Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms

SAVITRI TAYLOR*

1. Introduction

Australia's immigration detention regime has been widely criticised as being in breach of the prohibition against 'arbitrary' detention contained in article 9(1) of the *International Covenant of Civil and Political Rights* (*ICCPR*).[1] It is not the purpose of this article to traverse that ground.[2] Even if deprivation of liberty can itself be justified in relation to a particular individual, Australia remains obliged under international law to respect and protect all the rest of the individual's human rights. The greater part of this article is devoted to establishing that the mechanisms that Australia has in place for protecting the human rights of immigration detainees are seriously deficient. The article then recommends system changes that may go some way towards addressing the deficiencies identified. However, the article ends by suggesting that those who wish to achieve better protection of the human rights of immigration detainees would be well-advised to direct some of their efforts towards mustering public support for that objective.

* PhD (Melb), LLB (Hons) (Melb), BCom (Melb), Lecturer, School of Law and Legal Studies, La Trobe University. This publication results from research funded by a grant from the School of Law and Legal Studies, La Trobe University and an Australian Research Council Small Grant. The author gratefully acknowledges the research assistance of David Bell and Fiona Pitman. Note on terminology: The government department now named the Department of Immigration and Multicultural Affairs (DIMA) has had many names over the years. The most recent name has been used throughout this article except in author, case and title citations where the name of the time has been used.

1 16 December 1966 (999 UNTS 171). This treaty entered into force generally on 23 March 1976 and entered into force for Australia on 13 November 1980 (1197 UNTS 411).

2 The ground is traversed in Taylor S, 'Weaving the Chains of Tyranny: The Misrule of Law in the Administrative Detention of Unlawful Non-Citizens' (1998) 16(2) *Law in Context* 1.

2. *Immigration Detention*

A. The Immigration Detention Regime

The *Migration Act* 1958 (Cth) provides that an 'unlawful non-citizen'[3] must be kept in 'immigration detention' until removed from Australia, deported or granted a visa.[4] The visa granted need not be a substantive visa. It can be a bridging visa. The purpose of a bridging visa, as the name implies, is to bridge the time which elapses while a substantive visa application is being processed or while arrangements are being made for a non-citizen to depart Australia.

A non-citizen, who has been immigration cleared, is by that fact alone made eligible for the grant of a bridging visa and will normally be granted one, unless the facts of the particular case suggest that detention is necessary for the purpose of ensuring that the non-citizen will be available for removal from the country. By contrast, a non-citizen, who has not been immigration cleared (hereinafter described as an 'unauthorised arrival'), is ineligible for the grant of a bridging visa, unless he or she falls within one of a few narrowly circumscribed exceptions.[5] Since the official justification for detention of unauthorised arrivals is the same as for other unlawful non-citizens, for instance, ensuring availability for removal from the country,[6] the logical inference is that the differential treatment is based on an assessment that unauthorised arrivals (as a group) are far more likely to abscond than other unlawful non-citizens. This reliance on a generalised assessment of the risk of absconding is, of course, inherently likely to result in the detention of many individuals whose availability for removal could, in fact, be ensured through less restrictive means. However, successive Australian governments have proved determined to continue the policy of mandatory detention of unauthorised arrivals.

---

3 An 'unlawful non-citizen' is a non-citizen who is present in Australia without a current visa: *Migration Act* 1958 (Cth) ss5(1), 13 and 14.

4 *Migration Act* 1958 (Cth) ss189 and 196(1).

5 In broad terms, the exceptions to bridging visa ineligibility cover protection visa applicants who are under 18 or over 75 years, are unwell or traumatised, are spouses of Australian citizens, Australian permanent residents or eligible New Zealand citizens or family members of such spouses, or have not received a primary protection visa decision within six months. However, each of the exceptions specifies further requirements which have to be met before the exception can be invoked. In practice, very few unauthorised arrivals are able to fit themselves within one of the exceptions. See further, Taylor, above n2.

6 DIMA, *Annual Report 1997–98* at 47; Australian Government, *Response of the Australian Government to the Views of the Human Rights Committee in Communication No 560/1993 A v. Australia* (17 December 1997) at para 5.

B. Places of Immigration Detention

The *Migration Act* provides that a person is in 'immigration detention' if held by or on behalf of an 'officer'[7] in, inter alia, a detention centre established under the Act.[8] Section 273 of the *Migration Act* provides for the establishment and maintenance of Immigration Detention Centres (IDCs). As at 21 January 1999 there were four IDCs in operation: Villawood IDC in New South Wales (capacity 270 people, actual population 274 people), Port Hedland IDC[9] in Western Australia (capacity 700, actual population 102), Perth IDC in Western Australia (capacity 40, actual population 32) and Maribyrnong IDC in Victoria (capacity 70, actual population 71).[10]

Unlawful non-citizens can also be held in immigration detention in prisons and remand centres of the Commonwealth, States and Territories, police stations and watch houses,[11] vessels,[12] and other places approved by the Minister in writing.[13] Paragraph 1.2 of *Migration Series Instruction* (MSI) 92 (9 March 1995) states that:

> The approval of places of immigration detention in writing should be limited to where it is absolutely necessary because of the condition or special needs of the detainee, the unsuitability of locally available places of detention, or the unavailability locally of places of detention.

---

7 'Officer' means an officer of DIMA, an officer of certain other government authorities, or any other person authorised by the Minister, by notice published in the Commonwealth of Australia Gazette, to be an officer for the purposes of the Migration Act: *Migration Act* 1958 (Cth) s5(1). Employees of Australasian Correctional Management Pty Ltd have been gazetted as officers: Gazette Notices between 5 November 1997 and 20 January 1999. It should be noted that the Migration Legislation Amendment Bill (No 2) 1999 (Cth) will, if passed, allow the Minister to authorise a person or class of persons to be 'officers' by instrument in writing and will allow a class authorisation to extend to persons who become members of the class after the authorisation is given. While authorisations will have to be notified in the Gazette, the validity of the authorisations will not be affected by failure to do so.

8 *Migration Act* 1958 (Cth) s5(1).

9 This facility is officially called the Port Hedland Immigration Reception and Processing Centre. However, the term Port Hedland IDC will be used for ease of reference.

10 Commonwealth of Australia, *Official Committee Hansard: Consideration of Additional Estimates*, Senate Legal and Constitutional Legislation Committee, 9 February 1999 at L&C143 (testimony of Mr Metcalfe, DIMA): <http://www.aph.gov.au/hansard/senate/commttee/comsen.htm>. Additional IDCs have operated in the past. Curtin Airforce Base outside Derby in Western Australia was used as an IDC in 1995 and early 1996: Minister for Immigration, Commonwealth of Australia, *Boat People Processing Centre to be Activated at Curtin*, Media Release, B20/95 (28 March 1995); Minister for Immigration, Commonwealth of Australia, *Boat People Processing Centre to be Mothballed*, Media Release, B134/95 (7 December 1995). A wing of the Aurther Gorrie Correctional Centre in Wacol, Queensland was used exclusively for immigration detention from 1992 to early 1994: Commonwealth Ombudsman, *Investigation of Complaints Concerning the Transfer of Immigration Detainees to State Prisons* (1995) at 11.

11 For example, prisons, remand centres, police stations and watch houses in Adelaide, Brisbane, Melbourne, Perth, Port Hedland, Roebourne and Sydney are being, or have been, used regularly as places of immigration detention.

12 *Migration Act* 1958 (Cth) s249.

13 *Migration Act* 1958 (Cth) s5(1).

At various times in the past, unavailability of IDC accommodation has led to a sports gymnasium on Christmas island,[14] class rooms at a convent school in Darwin,[15] and many other such facilities being used as places of immigration detention. Hospitals have been approved as places of immigration detention for unlawful non-citizens in need of hospital treatment.[16] The Minister's ability to approve places of immigration detention has, on rare occasions, even been used to overcome (for all practical purposes) the bridging visa ineligibility of particular individuals with special needs.[17] Unlawful non-citizens have been 'held on behalf of an officer' by monks, nuns and various other members of the community in their homes.[18] Such alternative custody arrangements have come about sometimes because DIMA itself perceived a need, and sometimes in response to pressure brought to bear by the Commonwealth Ombudsman, community organisations or others.

The present article will focus on IDCs, simply because the vast majority of unlawful non-citizens are detained in IDCs.[19]

C. Management of Immigration Detention Centres

In the past, each IDC was under the day-to-day management of a DIMA officer known as a Centre Manager. However, DIMA contracted out the provision of certain detention services. In particular, custodial and escort services for the IDCs were provided by Australian Protective Services (APS), a semi-autonomous agency within the Attorney-General's portfolio.[20]

In an effort to make immigration detention more cost effective, DIMA recently outsourced the provision of all immigration detention services.[21] Seventeen organisations were invited to submit proposals for the provision of immigration detention services.[22] One of the five proposals lodged was from Australasian

---

14 65 unauthorised arrivals from China were held there for several months in 1995: Commonwealth Ombudsman, above n10 at 11; Ceresa M, 'Boat People Accommodation to Cost $2m' *Australian* (29 March 1995) at 8.

15 Commonwealth Ombudsman, above n10 at 11; Interview with Richard Egan, spokesperson, Indo-China Refugee Association (WA) (10 June 1995).

