31 August 2011

National Human Rights Action Plan Secretariat
Human Rights Policy Branch
Attorney-General’s Department
nhrap@ag.gov.au

The Victorian Foundation for Survivors of Torture (Foundation House) appreciates the opportunity to contribute to the development of the National Human Rights Action Plan. We consider the Action Plan a very important initiative by the Australian Government.

Foundation House was established in 1987 to assist survivors of torture and trauma, of refugee backgrounds, who had settled in Victoria. Today, we assist more than 4000 people each year through services such as counselling and family support; we provide training, consultancy and support for service providers in the health, education and welfare sectors; and we conduct and commission research to improve policies, programs and services that affect the health and wellbeing of people of refugee backgrounds.

Our submission focuses on three subjects about which we have particular knowledge by virtue of the work that we do:

- strengthening the monitoring of places of detention;
- promoting the social inclusion of people of refugee backgrounds; and
- ensuring the immigration detention regime complies with Australia’s human rights obligations.

The submission suggests a number of additional measures the National Human Rights Action Plan should include with respect to these areas.
The submission does not cover all areas of importance to people of refugee backgrounds. We are aware that other organisations with expertise on issues relating to particular groups such as women and children, and subject areas such as housing, are preparing submissions that identify measures which are pertinent to the needs of people of refugee backgrounds.

**Monitoring places of detention (3.9.3)**

Foundation House strongly supports Australia becoming a party to the Optional Protocol to the Convention (OPCAT) against Torture and implementing its obligations.¹ There are significant gaps and weaknesses in the current array of mechanisms to monitor places of detention (including but not restricted to immigration detention facilities) in Australia and becoming a party to OPCAT would provide welcome impetus to remedying this situation.

The Draft Baseline Study states that “all jurisdictions have mechanisms...that conduct regular visits to prisons.” (80) However it does not provide a baseline assessment of the compliance of those mechanisms with what is required of parties to OPCAT. The absence of such an assessment is a significant omission from the document.

The Australian Government initiated the preparation of a National Interest Analysis in mid 2008 and signed the Optional Protocol in mid 2009. As far as we are aware, since then the Government has not issued a substantive statement about progress. The only advice the Government has provided is along the lines stated in the Draft Baseline Study viz. “The Australian Government is currently working with State and Territory Governments to identify the most appropriate and effective method for establishing a National Preventative

___________________________

¹ E.g. As a member of the Forum of Australian Services for Survivors of Torture and Trauma, a national network of agencies of which we are a member, we made a submission to this effect in 2004 to the inquiry of the Joint Standing Committee Treaties into the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, published as Report 58.
Mechanism as required by the Optional Protocol to the CAT.” (page 80)

It is difficult to comprehend why the governments of Australia have been unable to identify a method for establishing a National Preventative Mechanism after more than two years of deliberations. There are a number of models in operation in federal systems and it should be reasonably straightforward to obtain information about how they function. Members of civil society government cannot help but be very concerned about the apparent lack of significant progress in the deliberations between the governments.

We welcome the suggestion in the Draft Baseline Study that a National Human Rights Action Plan could “better engage the NFP sector in all stages of human rights policy development and implementation in the spirit of the National Compact: Working Together.” (8) An essential element of effective engagement by the government with the NFP sector and other sectors of Australian society is a reasonable measure of substantive communication about the Government’s actions and intentions. It is appropriate for governments to have confidential discussions with each other, but there appear to be no compelling grounds for the Australian Government to issue no information at all about the progress towards Australian becoming a party to OPCAT.

Recommendations for the National Human Rights Action Plan:

The finalised baseline study should provide an assessment of the action that is required to ensure Australia complies with OPCAT.

The Australian Government should commit to providing material information regularly about progress towards Australian becoming a party to the Optional Protocol to the Convention against Torture.
Promoting the social inclusion of refugees, asylum seekers and migrants

As outlined in the Draft Baseline Study, Australia has “a wide range of programs, services and funding... to assist the inclusion of new arrivals into Australian society.” (91) The actions of governments at all levels and of civil society groups are commendable and Australia’s actions compare very well with those of countries of similar economic development that receive refugees and migrants.

However, as the document also acknowledges, barriers to inclusion remain and there is a need for improvement in key areas such as access to employment.

The Draft Baseline Study seeks views about initiatives the Government could focus on with respect to “tak(ing) an evidence-based approach to setting priorities.” (91) In our view, a critical initiative the Australian Government could adopt as part of the National Human Rights Action Plan is ensuring the development of a robust evidence base for setting priorities. This is currently lacking. As the Draft Baseline Study notes, “the research process has highlighted a general shortage of data that can be disaggregated on multiple bases, such as sex, age, disability, cultural identity, national/ethnic origin (including immigration status), family status, religion and sexual orientation.” (92)

We confirm that is certainly the case with respect to the health and wellbeing of people of refugee backgrounds. The dearth of significant data and the impediment this constitutes for policy and service development has been remarked upon by a number of authoritative sources for an extended period.2

The Australian Government has announced that it will work with state and territory governments “to ensure that data collected by government agencies on client services can be disaggregated by

---

2 For a recent example see, Department of Education and Early Childhood Development, State of Victoria, Refugee status report – a report on how refugee children and young people in Victoria are faring, 2011.
markers of cultural diversity...” 3 The commitment is most welcome. The development of such data sources will provide a critical contribution to the development of the evidence base that is essential for good public policy. Complementary action, including research studies, will also be needed because the client data collected by government agencies constitutes a vital but incomplete picture of key elements of social exclusion such as the nature and extent of discrimination.

