/partner, parent or child in Australia who will not be taken' to a regional processing country with the offshore entry person be referred to him for consideration of his power to determine that a person is not transferred to a third country.<sup>15</sup> The Commission recognises that the specific circumstances of each family will impact on which alternative might apply, in particular the immigration status of the family members residing in Australia. However, whatever the immigration status of family members in Australia, the Commission believes that people who have arrived in Australia by boat from 13 August 2012 onwards who have family members in Australia should not be transferred to a third country for processing of their protection claims.

- The documents make it clear that the pre-transfer assessment process will consider the issue of whether a person liable to be transferred to a third country has credible protection claims against the third country. The Section 198AD(2) guidelines state that: 'Where a person has raised protection claims against a designated RPC [regional processing country], the departmental officer should refer to the relevant country information and assurances given by the RPC ... to assess if those claims are credible.'<sup>16</sup> The guidelines go on to state that: 'Advice can be sought from an Onshore Protection officer with training and expertise in the consideration of protection claims.'<sup>17</sup> The Commission has serious concerns that the guidelines indicate that 'assurances given by the RPC' should be taken into account in assessing a claim for protection raised in this country. This runs counter to internationally established processes for the assessment of protection claims. In addition, the guidelines do not indicate that the person making the assessment has any appropriate training to consider protection claims, nor does it give any guidance as to the circumstances in which advice should be sought from an Onshore Protection officer. The Commission has serious concerns that these guidelines do not provide the guidance necessary to ensure that a robust assessment is made of any protection claims that may be raised in a 'regional processing country'.

### 6.3 Transfer processes

During its visit to Christmas Island the Commission was informed that the high security Support Unit is used on the day of transfer as a venue for the final steps in processing people who have been selected for transfer to a third country. The Support Unit is a self-contained, high security unit, situated in the IDC. The bedrooms are essentially small cells, with solid metal doors and grills on the windows. All furniture is hard and bolted to the floor. There are CCTV cameras in the bedrooms, including the toilet and bathroom areas, which cannot be turned off.

The Commission recognises that DIAC may perceive a need to hold people whose transfer is imminent in a secure environment separate from the rest of the population, and that they are operating within the infrastructure constraints of the IDC. Nevertheless, the Commission has significant concerns about the placement of asylum seekers in such a restrictive facility, even for a very short period of time.

## 7. Potential for indefinite or arbitrary detention of asylum seekers subject to transfer to a ‘regional processing country’

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The Commission is seriously concerned at the mandatory, indefinite and potentially prolonged detention of the large number of people who have arrived in Australia on or after 13 August 2012. Any person who has arrived in Australia on or after this date is liable to be transferred to a third country for processing of their protection claims.<sup>18</sup>

Following the recent amendments, the Migration Act now requires the detention of people who arrive in excised offshore places.<sup>19</sup> In the Commission’s view, instead of requiring the mandatory detention of broad groups of people, Australian law and policy should only require the detention of a person if it is necessary in their individual case. Further, time limits and access to judicial oversight should be introduced to ensure that if a person is detained, they are not detained for any longer than is necessary. These are basic protections and are required of the Australian Government under its international obligations, including the obligation to ensure that no person is arbitrarily detained.

The Commission acknowledges that the use of immigration detention *may* be legitimate for a strictly limited period of time. However, the need to detain should be assessed on a case-by-case basis taking into consideration individual circumstances. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in community-based alternatives to detention – if necessary, with appropriate conditions imposed to mitigate any identified risks. This includes people liable to be transferred to a third country for processing of their protection claims.

The Commission has long held the view that 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>20</sup>

The Commission welcomes the announcement that some people who arrived in Australia after 13 August 2012 will be granted bridging visas and permitted to live in the community. However, the Commission is concerned that without the right to work these people will find it difficult to maintain an adequate standard of living. The Australian Government should ensure that all people transferred into community-based arrangements are provided with an adequate level of support.

The Commission remains concerned that some people who are liable to be transferred to a third country for processing of their protection claims, including children, may still face prolonged periods of detention in closed facilities prior to being transferred into community-based arrangements. The Commission urges the prompt consideration of all post-13 August 2012 arrivals for community-based arrangements.

## 8. Mandatory detention of children on Christmas Island

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The Commission has particular concerns that families with children and unaccompanied minors continue to be subject to mandatory detention on Christmas Island, despite the Migration Act containing as a principle that a minor shall only be detained as a measure of last resort.<sup>21</sup> As noted above, the Commission has long opposed the mandatory detention of children because it leads to fundamental breaches of their human rights, including their right to be detained only as a last resort, and for the shortest appropriate period of time.<sup>22</sup> In order to comply with its obligation under the CRC, in deciding whether to detain a child, the Australian Government should consider any less restrictive alternatives available. A child should only be detained in exceptional circumstances.<sup>23</sup>

The Commission continues to advocate for changes to the Migration Act to ensure that children are only detained as a measure of last resort; and that if they are detained, it is for the shortest appropriate period of time and subject to independent and judicial review mechanisms.<sup>24</sup>

The Commission has repeatedly recommended that the Australian Government should implement the recommendations of the report, of the National Inquiry into Children in Immigration Detention, *A last resort?*, that Australia's immigration detention laws be amended to comply with the CRC, including:

- 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 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 children must be a primary consideration
    - the preservation of family unity
    - special protection and assistance for unaccompanied children.<sup>25</sup>

## 9. Detention placement for children on Christmas Island

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The Commission has welcomed the commitment made by the Australian Government that children will not be held in high security immigration detention facilities.<sup>26</sup> However, while children are no longer detained in high security facilities, they are still detained in closed low security facilities. On Christmas Island they are detained in Aqua and Lilac compounds and the Construction Camp facility. As discussed below, the Commission believes that it is misleading to call any of these facilities alternative places of detention. These are all secure facilities, from which people who are detained there are not free to come and go. In the Commission's view, none of these facilities provide appropriate accommodation for families and children or unaccompanied minors. In Aqua and Lilac compounds, the conditions are particularly harsh.