16 Interview with Maribyrnong IDC visitor B (30 September 1997).

17 Interview with Commonwealth Ombudsman Officer A (10 December 1997).

18 Ibid; Ceresa M, 'Cambodian Boat People Free at Last' *The Weekend Australian* (30–31 December 1995) at 3; Commonwealth of Australia, *Official Committee Hansard: Consideration of Estimates*, Senate Legal and Constitutional Legislation Committee, 13 November 1995 at L&C161 (testimony of Mr Sullivan, DIMA); Interview with Margaret Piper, Executive Director, Refugee Council of Australia (13 June 1995); Interview with Richard Egan, above n15.

19 As at 21 January 1999, only 38 out of 517 immigration detainees were being held at places of detention other than IDCs: Commonwealth of Australia, above n10 at L&C143 (testimony of Mr Metcalfe, DIMA).

20 Australian Protective Services, Submission No 16, 27 July 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) Vol 1 at S95.

21 DIMA, *Company Takes Up Responsibility for Immigration Detention Centre*, Media Release, DPS 19/97 (14 November 1997).

22 Ibid. APS was one of the organisations invited to submit a proposal, but it chose not to do so: DIMA, *Future Operation of Immigration Detention Services*, Media Release, DPS 04/97 (17 September 1997).

Correctional Services (ACS) — a partnership between Australasian Correctional Management Pty Ltd (ACM)[23] and Thiess Contractors Pty Ltd.[24] DIMA decided to enter into contract negotiations with ACS.[25] The negotiations resulted in a General Agreement between the Commonwealth of Australia and ACS that sets out the basis for the long-term relationship between the parties[26] and a Detention Services Contract between the same parties for a service term of three years from 22 December 1997.[27] Provision is made for renewal of the service term.[28]

ACS, through its service delivery arm, ACM, took up responsibility for the day-to-day management of the four IDCs in late 1997.[29] It is required to provide guarding, interpreting and translating, catering, cleaning, education, welfare, health services, escort and transport services, and 'any other services necessary to enable delivery of Detention Services in accordance with the Immigration Detention Standards'.[30] However, ultimate responsibility for immigration detainees remains with DIMA.[31]

3. *Human Rights Standards Relevant to the Treatment of Immigration Detainees*

The most important of the human rights standards against which the treatment of immigration detainees must be measured are contained in articles 7 and 10 of the *ICCPR*. Article 7 of the *ICCPR* provides: 'No one shall be subjected to torture or

23 ACM is the largest private provider of correctional services in Australia: DIMA, *Future Operation*, ibid. It runs the medium security prison at Sale, the Arthur Gorrie Correctional Centre in Queensland and Junee Correctional Centre in NSW: Miller C & Costa G, 'Custody Centre to Go Private' *The Age* (17 October 1998) at 3; Harding R, *Private Prisons and Public Accountability* (1997) at 5. ACM is a subsidiary of Wackenhut Correctional Corporation: DIMA, *Future Operation*, ibid. Other companies in the Wackenhut group provide immigration detention services in the United States and the United Kingdom: DIMA, *Future Operation*, ibid.

24 DIMA, *Future Operation*, above n22.

25 Ibid.

26 General Agreement between the Commonwealth of Australia (represented by DIMA) and Australasian Correctional Services Pty Limited dated 27 February 1998 (hereinafter General Agreement).

27 Detention Services Contract between the Commonwealth of Australia (represented by DIMA) and Australasian Correctional Services Pty Limited dated 27 February 1998 (hereinafter Detention Services Contract), clauses 1.1 and 2.3. There is also an Occupation Licence Agreement between the Commonwealth of Australia (represented by DIMA) and Australasian Correctional Services Pty Limited dated 27 February 1998 which permits ACS to occupy the IDCs for the purpose of complying with its obligations under the other contracts.

28 General Agreement, clause 5.2; Detention Services Contract, clause 2.4.

29 Joint Standing Committee on Migration, *Immigration Detention Centres: Inspection Report* (August 1998) at 1; DIMA, *Fact Sheet 82: Immigration Detention* (revised 28 October 1998). Until the signing of the formal contract on 27 February 1998, ACM operated under a letter of understanding with DIMA: Joint Standing Committee on Migration, *Immigration Detention Centres: Inspection Report* (August 1998) at 8. Hereafter all references will be to the contractor, ACS, except where the context absolutely requires reference to ACM only.

30 Detention Services Contract, clause 3.1.1.

31 Detention Services Contract, Schedule Immigration Detention Standards (Immigration Detention Standards), 'Principles underlying Care and Security'.

to cruel, inhuman or degrading treatment or punishment...'. Provisions to the same effect as article 7 of the *ICCPR* are contained in article 16(1) of the *Convention Against Torture (CAT)*[32] and article 37(a) of the *Convention on the Rights of the Child (CROC)*.[33]

Article 10 of the *ICCPR* provides: 'All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.' A provision to the same effect as article 10 of the *ICCPR* is contained in article 37(c) of the *CROC*. While there is a large degree of overlap between articles 7 and 10 of the *ICCPR* (and their parallels), treatment which is not of sufficient severity to amount to a breach of article 7 (or parallels) may nevertheless amount to a breach of article 10 (or parallels). Examples of breaches of articles 7 and/or 10 include infliction of corporal punishment,[34] unnecessary use of force, prolonged solitary confinement,[35] accommodation which is overcrowded, unsanitary, poorly ventilated or otherwise injurious to health, failure to provide adequate medical, educational and other such facilities, and withholding of outside contact.[36]

Articles 7 and 10 of the *ICCPR* (and their parallels) apply to both criminal detainees and administrative detainees. However, whether particular treatment amounts to a breach of those provisions may depend on whether or not the person subjected to the treatment is a person convicted of a criminal offence.[37] For example, punishment is not a legitimate end to be served by the detention of persons who have not been convicted of a criminal offence. Therefore, subjection of immigration detainees (who have not *also* been convicted of criminal offences) to detention which is at all punitive in character would be a breach of their human rights.[38]

---

32 10 December 1984, Australian Treaty Series 1989 No 21. This treaty entered into force generally on 26 June 1987 and entered into force for Australia on 7 September 1989.

33 20 November 1989, Australian Treaty Series 1991 No 4. This treaty entered into force generally on 2 September 1990 and entered into force for Australia on 16 January 1991.

34 UN Human Rights Committee, *General Comment 20: Article 7* (1992) at para 5: <http://www.austlii.edu.au/au/other/ahric/Primary/hrcomm/gencomm/hrcom20.html>.

35 Ibid. Solitary confinement of adult prisoners for short durations is permissible for the purposes of preventing escape, protecting health or maintaining discipline: Van Bueren G, *The International Law on the Rights of the Child* (1995) at 224.

36 Much of this follows from interpreting *ICCPR* article 10 in light of documents such as the *Standard Minimum Rules for the Treatment of Prisoners* (hereinafter *Standard Minimum Rules*) and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (hereinafter *Body of Principles*): UN Human Rights Committee, *General Comment 21: Article 10* (1992) at para 5: <http://www.austlii.edu.au/au/other/ahric/Primary/hrcomm/gencomm/hrcom21.html>. The *Standard Minimum Rules* were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and endorsed by the UN Economic and Social Council in 1957. The *Body of Principles* was adopted by a resolution of the UN General Assembly on 9 December 1988.

37 *Standard Minimum Rule* 94 provides that administrative detainees 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners ...'. *Standard Minimum Rules* 84 to 93 set out standards for the treatment of untried prisoners.

38 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, *Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers* (1986) at para 47: <http://www.unhcr.ch/refworld/unhcr/scip/44.htm>.

In relation to children, the basic principle which applies is that they ought to be detained only as a last resort, and even then, in accommodation which is as open and unlike a prison as possible.[39] Treatment which would not amount to a violation of human rights if applied to an adult, may amount to a violation if applied to a child. It is arguable, for example, that it would be 'cruel' to subject a child to any period of solitary confinement for any reason.[40]

As a matter of international law, the outsourcing of immigration detention services does not relieve the Australian Government of responsibility for ensuring the 'strict observance' of the provisions of human rights treaties to which it is party.[41] Most importantly, international law requires the Australian Government to take preventative measures so effective that violations of article 7 of the *ICCPR* (and its parallels) are 'very rare', and to ensure that any violations that do occur are investigated and remedied.[42]

4. *Contractual Mechanisms for Protecting the Human Rights of Immigration Detainees*

A. Standard Setting

The Detention Services Contract contains detailed Immigration Detention Standards (the Standards) which ACS is required to meet, and against which its performance is supposed to be measured.[43] The Standards, which deal with all aspects of detention service delivery, were developed by DIMA in consultation with the Commonwealth Ombudsman[44] and some other advisers.[45] The Standards commence with a statement of the principles which 'should underpin the provision of the detention function and the standard of care to be provided'. Among other things, the principles require:

- efficient management of the operations related to the detention function;
- prevention of escape by immigration detainees;
- compliance with all relevant Commonwealth, State and Territory laws, and all Departmental policies, instructions and other directions (for example, the *Migration Series Instructions*) in the delivery of detention services;
- an approach to delivery of the detention function which is informed by Australia's international obligations; and
- the upholding of the dignity of detainees in culturally, linguistically, gender and age appropriate ways.