Asylum seekers awaiting status resolution while resident in the community

The Draft Baseline Study notes the problems of asylum seekers seeking private rental accommodation. (84-85) It is important to recognise that the difficulties asylum seekers encounter securing shelter is one of a number of serious problems experienced by many asylum seekers arising from the fact that they are literally destitute, with little or no income from any source. The Asylum Seeker Assistance Scheme and Community Assistance Support program do not cover all who need assistance and the levels of assistance are inadequate. Asylum seekers commonly survive precariously with the assistance of friends, family and charitable agencies.

Recommendations for the National Human Rights Action Plan:

The Government should undertake to ensure the development of a robust and comprehensive evidence base for setting priorities to ensure the social inclusion of refugees and migrants among other groups.

The Government should review the assistance provided to asylum seekers in the community to ensure people awaiting status resolution are able to meet their basic needs.

Immigration detention (3.10.4)

The account of immigration detention and the issues arising that are provided in the Draft Baseline Study should be revised. The present draft provides a misleading characterisation of the main points of contention.

As stated in the document, the Australian Government’s “position” is “that mandatory detention of unauthorised arrivals for the purpose of health, identity and security checks is necessary to manage the risks to the Australian community.” (88) The document then refers to submissions to the National Consultation “rais(ing) concerns that the Australian Government’s policy of mandatory detention for unauthorised arrivals breached the right not to be arbitrarily detained under Article 9(1) of the ICCPR.” (88) The implication is that the concerns relate to detention for the purposes stated by the Government i.e. to conduct health, identity and security checks on people who have arrived in Australia without prior authorisation. This is not the case. Perhaps the main basis of the concerns is that the stated position of the Government does not describe the actual practice of immigration detention.  

The Government’s “position” on mandatory detention as described was adopted in mid-2008 - among other reasons – with the aim of bringing the policy and practice of immigration detention into compliance with human rights standards, following findings of the United Nations Human Rights Committee in a number of cases that Australian policy violated the prohibition on arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights. According to the Minister for Immigration and Citizenship the central tenet of the reforms was that people would be detained only if the need is established. The presumption will be that persons will remain in the community while their immigration status is resolved. If a person is complying with immigration

---

4 There are additional concerns e.g. that detention is not subject to external review by a court or tribunal that can order the release of people if there is no demonstrable necessity to detain them.
processes and is not a risk to the community then detention in a
detention centre cannot be justified. The Department will have
to justify a decision to detain – not presume detention.  

The Government asserts that the policy is applied in practice with the
effect that people are detained in immigration detention centres only
as a last resort and for the shortest practicable time. This assertion is
factually contentious.

On the basis of our contact with many clients, we do not believe that
the large number of asylum seekers who have been and are being
detained for prolonged periods in accordance with the “New
Directions” policy, because they have been individually determined to
be a risk the community if released. We note that the Ombudsman
who is charged with reviewing the cases of all people in immigration
for longer than six months has also indicated that the “New
Directions” policy is not rigorously applied. For example, on 29 July
2011 he stated:

What do the Government’s seven key immigration detention
values really mean today? Are they milestones to a fairer
society, or ‘motherhood’ statements overtaken by reality? The
challenges associated with immigration detention are unlikely to
diminish, so perhaps the time has come to review, clarify and
produce new operational guidelines designed to ensure the
values can be fully implemented.?

5 Senator Chris Evans, Minister for Immigration and Citizenship, “New Directions in
Detention, Restoring Integrity to Australia’s Immigration System,” Seminar – Centre
for International and Public Law, Australian National University, Tuesday 29 July
2008.
6 Human Rights Council, Working Group on the Universal Periodic Review, Tenth
session Geneva, 24 January–4 February 2011, National report submitted in
accordance with paragraph, 15 (a) of the annex to Human Rights Council resolution
5/1* Australia, paragraph 137.

7 “Australia’s immigration detention values: Milestones or motherhood statements?”,
2011.
So, the fundamental issue of contention is not about “mandatory detention” as such but whether or not people are being detained after proper assessments to determine whether their detention is justified to protect the community. The Baseline Study should be amended to accurately reflect this.

There is a measure the Government could readily adopt as part of the National Human Rights Action Plan to provide greater transparency about the decision-making process for immigration detention. That is, to table in Parliament the Ombudsman’s detention reviews and for the Minister for Immigration and Citizenship to respond and address the Ombudsman’s recommendations and why each has been accepted, rejected or is no longer applicable. This measure was recommended by the Joint Standing Committee on Migration in 2008. The Government has not yet responded to it.

Recommendation for the National Human Rights Action Plan:

The Government should adopt the recommendation of the Joint Standing Committee on Migration to table in Parliament the Ombudsman’s detention reviews and for the Minister for Immigration and Citizenship to respond within 15 sitting days addressing the Ombudsman’s recommendations and why each has been accepted, rejected or is no longer applicable.