During its recent visit, the Commission was very concerned to observe the co-location of families with children and single adult men in Aqua Compound. The Commission recognises the significant logistical difficulties faced by DIAC in accommodating the large number of boat arrivals in recent months. However, Australia has obligations under the CRC to ensure that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'.<sup>27</sup> The co-location of children with adults to whom they are not related could amount to a breach of this right.

A spokesperson for the Minister for Immigration and Citizenship has said that family groups and single adult men are only co-located if they had shared a boat and while initial health checks were completed.<sup>28</sup> However, when the Commission visited Aqua Compound there were people accommodated there from a number of different boats.

That this situation has occurred reinforces the Commission's view that Christmas Island is an inappropriate place in which to detain asylum seekers, especially child asylum seekers.

# 10. Unaccompanied minors in detention

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Australia's obligations under the CRC to only detain children as a measure of last resort and for the shortest appropriate period of time apply to unaccompanied minors.<sup>29</sup> UNHCR guidelines also provide that unaccompanied minors should not be detained, particularly in isolated areas.<sup>30</sup> In addition, because of their particular vulnerability, the CRC requires that the government provide unaccompanied minors with special protection and assistance.<sup>31</sup>

During the Commission's visit to Christmas Island, there were 101 unaccompanied minors detained in Lilac Compound. As discussed in section 11.3 below, the Commission did not find the conditions in Lilac Compound appropriate for immigration detention purposes, and especially inappropriate for the detention of children.

Unaccompanied minors detained on Christmas Island do not have dedicated carers. They are supervised by Serco officers. An Independent Observer is generally present as a support person at all interviews of unaccompanied minors. DIAC currently contracts the company Maximus Solutions to provide Independent Observers on Christmas Island. It is important to note that the role of an Independent Observer is very limited. Independent Observers do not advocate or care for unaccompanied minors in detention more generally and do not provide advice or information to minors about the interviews in which they are participating. Rather, they observe interviews to ensure that the minor is treated appropriately and can ask for an interview to be paused if they feel that the unaccompanied minor is stressed.

The Commission's visit to Christmas Island has reinforced its long-standing concerns regarding the guardianship arrangements for unaccompanied minors seeking asylum in Australia. The CRC requires Australia to ensure 'alternative care' for unaccompanied minors.<sup>32</sup> Effective guardianship is an important element of the care that unaccompanied minors need. The CRC also requires that the best interests of the child be the 'basic concern' of the child's legal guardian.<sup>33</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.

In Australia, the Minister for Immigration and Citizenship is the legal guardian of all unaccompanied minors seeking asylum. The Minister can delegate those powers to DIAC officers. The Commission has for many years raised concerns about these arrangements. In the Commission's view, they create a fundamental conflict of interest. It is not possible for the Minister or a DIAC officer to ensure that the best interests of an unaccompanied minor are their primary consideration when they are simultaneously the child's guardian, the detaining authority and, in the case of the Minister, the decision-maker about whether the child will be transferred to a third country. The Commission's concerns about the guardianship arrangements for unaccompanied minors have been heightened by the arrangements to transfer asylum seekers, including unaccompanied minors, to third countries for processing of their protection claims. In the Commission's view, the fact that the Minister for Immigration no longer has to provide his consent in writing for a child for whom he acts as guardian to be removed from Australia does not remove the conflict of interest inherent in his multiple roles.

The Commission has repeatedly recommended that an independent guardian should be appointed for unaccompanied minors in immigration detention.

The Commission met with a number of unaccompanied minors in detention on Christmas Island. Some of these children expressed significant anxiety about the possibility that they would be transferred to Nauru, the length of time that it might take for their claims to be processed, and the length of time that they might be separated from their families. The boys reported uniformly that they have been well treated by staff in immigration detention. Their primary concern regarding conditions of detention was that they are offered insufficient meaningful activities with which to occupy their time in detention.

# 11. Conditions of detention

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Under international standards, authorities should seek to minimise differences between life in detention and life at liberty in the design and delivery of detention services and facilities.<sup>34</sup>

The Commission has previously raised concerns that the immigration detention facilities on Christmas Island are not appropriate for asylum seekers, particularly families with children and people with a background of torture or trauma. The Commission acknowledges that DIAC is working within considerable infrastructure constraints on Christmas Island. However, in the Commission's view, the fact that suitable infrastructure is not available on Christmas Island is one reason why people should not be detained on the island.

During the Commission's visit it appeared that the overcrowding of all facilities was having a significant impact on both the conditions of detention and the services provided to people in detention on Christmas Island. At the time of the Commission's visit, a large number of people were sleeping in dormitory accommodation. In addition, the Commission observed situations where people in detention had to queue for long periods of time for meals, or to purchase items at the canteen. The Commission also heard from people in detention about the impact of overcrowding, particularly on their access to educational and recreational programs. Serco management acknowledged that the significant numbers of recent arrivals had placed a strain on some service delivery areas. For example, they reported that there had been delays in the processing of property.