---

39 Van Bueren, above n35 at 209–210.

40 Id at 224.

41 Rodley N, *The Treatment of Prisoners under International Law* (2nd ed, 1999) at 304–305.

42 Id at 115–116, 132.

43 General Agreement clause 7.3; Detention Services Contract clause 3.3.

44 DIMA, above n21; DIMA, *Fact Sheet 82: Immigration Detention* (revised 28 October 1998).

45 Other unnamed advisers are referred to in DIMA, above n21, though not in DIMA, *Fact Sheet 82*, ibid.

The 'outcome standards' that follow the listing of underlying principles are quite detailed, and appear to be informed by international human rights law. For example, the Standards prohibit the use of '[p]rolonged solitary confinement, corporal punishment, punishment by placement in a dark cell, reduction of diet, sensory deprivation and all cruel, inhumane or degrading punishments'.[46] They further provide that when detainees are placed in solitary confinement for security reasons, a qualified medical practitioner must visit daily to ensure that 'continued separation is not having a deleterious effect on physical or mental health'.[47]

Detailed written standards are necessary for the purpose of giving the contractor, and all its servants and agents, clear guidance as to what is expected of them. However, it cannot simply be assumed that standards specified on paper will be translated into practice. The attainment of outcome standards represents a cost to the contractor in terms of both money and effort. It is to be expected, therefore, that a rational contractor will strive harder to achieve standards for which it is held accountable in practice, than to achieve standards for which it is held accountable only in theory.

In order to make the contractor accountable in practice, effective mechanisms need to be in place for monitoring actual conditions in IDCs and comparing them with the required standards. Assuming such mechanisms are in place, however, the detailed specification of required standards makes easier the task of identifying particular aspects of actual IDC conditions as being below required standards. In other words, detailed written standards create the *potential* for a high level of accountability.[48]

B. Monitoring

The Standards require that copies of complaints lodged with the service provider by detainees[49] be provided to DIMA and also make provision for detainees to complain directly to DIMA.[50] Because of their vulnerable position, many detainees are extremely reluctant to complain about their treatment to either ACS or DIMA. They fear that, if they are perceived as troublemakers, their lives will be made more difficult or their substantive visa applications will be adversely affected.[51] They fear the latter because they mostly are unaware of, or

46 Immigration Detention Standards 7.8.3.

47 Immigration Detention Standards 7.8.4.

48 Harding, above n23 at 67.

49 The Immigration Detention Standards provide that there must be a secure box within the IDC in which written complaints can be lodged by detainees: Immigration Detention Standards 7.11.1. However, the procedures actually in place for receiving and dealing with complaints appear to vary from IDC to IDC: see Joint Standing Committee on Migration, above n29 at 20–21. The detainees at each of the IDCs are advised of the complaints mechanism in place at that centre upon arrival, and written information about the complaints mechanism is posted in the centres: Joint Standing Committee on Migration, above n29 at 20–21; Commonwealth of Australia, *Official Committee Hansard: Consideration of Estimates*, Senate Legal and Constitutional Legislation Committee, 3 June 1998 at L&C143 (testimony of Mr Sullivan, DIMA).

50 Immigration Detention Standards 7.11.1.

51 Interview with Villawood IDC visitor C (19 October 1998).

unconvinced of, the role demarcations between ACS and DIMA.[52] Where complaints are made and come to the attention of DIMA, they can, of course, assist DIMA in identifying breaches of the Standards.

More generally, the Standards require ACS to give DIMA full access to all relevant data for the purpose of monitoring, to provide DIMA with 'adequate reporting against the standards' on a 'regular and agreed basis', to report on various types of incidents as and when they occur, and to comply with various other requests for information.[53] However, such monitoring mechanisms can easily be undermined by the contractor choosing deliberately to withhold information from DIMA where disclosure would not be in its interests.

This problem is overcome to some extent by provision for the Contract Administrator (or delegated representative) to have 'access at all times with or without notice' to immigration detainees, ACS personnel, all areas of the IDCs, and all relevant records of ACS.[54] According to DIMA, the State Directors of DIMA and various other senior DIMA officers visit each of the IDCs regularly.[55] In addition, a senior DIMA officer is supposed to be located at each of the IDCs not only to deal with all immigration-related matters but also to monitor the delivery of services to detainees by ACS.[56] In late 1998, the actual situation on the ground was that three or four DIMA officers had offices located in the Villawood IDC, there was a DIMA officer located at Port Hedland IDC and likewise at Maribyrnong IDC, but the DIMA officer responsible for Perth IDC was not located there.[57]

It is unlikely that breaches of the Standards by ACS would escape the notice of the DIMA officers based on-site at the IDCs, and this is a huge argument in favour of on-site monitoring. However, the fact that these DIMA officers are working side by side with ACS staff, does increase the danger that they will regard the ACS staff as colleagues and comrades and will be reluctant to make adverse reports about them to their superiors within DIMA.[58] According to the Commonwealth Ombudsman, the 'lines of separation' between the roles of the contractors and the DIMA representatives at the IDCs needed 'clarification' at the time of his report.[59] The problem is one that is likely to grow rather than diminish over time.

C. Enforcement

Even if DIMA monitoring were completely effective, monitoring alone does not make for accountability in practice. There needs to be some effective mechanism

52 Ibid.

53 Immigration Detention Standards 13. See also General Agreement clause 4.3 and 4.4.

54 General Agreement clause 4.2. The Contract Administrator is a senior DIMA officer.

55 Commonwealth of Australia, above n49 at L&C143 (testimony of Mr Sullivan, DIMA).

56 DIMA, *Fact Sheet 82*, above n44; Commonwealth of Australia, ibid.

57 Interview with Commonwealth Ombudsman Officer A (22 October 1998); Interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998).

58 The quarterly performance reviews upon which the contractor's performance linked fees are based (see further below) are based on lengthy reports written by DIMA's representatives at the IDCs 'in consultation with' the contractor: Commonwealth of Australia, above n10 at L&C144 (testimony of Mr Metcalfe, DIMA).

59 Commonwealth Ombudsman, *Annual Report 1997–98* at 97.

for ensuring that below standard performance is avoided or is remedied. Since the contractor is in business to make a profit, it is likely to resist delivering services at the contracted standards if that means foregoing profit. For example, if the contractor's profitability can be increased by cutting back the more expensive services such as counselling and education, the temptation to do so may prove irresistible unless kept in check by effective enforcement action.[60] It is also likely that the contractor will resist sacrificing administrative convenience, unless it is forced to place other considerations first. For example, the most convenient method of dealing with 'difficult' immigration detainees is to get rid of them by transferring them to prison. It appears to be a method much used by the present contractor (as it was by APS/DIMA), even in cases where other (less convenient) management tools would be more appropriate.[61]

One of the contractual mechanisms for enforcing compliance with the Immigration Detention Standards involves a quarterly review of performance against the Standards, with bonus or demerit points awarded for performance above or below benchmark performance.[62] These bonus and demerit points are then translated into a financial reward or penalty as the case may be. The details about what constitutes benchmark performance for each Standard, and about the calculation of the performance linked fee, have been deleted from the publicly available version of the detention agreements for 'commercial reasons'. Without this information, the only comment that can be made is that, unless bonus/demerit points are weighted to reflect *with complete accuracy* the costs of achieving benchmark performance in relation to each of the Standards, it is still possible that the contractor's overall profitability could be increased by choosing not to meet certain Standards.

The other contractual mechanism for enforcing compliance with the Standards is the 'default notice' and the processes that such a notice triggers. If the contractor commits a contract default, is served with a 'default notice', and does not cure the default within the 'cure period', various remedies are available to the Commonwealth, including termination.[63] A 'default' is defined to mean a 'Service Default or a General Default'.[64] A 'Service Default' involves breach of the Standards relating to 'lawfulness of detention', 'safety', 'quarantine and public

60 Hughes B, 'Profit and the Hard Cell' *The Age* (17 January 1996) at 13. For example, the New South Wales Department of Corrections found that the inmates of Junee Correctional Centre had access to a good education program when it conducted a review six months after Junee opened (October 1993), but found that the education program had deteriorated considerably when it conducted another review nine months later (August 1994) and that ACM was prejudiced against inmate education: Elias D & Cookes T, 'Rebuke for Jail Operator' *The Age* (26 December 1995) at 1. In response to the later review, ACM took steps to improve the education program: Elias & Cookes.

61 See below section 5(B).

62 General Agreement clause 7.5; Detention Services Contract clause 4.5 and Schedule Performance Linked Fee Matrix; Commonwealth of Australia, above n10 at L&C144 (testimony of Mr Metcalfe, DIMA).

63 General Agreement clause 7.6. The General Agreement or any Service Contract can be terminated for the convenience of the Commonwealth, for default by ACS, or for breach by the Commonwealth: General Agreement clause 8.1.

health requirements', 'security', 'discipline and control', 'use of force', 'instruments of restraint', 'health care needs', '[dealing with] psychiatrically disturbed' or 'monitoring and reporting'.[65] Of course, the contractor would be well aware of the practical constraints on the Commonwealth using the ultimate remedy of termination. Only in circumstances of extreme and persistent default is it likely that the Commonwealth would be prepared to take on the expensive and difficult task of changing contractors.

D. DIMA's Commitment to Holding ACS Accountable for Breaches of Human Rights Standards

(i) Capture

All of the foregoing assumes that DIMA is committed to ensuring that ACS is held accountable for all breaches of the Standards. Unfortunately, the validity of the assumption is open to question. A fundamental problem with relying on DIMA to monitor ACS performance is that DIMA went out looking for a 'strategic alliance with a new service provider rather than a strictly contract-driven relationship'[66] and is already describing its relationship with ACS as a 'developing partnership'.[67] The language being used suggests a willingness to overlook breaches in some circumstances, in the interests of fostering an on-going co-operative relationship. Moreover, the partnership approach makes extremely high the risk of capture at agency level over the longer-term. A captured watchdog is, of course, no watchdog at all.[68]

(ii) The Relative Priority Given to Human Rights Standards

Even if it is assumed that DIMA is committed in a general way to holding ACS accountable for breaches of the Standards, it cannot necessarily be assumed that it is committed to holding ACS accountable for all human rights violations as required by international law.[69] The various provisions of the Detention Agreements (including the Standards) are directed towards three main ends. These

64 General Agreement clause 1. A 'General default' is defined to mean insolvency and other such events: General Agreement clause 1.

65 General Agreement clause 1; Detention Services Contract clause 1 and Schedule Detention Services Default. The exact specifications of service default events have been deleted from the publicly available version of the contract for 'commercial reasons'.

66 Mark Sullivan (Acting Secretary, DIMA), 'Forward' in *Detention Agreements* (12 August 1998). This is a document containing the public release versions of the three contracts between the Commonwealth of Australia and ACS.

67 Joint Standing Committee on Migration, above n29 at 39. See also DIMA's description of the relationship in Commonwealth of Australia, above n10 at L&C144 (testimony of Mr Metcalfe, DIMA).

68 See further Harding, above n23 at 33–49.

69 See above 3.

ends can easily come into conflict. When they do, it is to be expected that a rational contractor will resolve the conflict by pursuing the end that is of greater importance to their client in fact rather than in theory.

As previously stated, the reason officially advanced for detaining unlawful non-citizens is attaining the objective of ensuring that they are unable to avoid removal from the country by disappearing into the community. The fact that successive Australian governments have shown a preparedness to be wildly over-inclusive[70] in taking a measure so costly to the individual as deprivation of personal liberty suggests that it is almost impossible to overstate the importance that governments attach to the achievement of this objective of detention. It follows that DIMA is going to be particularly concerned to ensure that immigration detainees are prevented from escaping. The primary objective of out-sourcing the provision of detention services was to save taxpayers' money.[71] It follows that DIMA is going to be very concerned to ensure that taxpayers' money is in fact saved. Finally, it is a stated objective of Government to ensure that the detention function is discharged in a manner that complies with Australia's international treaty obligations.[72] The question is whether this last objective is likely to be given priority over the other two in the case of conflict.

The first point to note is that DIMA was presumably well aware of controversies surrounding ACM's running of the Arthur Gowrie Correctional Centre and the Junee Correctional Centre.[73] At the more extreme end, for example, the Queensland Corrective Services Commission concluded after inquiry that, in contravention of contracted confinement standards, ACM subjected rioting inmates at Arthur Gowrie Correctional Centre to 'indignity and acute physical discomfort' in November 1992.[74] Despite the human rights concerns raised in relation to ACM's operation of the Arthur Gowrie Correctional Centre and the Junee Correctional Centre, DIMA chose the ACS tender. This suggests that the primary concern for DIMA was to chose a contractor that would provide secure detention cheaply.

The greater the use of surveillance, confinement and force, the greater the ease and effectiveness that the objective of preventing escape is likely to be achieved. Would DIMA be prepared to tolerate the use of such measures to an extent that breaches the human rights of detainees? It is suggested that the answer to the question is 'yes'. For example, pre-privatisation, DIMA was faced with a situation in which a male detainee had escaped from the minimum security wing (stage one) of Villawood IDC. DIMA promptly placed the other detained members of the escapee's family unit—his wife and 16 month old child—in the maximum security wing (stage two) of Villawood IDC, in order to ensure that they also did not escape.[75] The odds of the woman escaping with a 16 month old child in tow were

70 See above secion 2(A).

71 DIMA, above n6 at 48; Commonwealth of Australia, above n10.

72 DIMA, *Fact Sheet 82*, above n44.

73 See, for example, Elias & Cookes, above n60; ABC Radio National, *Background Briefing: Privatisation of Prisons* (9 July 1995).

74 Harding, above n23 at 126.

clearly ridiculously small. At the same time, the negative impact on the child of the stage two environment was great[76] and clearly constituted a breach of the child's human rights under the *CROC*.[77] However, DIMA refused to reverse its decision despite representations made to it by both the Australian Red Cross and the Human Rights and Equal Opportunity Commission (HREOC).[78]

It costs money to meet many of the human rights standards relevant to immigration detainees, such as those relating to accommodation and medical, educational and other facilities. While there is probably limited scope for the contractor to pass on cost overruns to the Commonwealth,[79] it is perfectly clear that the Commonwealth gets to share with the contractor the cost savings 'achieved through operational efficiencies in the delivery of Detention Services'.[80] Is it likely that DIMA would insist too strenuously that cost savings not be achieved at the expense of full compliance with human rights standards? In light of DIMA's pre-privatisation parsimony, it is suggested that the answer to this question is 'no'. For example, IDC visitors often had to supply detainees with phone cards, clothing and other such necessities, because the supply from IDC administration was inadequate.[81] Medical, educational, recreational and religious services allegedly were not provided to an adequate standard by IDC administration either, although again volunteers sometimes stepped into the breach.[82]

E. Conclusion

In order to dissuade ACS and/or DIMA from succumbing to the temptation of sacrificing the human rights of immigration detainees for reasons of security, cost savings or administrative convenience, it is necessary that their actions be subjected to intense scrutiny by those who give first priority to ensuring that the human rights of detainees are respected and who are able to secure remedial action

75 Commonwealth of Australia, *Reference: UN Convention on the Rights of the Child (Proof Hansard Report)*, Joint Standing Committee on Treaties, 9 July 1997 at TR 814 (testimony of Ms Nolan, Australian Red Cross): <http://www.aph.gov.au/hansard/joint/commttee/comjoint.htm>.

76 Ibid.

77 See above section 3.

78 Above n75.

79 Detention Services Contract clauses 4.1 (Detention Facility Costs) and 4.2 (Detention Services Fee). Details of the basis on which the Detention Services Fee is calculated and the basis on which payments additional to the Detention Services Fee will be made have been deleted from clause 4.2 'for commercial reasons'.

80 See General Agreement clause 3.2 and Detention Services Contract clause 4.8.

81 Commonwealth of Australia, *Reference: Inquiry into Detention Practices (Official Hansard Report)*, Joint Standing Committee on Migration, 24 August 1993 at 150–151 (testimony of Mr Atkinson, Society of St Vincent de Paul). The need for IDC visitors to supply necessities continues to exist post-privatisation: Interview with Villawood IDC visitor C (19 October 1998).

82 Interview with John Dolling, Uniting Church Pastor, Port Hedland (12 June 1995); Interview with Maribyrnong IDC visitor B (30 September 1997); and HREOC, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) at 173–174, 185, 189–196. In relation to educational and medical services see further below 6(A)(ii).

in relation to any human rights violations that they identify. The question is whether any of the existing mechanisms for external accountability fit this description.

5. *Accountability to Independent Government Agencies*

A. Australian Federal Police

Where immigration detainees have been subjected to physical violence or other treatment that may amount to criminal conduct, the alleged victim can, and ACS and DIMA ought to, report the incident to the Australian Federal Police (AFP) for investigation with a view to prosecution. Police investigation and prosecution is, of course, a necessary mechanism of external accountability for conditions of immigration detention.

However, it is clearly not an adequate means of ensuring that conditions of immigration detention comply with international human rights standards. Most violations of human rights standards would not be criminal conduct under domestic law. For example, the AFP investigation of a disturbance that occurred in December 1996 at Port Hedland IDC revealed that 72 of the detainees involved in it were locked in individual rooms and kept isolated for up to six days.[83] This was clearly a violation of Articles 7 and 10 of the *ICCPR*, but probably not a criminal offence.

B. Commonwealth Ombudsman

It is a function of the Commonwealth Ombudsman to investigate administrative action by government departments in response to a complaint or of his or her own motion.[84] Where, after investigation, the Ombudsman is of the opinion that the administrative action or practice investigated is unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise 'wrong', the Ombudsman must report accordingly to the department concerned.[85] The Ombudsman may include in the report any recommendations he or she thinks fit, and may request that the department provide particulars of any remedial action that it proposes to take as a result of the report.[86] If, within a reasonable time of receiving the Ombudsman's report, a department has not taken remedial action that is, in the Ombudsman's opinion, appropriate and adequate, the Ombudsman can advise the Prime Minister of this and can also present his or her investigation report to Parliament.[87] The Ombudsman can also make public disclosure of information relating to an investigation if such disclosure is in the public interest.[88]

---

83 HREOC, above n82 at 116.
84 *Ombudman Act* 1976 (Cth) s5.
85 Id at s15(1) and (2).
86 Id at s15(4).
87 Id at ss16 and 17.
88 Id at s35A.

The Ombudsman's power of investigation extends to investigating the actions of ACM employees.[89] The General Agreement between the Commonwealth and ACS facilitates such investigations by providing that officers of the Ombudsman must be provided with access to IDCs and immigration detainees in accordance with the *Ombudman Act* 1976 (Cth).[90] Immigration detainees have the right to complain to the Ombudsman[91] and the Immigration Detention Standards require that material advising of the right be available at the IDCs.[92] Such material is in fact available at all of the IDCs.[93] Detainees' legal advisers and IDC visitors are also sources of information about the existence and role of the Ombudsman.