The following sections of this report describe conditions in each of the immigration detention facilities on Christmas Island. The report then discusses issues relating to staff treatment and to the provision of health and mental health care; access to communication facilities; and the provision of education and recreational activities.

## 11.1 Conditions of detention in the 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 area. The IDC is used to detain adult males. When the Commission visited, there were 975 men in the IDC.

Previous Commission reports have expressed concern about the prison-like nature of the Christmas Island IDC and have recommended that it should not be used for accommodating asylum seekers.<sup>35</sup> The Commission has expressed particular concerns about some security measures, including high wire fences, walkways enclosed in cage-like structures, CCTV surveillance, metal reinforced officer booths with perspex security screens, and metal grills on bedroom windows.<sup>36</sup> This infrastructure all remains in place.

The Commission has also previously noted positively the freedom of movement for people within the facility. During this visit as well, the Commission was pleased to observe that the IDC was being operated in a relatively open way, with people detained there having freedom of movement between their accommodation compound and the shared open areas during the day (other than at meal times).

However, the Commission's overarching concerns about the prison-like nature of the IDC remain. Asylum seekers are detained under the Migration Act because they do not have a valid visa. They are not detained because they are under police arrest or because they have been charged with or convicted of a criminal offence. The treatment of people in immigration detention should therefore be as favourable as possible, and in no way less favourable than that of untried or convicted prisoners.<sup>37</sup>

As with all other immigration detention facilities visited on Christmas Island, the Commission's overarching concern with the IDC regards overcrowding. Each of the accommodation compounds in the IDC was operating at surge capacity, with dormitory rooms containing approximately 20 beds, and some with activities rooms also converted to accommodation, containing approximately 14 beds. In addition, Education 3, a compound that was formerly used for educational and recreational activities, is currently being used as accommodation, with bunk beds having been placed in most of the rooms. The Commission is concerned that an education compound is being used for accommodation, given the significant pressure on the recreational facilities in the remainder of the IDC.





Accommodation compound, Christmas Island IDC.

As discussed in section 6.3 above, the Commission also has concerns about the Support Unit located within the Christmas Island IDC. As described above, the Support Unit is a self-contained, high security unit, in which the bedrooms are essentially small cells, all furniture is hard, with CCTV cameras in the bedrooms, including the toilet and bathroom areas, which cannot be turned off. The Commission has serious concerns that the CCTV cameras could breach the right to privacy as well as the right of people deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person.<sup>38</sup>

The Commission recognises that, prior to the commencement of transfers to third countries, the Support Unit has been infrequently used. During the visit the Commission was informed that during the previous six months it had not been used on any occasion for a period of more than 48 hours. The Commission also recognises that there may be occasions where it is necessary to separate one or more persons from the remainder of the population for either behavioural reasons or due to vulnerabilities.

However, the Commission has serious concerns that people with vulnerabilities could be detained in such a restrictive facility for any period of time. In the Commission's view, prior to a decision being made to place a person in the Support Unit, consideration should be given to an assessment conducted by the health services provider of the potential impacts of that placement on the person's health and mental health.

Since the Commission's last visit to Christmas Island, two of the accommodation compounds, White One and White Two, have been modified to enable their use for clients with specific vulnerabilities or clients with behaviour management issues. The Commission was not able to observe the use of these compounds for these purposes, as at the time of the Commission's visit they were being used as general accommodation compounds due to the high numbers of people detained in the IDC.



Dining area in accommodation compound, Christmas Island IDC.

However, DIAC and Serco officers described the system of placement that had been employed. In White One, which was used for behaviour management, the Commission was told that people were placed on behaviour management plans which were reviewed daily, and the compound operated with a very high ratio of staff to people detained. The Commission was told that in White Two, used for people with vulnerabilities, there was also a very high ratio of staff to people detained, and an intensive program of activities, which the health services provider was involved in delivering. The Commission was also informed that there has been a 92 per cent reduction in incidents since the White compounds began to be used in this manner.

The Commission supports the provision of intensive support to vulnerable people in detention. However, the Commission has some concerns about the alteration to the infrastructure in White One and White Two. In both of these compounds, wire mesh has been installed along the balcony of the upper accommodation floor to prevent objects being thrown from the upper to lower floor and to prevent people jumping from the balcony.

While the Commission recognises that there are safety reasons for having done so, this mesh contributes to the prison-like feel of the compounds.

### 11.2 Conditions of detention in Aqua Compound

Aqua Compound is located on the edge of the Christmas Island IDC. It has an operational capacity of 200 and a contingency capacity of 400. At the time of the Commission's visit there were 415 people detained in Aqua Compound, including 347 men, 33 women and 35 children.

Aqua Compound is described by DIAC as an alternative place of detention. In the Commission's view this is a misnomer. It is a secure facility, surrounded by a high wire fence. The Commission found the conditions in Aqua Compound to be particularly harsh. The compound consists of a series of demountable buildings, containing bedrooms, bathrooms and a dining area.

The compound has extremely limited internal recreation areas, and no dedicated external recreation area. There is also no grass, and little shade. There is no play equipment provided for children.