The Ombudsman gets a steady stream of complaints from immigration detainees.[94] Because detention is a serious matter and avenues of redress for grievances are limited, the Ombudsman is very conscientious about looking into complaints concerning the administration of immigration detention.[95]

The Ombudsman has also engaged of its own motion investigations into the administration of immigration detention. In 1995 (when this research commenced), many lawyers, IDC visitors and others in contact with immigration detainees were expressing concern that detainees manifesting difficult behaviour, and those perceived by DIMA and APS to be troublemakers/ringleaders, were being transferred from IDCs to prisons by way of punishment and/or to make the task of IDC management easier.[96] A sufficient number of complaints were made to the Ombudsman about transfers to prisons to prompt an 'own motion' investigation of the matter.[97] Six months after the Ombudsman reported on the investigation,[98] she reported that DIMA had accepted 24 of the 25 recommendations contained in the report and had acted quickly to implement a significant range of changes in APS and DIMA practices and procedures, such as tightening criteria for transfer to prison, introducing alternative (more appropriate) methods for managing detainee behaviour, and so on.[99] The new procedures were given written form in Migration Series Instruction 157 and also in the Station Instructions of the individual IDCs.[100]

---

89 Interview with Commonwealth Ombudsman Officer A (10 December 1997).

90 General Agreement clause 9.4.3 and *Ombudsman Act* 1976 (Cth) ss7(3)(b) and 14.

91 The right is contained in the *Ombudsman Act* 1976 (Cth) s7(3)(a).

92 Immigration Detention Standards 7.11.2.

93 Interview with Commonwealth Ombudsman Officer A, above n57.

94 Ibid.

95 Above n89.

96 For example, Interview with Kerry Murphy, Policy Officer, Jesuit Refugee Service (29 June 1995); Interview with Richard Egan, spokesperson, Indo-China Refugee Association (WA) (10 June 1995); Interview with Larry Reitmeyer, Co-ordinator, Australian Catholic Refugee Office (17 June 1995); and Interview with Nick Poynder, lawyer (14 June 1995).

97 Commonwealth of Australia, *Reference: Migration Legislation Amendment Bill (No 2) 1996 (Proof Hansard Report)*, Senate Legal and Constitutional Legislation Committee, 26 June 1996 at L&C169 (Ms Smith, Commonwealth Ombudsman).

98 Commonwealth Ombudsman, above n10, released to the public pursuant to *Ombudsman Act* 1976 (Cth) s35A.

99 Commonwealth Ombudsman, *Annual Report 1995–96* at 145–146.

100 HREOC, above n82 at 119.

Two and a half years after the Ombudsman reported on transfers to prisons, HREOC came to the conclusion that '[t]ransfers to State prisons are being used too frequently and are not being used only as a last resort'.[101] At the time of HREOC's report, APS was still the service provider for the IDCs. At the end of 1998 (when this research was being concluded), ACS had taken over. However, not much changed. IDC visitors and others in contact with immigration detainees were observing that ACS was using transfers to prison as punishment and/or to get rid of difficult individuals in order to make its own job easier.[102] Furthermore, the Ombudsman's Office was in the process of investigating several instances in which the procedures set out in MSI 157 had not been followed.[103] In short, the improvements arising from the Ombudsman's December 1995 report were either extremely short-lived or else always more apparent than real.

Resource constraints have prevented the Ombudsman's Office from using the power of 'own motion' investigations to institute a proper IDC inspection process.[104] Prior to privatisation, representatives of the Ombudsman's Office managed to visit Perth, Maribyrnong and Villawood IDCs every six to twelve months.[105] However, the last pre-privatisation visit to Port Hedland IDC took place in March 1995.[106] At the time of writing, representatives of the Ombudsman's Office had visited each of the IDCs once after privatisation.[107] The purpose of those visits was to examine how the Immigration Detention Standards were operating on the ground.[108] At the time of writing, the Ombudsman had not reported publicly on the visits.

Pre-privatisation scrutiny by the Ombudsman was useful for uncovering maladministration in IDCs, but it was not an adequate means of monitoring immigration detention conditions for compliance with international human rights standards. It was not necessarily part of the Ombudsman's role to assess DIMA or APS actions against such standards, and the Ombudsman did not in fact do so. For example, the Ombudsman's report on its investigation into the transfer to prison of immigration detainees made passing reference to the fact that transfers to prison raise 'human rights issues',[109] but did not enter into discussion of these.[110] Post-privatisation, there is scope for the Ombudsman to play a much greater role in monitoring immigration detention conditions for compliance with human rights

101 Id at 121.

102 Interview with IDC Visitor C (19 October 1998); and Interview with Martin Clutterbuck, above n57.

103 Interview with Commonwealth Ombudsman Officer A, above n57.

104 Andrew Herington, Assistant Commonwealth Ombudsman, 'The Effects of Detention', paper presented at *Desperately Seeking Asylum: The Future of Refugee Policy in Australia*, Deakin University, Melbourne, 17 October 1997.

105 Interview with Commonwealth Ombudsman Officer A, above n57.

106 Ibid. The visit was undertaken in response to increased numbers at the IDC and comments made by third parties to the Ombudsman's Office regarding conditions there: Commonwealth Ombudsman, *Annual Report 1994–95* at 116.

107 Villawood and Maribyrnong IDCs in February 1998 and Perth and Port Hedland IDCs in about August 1998: Interview with Commonwealth Ombudsman Officer A, above n57.

108 Ibid.

109 Commonwealth Ombudsman, above n10 at 73.

standards. Failure by DIMA or ACS to comply with the Standards would clearly be maladministration, and the Standards include, of course, the most important of the human rights standards, as well as a statement that the contractor should take an approach to delivery of the detention function that is informed by Australia's international obligations.

C. Human Rights and Equal Opportunity Commission

It is a function of HREOC to inquire into any act or practice that may breach human rights. [111] Performance of the inquiry function may come about because HREOC has received a complaint about an act or practice, or the Attorney-General has requested an inquiry, or HREOC thinks an inquiry would be desirable.[112] If HREOC finds that an act or practice breaches human rights, it must notify its findings to the person engaging in the act or practice and may include in the notice recommendations for remedial action.[113] Unless settlement is effected by conciliation, HREOC must also report to the Attorney-General about the inquiry, its findings and recommendations, and any remedial action being taken by the person to whom the findings and recommendations were notified.[114] The Attorney-General must table such a report in Parliament within 15 sitting days of receiving it.[115]

The General Agreement between the Commonwealth and ACS provides that officers of HREOC must be provided with access to IDCs and immigration detainees in accordance with the *HREOC Act* 1986 (Cth).[116] Immigration detainees have the right to complain to HREOC,[117] but ACS has been placed under no obligation to advise them of that right. On the whole, immigration detainees appear to be far less aware of the existence and role of HREOC than they are of the existence and role of the Ombudsman.[118] Lack of knowledge can, therefore, be said to be a barrier to the making of complaints to HREOC by the detainees themselves. However, HREOC can, and does, inquire also into complaints made by third parties on behalf of detainees.

---

110 Although unconvicted immigration detainees are, in the first instance, placed in the remand areas of prisons, they are thereafter subject to normal prison practices and discipline, and can, among other things, be moved by prison authorities to areas in which convicted criminals are held: ibid; and HREOC, above n82 at 123. Accommodation of unconvicted immigration detainees with criminals is contrary to *Standard Minimum Rule* 85(1). Subjection of immigration detainees to the high level of regimentation that is a feature of prison life and their exposure to possible ill-treatment by criminal detainees is probably contrary to *Standard Minimum Rule* 94.

111 *HREOC Act* 1986 (Cth) s11(1)(f).

112 Id at s20(1).

113 Id at s29(1).

114 Id at ss11(1)(f) and 29(2).

115 Id at s46.

116 General Agreement clause 9.4.3 and *HREOC Act* 1986 (Cth) ss13 and 20(6)(b).

117 The right is contained in the *HREOC Act* 1986 (Cth) s20(6)(a).

118 Interview with Martin Clutterbuck, lawyer, above n57.

Prompted by its long-standing concerns about detention of unauthorised arrivals and also by continuing complaints about the conditions of immigration detention, HREOC conducted a comprehensive inquiry into the detention of unauthorised arrivals between January 1996 and June 1997 (that is, pre-privatisation).[119] For the purposes of the inquiry, HREOC visited all four IDCs, conducted interviews with immigration detainees, DIMA and APS staff, and members of the community, and drew also on the information provided in relation to individual complaints.[120] Despite all of this, HREOC observed that it was 'difficult to get a clear overall picture of how detainees are being treated in immigration detention centres'.[121]

HREOC's report on its inquiry was presented to the Attorney-General in May 1998,[122] and was later tabled in Parliament as required by the *HREOC Act*. At the time of writing, the Government had not yet made a formal response to the report.[123] However, DIMA has attacked the report on many occasions and in many fora, saying that it is sensationalist and that many of the findings are factually inaccurate or out of date.[124] HREOC, for its part, has continued to stand by the findings contained in the report, stating that it has corroborating evidence for every one of those findings.[125] It does acknowledge that conditions in the IDCs have improved since the commencement of its inquiry and suggests that the improvement is attributable in part to the inquiry.[126] This is undoubtedly correct. DIMA is clearly quite sensitive to public criticism by HREOC and consequently eager to demonstrate that conditions of detention are continually improving.[127] It may even be, although this is speculation, that HREOC's known concerns about human rights compliance post-privatisation[128] played a large part in prompting DIMA to write human rights standards into the Immigration Detention Standards. The HREOC report has certainly been responsible for engendering further external scrutiny of IDCs. The community interest generated by the media publicity given to the HREOC report was partly responsible for the Joint Standing Committee on Migration's decision to inspect the IDCs in 1998.[129]

---

119 HREOC, above n82 at 9; and HREOC, *Annual Report 1995–96* at 48–49.

120 HREOC, above n82 at 13, 81 and 239.

121 Id at 239.

122 HREOC provided a draft of its full report to DIMA, the Minister of Immigration and the Attorney-General in August 1997: id at 14. The material in the report relating to conditions of detention was revised in light of discussions with DIMA over the period November 1997 to January 1998: ibid. The final draft of the full report was provided to DIMA, the Minister for Immigration and the Attorney-General in February 1998 for comment: ibid.