The Commission recognises the logistical challenges faced by DIAC given the very large numbers of arrivals in recent months, and that Aqua Compound is currently generally used to accommodate people for short periods of time until they are moved to more appropriate accommodation. However, in the Commission's view Aqua Compound is unsuitable for accommodating families and children.

As discussed in section 9 above, the Commission also has serious concerns about the co-location of single adult men and families with children in Aqua Compound.

### 11.3 Conditions of detention in Lilac Compound

Lilac Compound is immediately adjacent to Aqua Compound. It has an operational capacity of 150 and a contingency capacity of 200. At the time of the Commission's visit there were 114 people detained in Lilac Compound, including 101 unaccompanied children and 13 adult men.

Lilac Compound is also described by DIAC as an alternative place of detention, which the Commission also believes is a misnomer. Lilac Compound is a secure facility surrounded by a high wire fence, with harsh conditions. The compound consists of a series of demountable buildings, including accommodation blocks, a dining area, and some limited indoor recreation areas. There are also three open cabanas offering some external shaded communal space. Although there is more open space in Lilac Compound than in Aqua Compound, the compound has no grass, little shade and the area dedicated to sport had a dirt surface.

In the Commission's view, Lilac Compound is unsuitable for accommodating unaccompanied minors.

### 11.4 Conditions of detention in the Construction Camp

The Construction Camp immigration detention facility is a low security facility, which was formerly a camp used to accommodate construction workers. It is located across the road from the Phosphate Hill facility, approximately 5 kilometres from the island's town area. It consists of demountable buildings, with accommodation blocks joined by covered wooden decking, as well as a large dining room, a large recreation room, several smaller classrooms or recreation rooms and a small medical clinic. The facility is primarily used to detain families with children.

The Construction Camp has an operational capacity of 200 and a contingency capacity of 310. When the Commission visited, there were 485 people detained in the Construction Camp – 144 men, 162 women and 179 children.

As with Lilac and Aqua Compounds, the Commission believes that it is misleading to describe the Construction Camp as an alternative place of detention. While it is a low security facility, people are not free to come and go.

The Commission recognises that there have been some improvements at the Construction Camp since the last Commission visit, including the installation of a children's play area, and the fact that the dining area and a large recreation room are no longer used to process new boat arrivals to Christmas Island, making more space available for meal times and for recreation activities.

However, the Commission continues to hold serious concerns about the suitability of the Construction Camp as an immigration detention facility, particularly given the very large number of people currently detained there. The Construction Camp is cramped, and has limited internal or external recreation spaces. There is no open grassy area within the facility and very limited access to the community oval next door to the facility. In the Commission's view, the Construction Camp is not an appropriate facility in which to detain families with children.



Bunks inside an accommodation tent, Phosphate Hill Bravo Compound.

### 11.5 Conditions of detention in the Phosphate Hill Processing Centre

The Phosphate Hill Processing Centre is across the road from the Construction Camp. It consists of three compounds which are used to accommodate people when they first arrive on Christmas Island and while they are processed. The Commission was informed that people arriving on Christmas Island are usually only detained at the Phosphate Hill facility for one or two days while their processing is completed.

There was no-one detained at the Phosphate Hill facility during the Commission's visit.

As with Aqua and Lilac Compounds and the Construction Camp, the Phosphate Hill facility consists of demountable accommodation blocks, as well as several large demountable buildings which are used for processing. The Commission's primary concern with the Phosphate Hill facility was regarding three large tents that have been installed in the middle of the Bravo Compound. The tents are used for accommodation purposes, each containing bunk beds for approximately 40 people. In the Commission's view, this accommodation is suitable for only the shortest possible period of time. The installation of the tents has meant that there is now limited open grassy space in the Bravo Compound. The only external recreation space available in this compound is found in two cabanas which offer some shade and some outdoor seating areas.

## 12. Treatment by staff

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Under international human rights standards, all people deprived of their liberty are to be treated with humanity and with respect for the inherent dignity of the human person.<sup>39</sup> The manner in which people in immigration detention are treated by DIAC, Serco and other service provider staff can have significant impacts on their experience in detention and on their physical and mental wellbeing.

During the Commission's visit to immigration detention facilities on Christmas Island, the Commission observed positive interaction between staff and people in detention. In addition, almost all of the people detained in each of the facilities visited by Commission staff reported that they felt that they were treated with respect by DIAC, Serco and IHMS staff working in the detention facilities.

## 13. Access to physical and mental health care

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Under international human rights standards, all people have a right to the highest attainable standard of physical and mental health.<sup>40</sup> Each person in detention is entitled to medical care and treatment provided in a manner which is culturally appropriate, and of a standard which is commensurate with that provided in the general community. This should include preventive and remedial medical care and treatment including dental, ophthalmological and mental health care whenever necessary. Each person in immigration detention should also be entitled to obtain a second medical examination or opinion.<sup>41</sup>

The Commission has in the past expressed concerns regarding the availability of health and mental health care for people detained on Christmas Island.<sup>42</sup> The Commission acknowledges that there have been positive developments since the Commission's visit to Christmas Island in 2010, including the introduction of visits by a psychiatrist for one week each month and the installation of a dental van.

However, the Commission remains concerned about the difficulty of providing adequate health and mental health care for a large detainee population in such a small and remote community. The Commission's most significant concern following the visit is the capacity of the mental health services provided on Christmas Island to cope with the apparently large number of people in detention requesting appointments regarding their mental health.