123 Commonwealth of Australia, above n10 at L&C141.

124 See, for example, Commonwealth of Australia, above n49 at L&C139–142.

125 Sidoti C, 'Unlucky voyagers to the Lucky Country' *The Age* (28 May 1998) at 17; Commonwealth of Australia, *Official Committee Hansard: Consideration of Estimates*, Senate Legal and Constitutional Legislation Committee, 2 June 1998 at L&C17 (testimony of Mr Sidoti, HREOC).

126 Sidoti, ibid.

127 See, for example, DIMA, above n6.

128 HREOC, above n82 at 66–68.

129 Above n29 at 1–2.

Since the focus HREOC inquiries is to ascertain whether an act or practice is in breach of human rights, such inquiries would be a useful means of monitoring human rights compliance within the privatised IDCs. At the time of writing, HREOC had in fact carried out post-privatisation site inspections at each of the IDCs, but a report on those inspections had not been made publicly available.

D. Limitations on the Effectiveness of Independent Government Agencies

(i) Shortcomings of the Monitoring Mechanisms

While other government agencies describe DIMA as being usually quite cooperative,[130] DIMA is quite prepared to take evasive action where scrutiny by such agencies would cause it serious difficulty. Previous mention has been made of the December 1996 disturbance at the Port Hedland IDC, in the course of which several detainees were allegedly assaulted by APS officers. It is a point well worth noting that neither DIMA nor APS referred the matter to the police until HREOC commenced an inquiry into the matter following a complaint from the detainees in question.[131] In other words, the police investigation had more or less to be forced upon DIMA and the then service provider. After the December 1996 incident, DIMA indicated that it would in future invite police investigation of all assault allegations.[132] However, there is a clear element of moral hazard in relying on either DIMA or the contractor to invite external scrutiny that may place them in a bad light.

It is not only police investigation that DIMA has tried to evade. Pre-privatisation there were reported instances of DIMA discouraging and/or blocking attempts by immigration detainees to contact the Ombudsman[133] and HREOC.[134] The case of *Human Rights and Equal Opportunity Commission & Anor v Secretary of the Department of Immigration and Multicultural Affairs*[135] and its aftermath is also very instructive. The facts which gave rise to the litigation were as follows. The Refugee Advice and Casework Service (Victoria) Inc (RACS) attempted to communicate with a group of unauthorised boat arrivals[136] being detained at the Port Hedland IDC for the purpose of advising them of their legal rights. In line with Departmental policy, DIMA refused to allow RACS to initiate contact with the unauthorised arrivals.[137] In response, RACS lodged a complaint with HREOC alleging that the detainees' rights under the ICCPR were being violated.

HREOC attempted to use section 20(6)(b) of the *HREOC Act* to require DIMA to deliver a confidential letter to the detainees. The letter, as it later emerged,

130 See, for example, Commonwealth of Australia, *Reference: Migration Legislation Amendment Bill (No 2) 1996 (Hansard Proof Report)*, Senate Legal and Constitutional Legislation Committee, 26 June 1996 at L&C164 (testimony of Mr Sidoti, HREOC).

131 HREOC, above n82 at 100–101.

132 Interview with Commonwealth Ombudsman Officer A, above n57.

133 HREOC, above n82 at 101.

134 Id at 217.

135 (1996) 67 FCR 83.

136 The captain, crew and passengers of the 'Teal'.

137 Above n130 at L&C193 (testimony of Mr Richardson, DIMA).

informed the detainees that a complaint had been lodged, asked for their assistance in investigating the complaint and, incidentally, mentioned that the detainees could obtain legal advice by contacting RACS. DIMA refused to deliver the letter arguing that HREOC could not use section 20(6)(b) to communicate with a detainee except in response to a complaint initiated by the detainee. HREOC went to the Federal Court in order to secure delivery of the letter. Justice Lindgren agreed with HREOC's interpretation of section 20(6)(b), and HREOC obtained the order it sought.[138]

At this point, the Government attempted to rush through the Migration Legislation Amendment Bill (No 2) 1996. The Bill, if passed, would have inserted into the *Migration Act* a new subsection 193(3), providing that section 20(6)(b) of the *HREOC Act* and section 7(3)(b) of the *Ombudsman Act*[139] do not apply to an unauthorised arrival in immigration detention unless that person has made a complaint in writing to HREOC or the Ombudsman (as the case may be). In other words, passage of the Bill would have prevented HREOC and the Ombudsman from initiating confidential contact with immigration detainees. Opposition to the Migration Legislation Amendment Bill (No 2) 1996 by the minor parties and independents in the Senate forced its deferral, and it lapsed with the proroguing of Parliament prior to the 1998 Federal election. However, the substance of the Bill has since been revived in the Migration Legislation Amendment Bill (No 2) 1998,[140] and there appears to be bipartisan support for its passage.

What is interesting for present purposes is that the reach of the Bill far exceeds its supposed objective of ensuring that HREOC and the Ombudsman do not use

---

138 DIMA also argued that the court should, in the exercise of its discretion, refuse to order delivery of the letter because of the reference in it to the possibility of obtaining legal advice from RACS. Justice Lindgren accepted HREOC's evidence that what was meant was legal advice in relation to HREOC's inquiry into the RACS complaint. His Honour did not think that the probability that RACS would also provide legal advice relating to refugee status was a reason for refusing the relief sought by HREOC.

139 This is a similar provision to *HREOC Act* 1986 (Cth) s20(6)(b).

140 It should be noted that in response to the threatened passage of the Migration Legislation Amendment Bill (No 2) 1996, HREOC gave an informal undertaking to DIMA that before using its powers under s20(6)(b) in dealing with third party complaints, it would consult with DIMA about the complaints: Commonwealth of Australia, *Official Committee Hansard, Reference: Migration Legislation Amendment Bill (No 2) 1998 and associated bills*, Senate Legal and Constitutional Legislation Committee, 29 January 1999 at L&C100 (testimony of Mr Sidoti, HREOC). The Ombudsman also gave an informal undertaking to DIMA: Commonwealth of Australia, *Official Committee Hansard, Reference: Migration Legislation Amendment Bill (No 2) 1998 and associated bills,* Senate Legal and Constitutional Legislation Committee, 4 March 1999 at L&C67 (Mr McLeod, Commonwealth Ombudsman). While somewhat different from the HREOC undertaking, the Ombudsman undertaking was offered in order to avert the same threat. Both HREOC and the Ombudsman have abided by their undertakings, but DIMA asserts that the passage of Migration Legislation Amendment Bill (No 2) 1998 is necessary as a means of 'clarifying the law' and 'avoiding any tension that may arise should there be any departure from the agreement in the future': Commonwealth of Australia, *Official Committee Hansard, Reference: Migration Legislation Amendment Bill (No 2) 1998 and associated bills,* Senate Legal and Constitutional Legislation Committee, 28 January 1999 at L&C5 (testimony of Mr Sullivan, DIMA).

their powers to assist third parties (such as lawyers) who are seeking to make contact with immigration detainees.[141] Passage of the Bill will so clearly have the additional effect of undermining the capacity of the Ombudsman and HREOC to monitor the conditions of immigration detention[142] that it is difficult to avoid the conclusion that this is one of DIMA's objectives.

Even if IDC management does not use its physical control over detainees to prevent it, it cannot be assumed that all those detainees with grievances about IDC conditions will themselves complain to the Ombudsman and HREOC. Part of the problem is lack of knowledge about the possibility of complaining to external bodies.[143] Another part of the problem is that many detainees are not assertive enough to make complaints. However, the greatest part of the problem is that many detainees are reluctant to complain for fear that their lives will be made more difficult, or their substantive visa applications will be adversely affected if they are perceived as trouble-makers.[144] The Ombudsman and HREOC need, therefore, to conduct regular investigation or inquiry into IDC conditions by conducting site inspections and also by communicating confidentially with detainees—even if those detainees have not initiated contact.

Leaving aside the threat posed by the Migration Legislation Amendment Bill (No 2) 1998, a couple of the features of the 'own motion' monitoring presently conducted by the Ombudsman and HREOC already limit its effectiveness. The present spacing of visits by these agencies to the IDCs is simply too wide. Many months elapse between visits to the capital city IDCs. In the case of Port Hedland IDC, its physical location in a small town remote from major population centres means that HREOC and the Ombudsman cannot afford to visit it as often as the other IDCs.[145] Another problem is that all visits are notified in advance.[146] The problem with widely spaced visits notified in advance is that IDC management can very easily put on show days bearing very little relation to normal IDC conditions. For example, one detainee observed to an IDC visitor that Villawood IDC had been spruced up especially for HREOC's most recent site inspection, and that the Centre Manager who was guiding HREOC representative around the IDC appeared to be steering that person away from possible trouble-makers.[147]

---

141 Ibid, Testimony of Mr Sullivan, DIMA.

142 Above n140 at 66–67. Mr McLeod, Commonwealth Ombudsman; Commonwealth of Australia, *Reference: Migration Legislation Amendment Bill (No 2) 1996 (Hansard Proof Report)*, Senate Legal and Constitutional Legislation Committee, 26 June 1996 at L&C153 (Mr Sidoti, HREOC).