### 13.1 Health care

Health care services for people in detention on Christmas Island are primarily provided by IHMS, a private company contracted by DIAC. At the time of the Commission's visit, IHMS was operating the following services in immigration detention facilities on Christmas Island:

- Christmas Island IDC: a general nursing and mental health clinic seven days a week and a GP clinic on week days

## 13. Access to physical and mental health care

- Lilac and Aqua compounds: a general nursing clinic on week days, a GP clinic three days a week and a mental health clinic once a week
- Construction Camp: a general nursing clinic seven days a week, a GP clinic on week days and mental health services on week days.

The local hospital is run by the Indian Ocean Territories Health Service (IOTHS). IOTHS provide basic in-patient services as needed.

The IHMS service standard requires that no person in detention should have to wait more than three business days for a consultation with a general practitioner. IHMS reported that they were currently meeting this standard.<sup>43</sup> However, the Commission met with some people in detention in both the Christmas Island IDC and in Lilac Compound who reported that they had to wait for a longer period of time for an appointment. At the time of the Commission's visit, the dedicated clinic had only recently been established in Aqua and Lilac compounds, which might be expected to reduce waiting times for people in those compounds.

There remains very limited access to specialist care on Christmas Island. IHMS staff informed the Commission that specialist referrals are made by IHMS doctors to the IHMS Health Services Manager. Cases are then discussed with DIAC regarding possible placement and then a referral is made to the appropriate facility on the mainland. The Commission has in the past held serious concerns about the capacity for people detained on Christmas Island to obtain specialist appointments, and has observed that the remoteness of Christmas Island means that people in detention who feel that they have not been provided with appropriate or prompt access to specialist care are not able to initiate that access independently, even if they are able to pay for it themselves. The Commission met with a few people in detention who felt that they may need specialist care that would not be available on Christmas Island. However, the Commission's concerns about access to specialist care are not as serious as they have been in past years as most people are currently being transferred off Christmas Island within a relatively short period of time. Should people be detained on Christmas Island for longer periods of time, this issue may once again become of more significant concern.

### 13.2 Mental health care

Mental health services for people in detention on Christmas Island are primarily provided by IHMS, which runs mental health clinics in each of the immigration detention facilities on Christmas Island at least once a week.

Under DIAC's policy on mental health screening for people in immigration detention, IHMS does initial screening within 72 hours of a person's arrival, and a mental health assessment within a week.<sup>44</sup> People in detention can request an appointment at any time and DIAC, Serco or IHMS staff can flag concerns that a person may be in need of mental health care or treatment.<sup>45</sup>

People in immigration detention who are considered to be at risk of self-harm or suicide are managed through the Psychological Support Program (PSP).<sup>46</sup> Under the PSP, people in immigration detention who are identified to be at risk of self-harm or suicide are managed according to one of three levels of risk, with observation by IHMS, DIAC or Serco staff. The Commission was informed that at the time of this visit, there were only three or four people on PSP.

Following previous visits to immigration detention facilities, including on Christmas Island, the Commission has found that there is a clear link between the length of time for which a person has been detained and their mental health.<sup>47</sup> At the time of the Commission's visit a significant majority of the people in detention on Christmas Island had been detained for less than two months. As such, the Commission did not observe any deterioration in the mental health of people in detention as a consequence of prolonged detention. However, some people expressed concern about the impact that prolonged detention might have on their mental health. For example, one person told the Commission: 'If we stay here for a long time we have to make trouble because we get mental problems, because we don't see our families.'<sup>48</sup>

During the visit to Christmas Island, the Commission heard that there had recently been a significant increase in demand for mental health services. The Commission acknowledges that there has been an increase in health staff on Christmas Island recently, but is concerned that the increase may not be sufficient to meet the increased level of demand.

Many people in detention told the Commission that the possibility of being transferred to a third country for processing of their protection claims was causing them significant anxiety. People expressed concern about the length of time that they might be required to stay in a third country, and about the conditions in which they would live in a third country. Several people the Commission spoke to reported that this situation was causing them 'severe depression'. One person told the Commission: 'Every night we sleep for one or two hours and then we think of Nauru. We came here as asylum seekers, we have escaped from one death and will be taken to another.'<sup>49</sup>

The Commission met with a few individuals who reported that they had requested a mental health appointment either some time previously, or on several occasions, and had yet to see a mental health practitioner. The Commission does not have any evidence to indicate that there are widespread delays in the provision of mental health appointments. However, if the increase in demand is as reported, it will be very difficult for IHMS to respond to all people in detention who request a mental health appointment, without a commensurate increase in the number of mental health staff on Christmas Island.

## 14. Access to communication facilities

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For people deprived of their liberty, the capacity to communicate with the outside world is critical to allow regular contact with family members, friends and support networks. Under international human rights standards, people in detention should be able to enjoy regular contact with family, friends and community members, facilitated through visits, correspondence and access to telephones. They should also be provided with facilities to communicate and consult in private with legal representatives.<sup>50</sup>

Following this visit, the Commission holds concerns about the level of access to communication facilities, especially given the very high number of people in detention on Christmas Island. A number of people detained in the Christmas Island IDC reported to the Commission that at times they had great difficulty in finding a telephone that was free. Others reported that they were satisfied with the access to telephones.