143 HREOC, above n82 at 239.

144 Ibid.

145 Ibid.

146 Requests by other agencies to visit IDCs for the purpose of inspecting their facilities must be referred to the Assistant Secretary of the Compliance Branch and, in some circumstances, must also be cleared through the Minister's Office: MSI 92 (9 March 1995) para 17.4.

147 Interview with Villawood IDC visitor C (19 October 1998). The evidence on which the detainee based the latter observation was that she was asked to speak to the HREOC representative and when she suggested that another detainee, who had already made several written complaints to HREOC, be asked instead, the Centre manager indicated that he did not wish to select that detainee for the task.

(ii) Shortcomings of Enforcement Mechanisms

If the AFP finds that criminal offences have been committed against immigration detainees, it can in theory set in motion the criminal justice process. However, the proper working of the enforcement mechanism can be easily frustrated by DIMA. This is clearly illustrated by the aftermath of the December 1996 disturbance at the Port Hedland IDC. Several detainees claimed that they were assaulted by APS officers during the disturbance. The police found the allegations of assault of detainees by three APS officers to be sufficiently substantiated to warrant referral to the Director of Public Prosecutions.[148] However, the APS officers were not charged and prosecuted because the witnesses needed to make out the prosecution's case were removed from the country.[149]

If the Ombudsman uncovers maladministration of the IDCs or HREOC finds that the human rights of detainees are being breached, all they can really do is make a report containing recommendations for remedial action.[150] If ACS and DIMA choose not to act on a report, the Ombudsman or HREOC (as the case may be) must leave it in the hands of others — the Parliament and the general public — to procure such action. This may or may not happen.

(iii) Vulnerability of the Agencies to Collateral Attack

While it is undeniable that the AFP, the Ombudsman and HREOC presently play useful roles as independent monitors of IDC conditions, both their independence and their ability to monitor are, of course, always vulnerable to erosion by the Government. The greatest threat is that of emasculation through funding cuts. HREOC's budget has been slashed by almost half, with the result that it has had to abandon most of its inquiry work.[151] The funding of the Ombudsman's Office has been reduced as drastically as HREOC's funding.[152] This will undoubtedly impact on the ability of the Ombudsman's Office to investigate complaints from immigration detainees and will further restrict its already limited ability to play a general monitoring role in relation to IDCs.

6. *Accountability To Parliament*

A. *Monitoring*

(i) Individual Parliamentarians

Individual parliamentarians who are interested in immigration detention matters can seek information informally from DIMA or from the Minister's Office and can

148 HREOC, above n82 at 101.

149 Ibid.

150 See above sections 5(B) and (C).

151 Mr Melham (ALP), Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 25 June 1998 at 5410; and Mr McClelland (ALP), Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Handsard)*, 17 February 1999: <http://demos.anu.edu.au>.

152 Mr Price (ALP), Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Handsard)*, 25 June 1998 at 5421.

also seek it formally by asking questions in Parliament. However, parliamentarians who do not belong to the government's political party have limited success in obtaining through these avenues information that the government would rather not have publicly available. For example, inconvenient questions asked in Parliament can quite easily be turned aside with the response that it would be too resource intensive for DIMA to ascertain and provide the answers sought in the time available.[153] Very often non-government parliamentarians turn to non-government organisations involved in the area in question as a source of information,[154] rather than relying exclusively on the government and its agencies.

The most useful thing which non-government parliamentarians are able to do with the information that they acquire about government actions (from whatever source) is to reveal the information and criticise the actions in Parliament. Their words reach not only other parliamentarians, but also the public at large through the media.[155] If public opinion can be enlisted in favour of a particular resolution of a particular case or issue, the government might be persuaded to modify its behaviour accordingly. By introducing new information and ideas into public discourse, such parliamentarians may also be contributing to more fundamental shifts in public opinion over the longer term. However, there is political risk in pursuing either of these goals. Generally the safest path to an electoral win is to accept existing voters' prejudices on issues such as illegal immigration, and to play to those prejudices in responding to the issues.

Since many voters are quite hostile towards those attempting to circumvent Australia's ordinary immigration processes,[156] it is not surprising that few members of the main opposition party or parties (whether ALP or Liberal/National at the particular time) have been conspicuous in championing the human rights of unlawful non-citizens in the parliamentary forum.[157] Fortunately, some independents and the members of some minor parties do not face the same constraints as the majority of their Parliamentary colleagues. Their voter base is either personally loyal or more likely to have sympathy for immigration detainees than the average voter. Of all parliamentarians, they are the ones who most use the parliamentary forum to draw attention to Australia's international obligations, the

153 See, for example, Senator Amanda Vanstone, Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 20 October 1997 at 7684.

154 Interview with Senator Andrew Bartlett, Democrats spokesperson on immigration matters (18 March 1998); and Interview with Eve Lester, Research and Policy Officer, Jesuit Refugee Service (4 March 1998).

155 Hardcastle L, Parkin A, Simmons A & Suyama N, 'The Making of Immigration and Refugee Policy: Politicians, Bureaucrats and Citizens' in Adelman H et al (eds), *Immigration and Refugee Policy: Australia and Canada Compared* (vol 1, 1994) at 95–104.

156 See Taylor S, 'Rethinking Australia's Practice of "Turning Around" Unauthorised Arrivals: The Case for Good Faith Implementation of Australia's Protection Obligations' (1999) 11(1) *Pacifica Review: Peace, Security and Global Change* at 43; and Taylor S, 'Should Unauthorised Arrivals in Australia Have Free Access to Advice and Assistance?' (1999) 6(1) *Australian Journal of Human Rights* (forthcoming).

157 See Senator Margetts (WA Greens) Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 11 March 1999 at 2729–2735.

ways in which past or proposed treatment of detainees breaches these obligations, and the wider societal implications of such breaches.[158]

(ii) Parliamentary Committees

There are two Parliamentary Committees that deal with immigration matters on a regular basis. The Senate Legal and Constitutional Legislation Committee[159] considers DIMA budget estimates and also holds inquiries into Bills to amend migration legislation. In so doing, it is able to subject immigration detention conditions to some incidental scrutiny. By contrast, the Joint Standing Committee on Migration[160] has the scope to scrutinise immigration detention conditions in a far more regular and systemic fashion because its role is to inquire into and report upon the *Migration Act* and *Migration Regulations* (including proposed changes thereto) and 'such other matters relating to migration as may be referred to it by the Minister for Immigration and Multicultural Affairs.'[161]

The ability of Parliamentary Committees to scrutinise immigration detention effectively depends on their ability to obtain all relevant information either from the Government and its agencies or from other sources. Parliamentary Committees have always had to work hard to get relevant information from DIMA. The privatisation of IDCs has given DIMA new excuses for withholding relevant information, ie the excuse of safeguarding the commercial interests of the contractor.[162] When Senator Cooney (ALP) requested a copy of the Detention Agreements from DIMA in the course of an Estimates hearing, the version offered to him was the same version made available to HREOC, the Ombudsman's Office and the public at large, that is, a version from which deletions had been made for reasons of 'commercial confidentiality and/or security'.[163]

---

158 See, for example, Senator Spindler (Democrats), Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 28 June 1996 at 2560–2563 explaining why the Democrats opposed the Migration Legislation Amendment Bill (No 2) 1996.

159 This Committee has an equal number of Government and non-Government members, with the Chair being one of the Government members: Commonwealth of Australia, *Senate Standing Orders* (February 1999): <http://www.aph.gov.au/senate/pubs/orders97/ch5-1.htm>.

160 The Joint Standing Committee has an equal number of Government and non-Government members, with the Chair being one of the Government member: Mr Reith (Leader of the House), Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 3 December 1998 at 1317–1318.

161 Id at 1317.

162 In the United States and some other places, where full versions of private prison and immigration detention contracts are required to be placed on the public record for various purposes, private companies (including those in the Wackenhut group of companies) are still willing to enter into such contracts. This gives rise to the inference that the censorship of the Detention Agreements between the Commonwealth and ACS has more to do with protecting the Government from having its own actions scrutinised, than to do with protecting ACS's commercial interests. (The foregoing point was made in relation to the Victorian Government censorship of private prison contracts in Freiberg A, 'Commercial Confidentiality and Public Accountability for Private Prisons', paper presented at *Private Prisons and Public Accountability: Australia and Beyond*, Institute of Criminology, University of Sydney, 24 November 1998 at 11, 13–14).

Parliamentary Committees are, of course, able to hold inquiries and through that mechanism to draw on many more sources of information than the Government and its agencies. In 1993, at the request of the Senate, the Joint Standing Committee on Migration undertook an inquiry into immigration detention practices in Australia.[164] Most of the submissions made to the 1993 inquiry concentrated on advocating an end to mandatory detention of unauthorised arrivals.[165] However, concerns were also raised about the conditions of immigration detention. Many of these concerns were human rights concerns, though not necessarily couched in human rights terms.[166] Having obtained the information, what did the Joint Standing Committee do with it? In its report on the inquiry, the Joint Standing Committee made three recommendations on ways in which conditions of detention could be improved. The first and main recommendation was that an IDC Advisory Committee be established.[167] It was to be the IDC Advisory Committee's task to address the bulk of the concerns raised about conditions of immigration detention in the course of the inquiry.[168] The substance of this recommendation was implemented, and is discussed further below.