The Commission heard a much greater level of dissatisfaction from people in detention regarding their access to the internet. At the time of the Commission's visit there were 18 internet terminals for the 975 people detained in the Christmas Island IDC; seven terminals in

Aqua Compound for 415 people; four terminals in Lilac Compound for 114 people; and 13 internet terminals for the 485 people detained in the Construction Camp.

People detained in all facilities on Christmas Island complained about their level of access to the internet. The Commission was informed that in the Christmas Island IDC and the Construction Camp, people generally had a one hour session on the internet each week. People detained in Aqua and Lilac compounds reported that they have access to 30 minutes on the internet each day. The Commission also heard frustration about the very slow internet speed on Christmas Island.

During the visit, the Commission was informed by DIAC that if a person needs to use a telephone for a confidential matter, a DIAC Case Manager or a Serco officer can facilitate a phone call, and that immediate access to the internet can be arranged if a person needs to contact a lawyer or an advocate.

Nevertheless, the Commission holds serious concerns about the limited communications infrastructure on Christmas Island, given the very large numbers of people in detention in each of the detention facilities.

## 15. Education



Woodwork outside the education blocks in the Phosphate Hill facility.

One of the Commission's most serious concerns arising from the visit to Christmas Island was the lack of access to education provided to children in detention. Under international human rights standards, all children have a right to education.<sup>51</sup> This right should be recognised for all children in immigration detention. Children of compulsory school age should be provided with access to education of a standard equivalent to that in Australian schools. Children older than compulsory school age should also be provided with opportunities to continue their education. Wherever possible, the education of children should take place outside the detention facility, in the general school system.<sup>52</sup>

During its visit to Christmas Island the Commission heard a significant number of complaints about access to education. The Commission recognises the serious logistical difficulties presented by the large number of school age children currently in detention on Christmas Island. However, it appears that the provision of education to children on Christmas Island is insufficient to meet the requirements of the CRC.

DIAC staff informed the Commission that there are 12 places at the Christmas Island public school for children in immigration detention on Christmas Island. However, at the time of the Commission's visit, there were 73 children between the ages of six and 12 in detention on Christmas Island. The Commission recognises that most of the children in detention on Christmas Island at the time of the Commission's visit had been in detention for a relatively short period of time. However, at the time of the Commission's visit there were 24 children in detention aged between six and 12, who had been taken into detention in August. At least half of these children are unlikely to have had access to education at the Christmas Island public school.

The Commission was also concerned about education for secondary school age children. There is capacity for secondary school age children detained at the Construction Camp to attend classes in classrooms within the Phosphate Hill complex that are staffed by Western Australian Department of Education teachers



(it was school holidays at the time of the Commission's visit so the classes were not running). The Commission welcomes the provision of these classes. However, unaccompanied children of secondary school age detained in Lilac Compound are not transported to the Phosphate Hill classes, and are only provided with one hour of English class each day. The Commission does not believe that this amounts to sufficient provision of education for secondary school age children.

The Commission urges DIAC to take appropriate steps to ensure that all children are provided with access either to the local school, or to educational classes in the classrooms at Phosphate Hill. Consideration should be given to establishing some classes for primary school age children at the classrooms at Phosphate Hill. If this cannot be arranged due to capacity constraints on Christmas Island, children should be transferred to a location on the mainland where they can be provided with access to education, ideally in the general school system.

## 16. Recreation and activities

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International human rights standards require that people in immigration detention 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. In addition, each immigration detention facility should have a library stocked with recreational materials in the principal languages spoken by people in detention.<sup>53</sup>

During this visit, the Commission observed that positive efforts were being made in most facilities on Christmas Island to provide recreational opportunities for people in detention. For example, the Commission observed a women's group at the Construction Camp, and a concert involving unaccompanied minors in Lilac Compound. The Commission also observed a significant number of people using the gymnasium facility in the Christmas Island IDC. In addition, the Commission observed that there were timetables for recreational activities displayed in most facilities. The Commission was also pleased that there are currently a greater number of programs and activities officers employed in immigration detention facilities than has been the case during previous Commission visits.

In addition, as noted above in section 11.4, the Commission welcomes the installation of play equipment in the Construction Camp, and is pleased that there is an operating toy library providing play materials for children.

However, the Commission holds a number of concerns about the adequacy of recreational facilities and activities on Christmas Island, including:

- the lack of appropriate recreational facilities, particularly in Aqua and Lilac compounds and in the Construction Camp
- the impact of overcrowding on people in immigration detentions' access to recreational and educational opportunities in all detention facilities
- the very limited opportunities to leave the detention environment for people in all detention facilities.

Many people in detention who met with the Commission reported that they did not feel that they were provided with adequate recreational opportunities. In particular, people detained in Aqua Compound reported that there was very little for them to do apart from English classes. Unaccompanied minors detained in Lilac Compound also reported that they had very little access to recreational activities. They reported playing cricket, soccer and volleyball in the open area, but that people are frequently hurt because of the rough ground.

The vast majority of the people with whom the Commission spoke reported that they had not left the immigration detention facilities on an external excursion. The one exception to this was unaccompanied minors detained at Lilac Compound who reported having been taken to the community Recreation Centre to play soccer.

# 17. Recommendations

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## Recommendation 1

The Australian Government should end the current system of mandatory and indefinite immigration detention. The need to detain should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.

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## Recommendation 2

The Australian Government should comply with its international human rights obligations by providing for a decision to detain a person, or a decision to continue a person's detention, to be subject to prompt review by a court. To comply with article 9(4) of the ICCPR, the court must have the power to order a 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, which affirms the right to liberty and prohibits arbitrary detention.

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## Recommendation 3

The Minister for Immigration and Citizenship and DIAC should make the greatest possible use of community-based alternatives to holding people in immigration detention facilities, including for people who have arrived in Australia on or after 13 August 2012 and who are liable to transfer to a third country for processing of their protection claims.

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## Recommendation 4

The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention other than for the shortest possible periods of time. If people must be held in immigration detention facilities, they should be located in metropolitan areas.

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## Recommendation 5

The Australian Government should implement the outstanding recommendations of the report of the National Inquiry into Children in Immigration Detention, *A last resort?*. 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 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 children must be a primary consideration
    - the preservation of family unity
    - special protection and assistance for unaccompanied children.
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### **Recommendation 6**

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

- Australia's law 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.
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### **Recommendation 7**

Immediate measures should be taken to reduce overcrowding in immigration detention facilities on Christmas Island. These should include:

- ensuring that people in detention on Christmas Island are transferred to the mainland as quickly as possible
  - ceasing the practice of accommodating people in dormitory bedrooms in Education 3 Compound, and returning the compound to its original use as space for educational and recreational activities
  - refraining from using other areas as accommodation
  - ceasing the practice of accommodating people in tents in the Phosphate Hill immigration detention facility.
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### **Recommendation 8**

DIAC should ensure that all people in detention are provided with adequate access to mental health services. Immediate steps should be taken to review the capacity of mental health services to meet the apparently increased level of demand.

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### **Recommendation 9**

DIAC should ensure that all people in detention have adequate access to communication facilities. This should include:

- ensuring that all people in detention are provided with adequate access to telephones and that they can make and receive calls in privacy
  - increasing the number of internet terminals in each of the detention facilities.
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### **Recommendation 10**

DIAC should ensure that all school aged children detained on Christmas Island have adequate access to education. This should include:

- ensuring that all primary school age children have access to education equivalent to that provided to children in the Australian community
  - ensuring that all secondary school age children have access to appropriate education delivered by trained teachers.
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## 17. Recommendations

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### **Recommendation 11**

DIAC should ensure that all people in immigration detention have access to appropriate educational facilities, including ESL classes.

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### **Recommendation 12**

DIAC should ensure that all people in immigration detention are provided with adequate access to a range of recreational facilities and activities.

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### **Recommendation 13**

DIAC should ensure that all people in detention have access to regular external excursions from immigration detention facilities.

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## Endnotes

- 1 The Commission's reports of complaints about alleged human rights breaches in immigration detention are available at [www.humanrights.gov.au/legal/humanrightsreports/index.html](http://www.humanrights.gov.au/legal/humanrightsreports/index.html). The Commission's national inquiry reports are *A last resort? National Inquiry into Children in Immigration Detention* (2004) (A last resort). At [www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.humanrights.gov.au/human_rights/children_detention_report/index.html) (viewed 8 November 2012), and *Those who've come across the seas: Detention of unauthorised arrivals* (1998) (Those who've come across the seas). At [www.humanrights.gov.au/human\\_rights/immigration/seas.html](http://www.humanrights.gov.au/human_rights/immigration/seas.html) (viewed 8 November 2012).
- 2 See, for example A last resort, note 1; Those who've come across the seas, note 1.
- 3 Other activities have included developing minimum standards for the protection of human rights in immigration detention; submissions to parliamentary inquiries; investigating complaints from individuals in detention; examining proposed legislation and commenting on government policies; and raising public awareness. Further details are available at [www.humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html](http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html).
- 4 Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009) (2009 Christmas Island report). At [www.humanrights.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island.html](http://www.humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html) (viewed 8 November 2012). Australian Human Rights Commission, *2010 Immigration detention on Christmas Island* (2010) (2010 Christmas Island report). At [www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.html](http://www.humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.html) (viewed 8 November 2012).
- 5 See 2010 Christmas Island report, note 4, p 6.
- 6 *Migration Amendment (Regional Processing and Other Measures) Act 2012* (Cth).
- 7 See Australian Human Rights Commission, 'Human rights issues raised by the transfer of asylum seekers to third countries', November 2012. At [www.humanrights.gov.au/human\\_rights/immigration/transfer\\_third\\_countries.html](http://www.humanrights.gov.au/human_rights/immigration/transfer_third_countries.html) (viewed 15 November 2012).
- 8 Statistics provided by DIAC for 10 October 2012.
- 9 Above.
- 10 Migration Act, s 198AD(2). On 18 August 2012, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) commenced, amending the *Migration Act 1958* (Cth) and the *Immigration (Guardianship of Children) Act 1946* (Cth). For more information about the Commission's concerns regarding the transfer of asylum seekers to third countries for the processing of their claims for protection, see Commission paper regarding third country processing, note 7.
- 11 Department of Immigration and Citizenship, 'Irregular maritime arrivals – arrivals on or after 13 August 2012, Group statement', 23 August. Provided to the Commission by DIAC during visit to Christmas Island.
- 12 DIAC, *Departmental guidelines for assessment of persons prior to transfer pursuant to section 198AD(2) of the Migration Act 1958*, (Section 198AD(2) guidelines), p 6.
- 13 Minister for Immigration and Citizenship, *Minister's determination power under section 198AE of the Migration Act 1958 to determine that section 198AD does not apply* (Section 198 AE guidelines), p 6.
- 14 Section 198AD(2) guidelines, note 12, p 7.
- 15 Section 198 AE guidelines, note 13, p 6.
- 16 Section 198AD(2) guidelines, note 12, p 8.
- 17 Above.
- 18 Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth), Schedule 1, Item 36. Migration Act, s 198 AD(2).
- 19 Migration Act, s 189(3).
- 20 Under article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR), 1966, 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 Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2].
- 21 Migration Act, s 4AA.
- 22 *Convention on the Rights of the Child* (CRC), 1989, art 37(b).
- 23 See further A last resort, note 1, section 4.3.2; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), guidelines 7.6, 7.7. At [www.unhcr.org/3d4f91cf4.html](http://www.unhcr.org/3d4f91cf4.html) (viewed 22 November 2012); UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, guideline 6. At [www.unhcr.org/refworld/docid/3c2b3f844.html](http://www.unhcr.org/refworld/docid/3c2b3f844.html) (viewed 22 November 2012).
- 24 See, for example Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Migration Amendment (Immigration Detention Reform) Bill 2009*, (31 July 2009), section 7. At [www.humanrights.gov.au/legal/submissions/2009/20090731\\_migration.html](http://www.humanrights.gov.au/legal/submissions/2009/20090731_migration.html) (viewed 15 November 2012); 2009 Christmas Island report, note 4, section 11; 2010 Christmas Island report, note 4, Part C. See also Australian Human Rights Commission, *2010 Immigration detention in Darwin*, section 7. At [www.humanrights.gov.au/human\\_rights/immigration/idc2010\\_darwin.html](http://www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.html) (viewed 15 November 2012). Australian Human Rights Commission, *2011 Immigration detention in Leonora*, section 7. At [www.humanrights.gov.au/human\\_rights/immigration/idc2011\\_leonora.html](http://www.humanrights.gov.au/human_rights/immigration/idc2011_leonora.html) (viewed 15 November 2012). Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia's Immigration Detention Network*, August 2011. At [www.humanrights.gov.au/legal/submissions/2011/201108\\_immigration.html](http://www.humanrights.gov.au/legal/submissions/2011/201108_immigration.html) (viewed 15 November 2012).

- 25 A last resort, note 1, p 7.
- 26 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) (New Directions). At [www.minister.immi.gov.au/media/speeches/2008/ce080729.htm](http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm) (viewed 19 November 2012).
- 27 CRC, note 22, art 37(c).
- 28 G Jones, ‘Christmas Island riot fear, says Triggs’, *The Daily Telegraph*, 12 October 2012.
- 29 CRC, note 22, art 37(b).
- 30 UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, note 23, guidelines 7.6, 7.7. See also UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 23, guideline 6.
- 31 CRC, note 22, art 20.
- 32 Above.
- 33 CRC, note 22, art 18(1).
- 34 See *United Nations Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules), Rule 60(1). At [www2.ohchr.org/english/law/treatmentprisoners.htm](http://www2.ohchr.org/english/law/treatmentprisoners.htm) (viewed 15 November 2012). See also *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rules for the Protection of Juveniles), Rule 86(f). At [www2.ohchr.org/english/law/res45\\_113.htm](http://www2.ohchr.org/english/law/res45_113.htm) (viewed 15 November 2012).
- 35 2010 Christmas Island report, note 4, section 17.1; 2009 Christmas Island report, note 4, section 12.1.
- 36 See 2010 Christmas Island report, note 4, section 17.1; 2009 Christmas Island report, note 4, section 12.1.
- 37 See Standard Minimum Rules, note 34, rule 94.
- 38 See ICCPR, note 20, arts 10, 17; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) (Body of Principles), principle 1. At [www2.ohchr.org/english/law/bodyprinciples.htm](http://www2.ohchr.org/english/law/bodyprinciples.htm) (viewed 15 November 2012). See also Standard Minimum Rules, note 34, rules 13, 15 and 16; Rules for the Protection of Juveniles, note 34, rule 34.
- 39 ICCPR, note 20, art. 10; Body of Principles, note 38, principle 1.
- 40 See *International Covenant on Economic, Social and Cultural Rights*, 1966, art 12; CRC, note 22, art 24.
- 41 Body of Principles, note 38, principle 25.
- 42 2010 Christmas Island report, note 4, section 19.
- 43 Meeting with IHMS staff, Christmas Island, 9 October 2012.
- 44 DIAC, *Mental health screening for people in immigration detention* (April 2009).
- 45 Above.
- 46 DIAC, *Psychological Support Program for the Prevention of Self-Harm in Immigration Detention* (April 2009).
- 47 2010 Christmas Island report, note 4, section 19.2.
- 48 Interview with people in detention, Christmas Island IDC, 10 October 2012.
- 49 Above.
- 50 Standard Minimum Rules, note 34, rule 37; Rules for the Protection of Juveniles, note 34, rules 60 and 61; Body of Principles, note 38, principle 17(1).
- 51 See CRC, note 22, art 28.
- 52 Standard Minimum Rules, note 34, rule 77(2); Rules for the Protection of Juveniles, note 34, rule 38.
- 53 Standard Minimum Rules, note 34, rule 40; Rules for the Protection of Juveniles, note 34, rule 41.

- **Further Information**

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