The Joint Standing Committee's other two recommendations addressed concerns about detention conditions more directly, but the concerns addressed were at the less serious end of all the concerns raised in the course of the inquiry. One of these two recommendations was that DIMA look into the possibility of giving detainee children the opportunity to attend local schools and that it consider the viability of providing education in the native language of the children.[169] DIMA accepted this recommendation,[170] but not much came of that acceptance.

---

163 Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Official Committee Hansard: Consideration of Additional Estimates*, 9 February 1999 at L&C147–149. Senator Cooney asked for the uncensored version of the contract to be produced to the Committee, and was informed that legal advice would be sought before the Minister for Immigration made the decision about whether or not to comply with the request.

164 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (February 1994) at 1.

165 These submissions had little impact. The majority report of the Joint Standing Committee recommended the continuation of mandatory detention subject to provision being made for release in certain, very limited, circumstances: id at 156–158.

166 For a truly chilling list of concerns see Australian Catholic Refugee Office, Submission No 33, 29 July 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) vol 1, S255.

167 Joint Standing Committee on Migration, above n164 at 193.

168 Id at 190–191.

169 Id at 193. Children have a right to education under the *CROC* art 28 that is not curtailed in any way by the deprivation of liberty: Van Bueren, above n35 at 218. Rule 38 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (adopted by UN General Assembly Resolution 45/113 (14 December 1990)) and Guideline 5 of the *UNHCR Guidelines on Detention of Asylum Seekers* (contained in United Nations High Commissioner for Refugees (Regional Bureau for Europe), *Detention of Asylum Seekers in Europe* (1995) at 7, 13) both state that education should be provided outside the detention facility wherever possible. These documents are of great persuasive value in interpreting Australia's treaty obligations. *CROC* art 29 provides that a child's education should, inter alia, be directed towards developing respect for the cultural identity and language of that child.

170 McKiernan J, 'Asylum, Border Control and Detention' (1995) 3(2) *People and Place* 39 at 41.

According to HREOC's report, *Those Who've Come Across the Seas*, there was no native language education being provided at the IDCs at the time of its visits.[171] The HREOC report also stated that HREOC was not aware of cases where detainee children had attended local schools in the three years since the Joint Committee's report.[172] In fact, from about mid-1996, some of the children detained at Maribyrnong IDC were able to attend a local primary school.[173] Children at Port Hedland IDC have also been able to attend the local school.[174] For the most part, however, the legislative requirement that detainees must either be at a place of detention or under the control of a custodial officer has been treated as an insurmountable obstacle to detainee children attending local schools.[175] Schools are naturally reluctant to be declared as places of detention.[176] The alternative of a teacher being made a custodial officer for the purpose of teaching/guarding detainee children at the local school is one that has been canvassed,[177] but clearly has not often been implemented.

The Joint Standing Committee's other direct recommendation for improving conditions of detention was that, where a large group of detainees of the same ethnic group were being held at the one IDC, DIMA should make every effort to ensure that those detainees had the opportunity to consult medical personnel who spoke their native language.[178] It would appear that the Joint Standing Committee's recommendation did not result in any action being taken, since the recommendation was repeated by HREOC in its 1998 report.[179]

The Joint Standing Committee chose not to address directly the many other concerns raised during the course of the 1993 inquiry about the adequacy of medical services available to immigration detainees.[180] However, the airing of the concerns appears to have had some effect. In the years since the 1993 inquiry, improvements have been made to the medical services available to detainees at Maribyrnong IDC, Perth IDC and Port Hedland IDC.[181] It should be noted, though, that the improvements have been made at a slow pace and with some degree of backsliding, especially in relation to mental health care.[182]

Another example of a human rights concern that the Joint Standing Committee chose not to address directly was the concern that detainees were being subjected to solitary confinement.[183] This is a concern that has continued to be raised frequently

171 HREOC, above n82 at 179.

172 Ibid.

173 Interview with Maribyrnong IDC visitor A (14 October 1997); Interview with Maribyrnong IDC visitor B (30 September 1997).

174 Joint Standing Committee on Migration, *Immigration Detention Centres Inspection Report* (August 1998) at 40.

175 Ibid; Mr Sullivan, Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Official Committee Hansard: Consideration of Estimates* (testimony of Mr Sullivan, DIMA); and Interview with Legal Aid NSW lawyer (14 June 1995).

176 Interview with Legal Aid NSW lawyer (14 June 1995).

177 Ibid.

178 Joint Standing Committee on Migration, above n164 at 193.

179 HREOC, above n82 at 167.

180 See summary of concerns in Joint Standing Committee on Migration, above n164 at 178–179.

in the years since the 1993 inquiry.[184] In other words, the airing of the concern at the 1993 inquiry did little to bring about change.

Since the privatisation of the IDCs, the Joint Standing Committee has gathered first-hand information about IDC conditions by conducting site inspections and has reported its findings to Parliament.[185] The Joint Standing Committee reported that the Perth IDC was overcrowded at the time of its visit and had some 'obvious limitations' as a place of longer-term detention, but that otherwise '[IDC] facilities were adequate and the services were of an appropriate standard'.[186] The Joint Standing Committee made no recommendations in relation to Perth IDC. It simply noted that the Minister had advised the Committee that detainees would be relocated from Perth IDC to other IDCs using case-by-case criteria.[187]

The use of Perth IDC for long-term detention has been going on for many years, despite the Ombudsman and others asserting its unsuitability for such a purpose through all of that time.[188] DIMA itself accepts that Perth IDC is not ideal for long-term detention, but suggests that the real problem is the reluctance of such detainees to agree to relocation to Port Hedland IDC[189] away from their lawyers

181 Comparison of services described in Attachment A to Department of Immigration and Ethnic Affairs, Submission No 74, 13 August 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) vol 3, S637 with services described in HREOC, above n82 at 157–160 and Joint Standing Committee on Migration, above n174 at 15. It would appear that medical services available to detainees at Villawood IDC have remained much the same over time: Attachment A to Department of Immigration and Ethnic Affairs, Submission 74, 13 August 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) vol 3 at S637 and Joint Standing Committee on Migration, above n174 at 14.

182 In response to the criticisms made during the 1993 inquiry, DIMA informed the Joint Standing Committee that it had already taken steps to ensure adequate mental health care: Joint Standing Committee on Migration, above n164 at 185. However, concerns about mental health care continued to be raised. In relation to Maribyrnong IDC: see interview with Maribyrnong IDC visitor A (14 October 1997). Also Commonwealth Ombudsman, *Investigation of Complaints Concerning the Transfer of Immigration Detainees to State Prisons* (December 1995) at 25–40 deals with the case of Mr Z who was transferred to prison from Maribyrnong IDC instead of being provided with the psychiatric care he needed. In relation to Perth IDC: see HREOC, above n82 at 157. In relation to Villawood IDC: see HREOC, above n82 at 158–159. In relation to Port Hedland IDC: see HREOC, above n82 at 160–164 and interview with Port Hedland IDC visitors D and E (11 June 1995).

183 Australian Red Cross, which was one of those raising the concern, gave the example of a detainee (believed at the time to be a minor) being placed in isolation detention for about 16 hours 'for a perceived breach of camp regulations': Australian Red Cross, Submission No 63, 13 August 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) vol 2 at S563, S571; Letter from Australian Red Cross to DIMA (21 October 1993) in Australian Red Cross, Submission No 108, 21 October 1993 in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) vol 4 at S1217, S1222–1223. As previously mentioned, solitary confinement of minors is likely to be a breach of their human rights regardless of the circumstances.

184 See, for example, HREOC, above n82 at 114–117.

185 Joint Standing Committee on Migration, above n174.

186 Id at 39, 41.

187 Id at 41.

188 See, for example, Commonwealth Ombudsman, *Investigation of Complaints Concerning the Transfer of Immigration Detainees to State Prisons* (December 1995) at 69; and HREOC, above n82 at 83.

and other contacts.[190] The reluctance is entirely reasonable. The human rights of immigration detainees include the right of accessing legal advisers,[191] practising religion,[192] and maintaining ties with family and friends.[193] Relocation of a detainee from a capital city IDC to Port Hedland IDC involves a considerable diminution of the detainee's ability to enjoy these rights, because of the latter IDC's remoteness from major population centres.[194] Turning to overcrowding, this is a human rights problem that keeps arising in relation to the IDCs.[195] However, resolution of overcrowding at Perth IDC by means of relocating detainees to Port Hedland IDC raises the human rights concerns already mentioned.

Human rights focused options for resolving the problems of overcrowding and long-term detention at Perth IDC would be to upgrade Perth IDC and/or to find other facilities more suited to long-term detention in Perth itself. The reason that the option of relocation to Port Hedland IDC is the only option being considered is that DIMA trying to bring down the cost to Government of operating Port Hedland IDC by increasing its population.[196] In other words, the Joint Standing Committee's observations have clearly not had the effect of prompting DIMA to give greater priority to resolving the human rights problems than to resolving the cost problem.

The Joint Standing Committee on Migration recommended in its August 1998 report that the Committee continue to monitor detention practices and that it inspect the IDCs again in the next Parliament.[197] While scrutiny by the Joint Standing Committee is not without use, it cannot be regarded as a particularly effective mechanism for monitoring human rights compliance within IDCs unless

189 Port Hedland IDC has the most spare capacity at the present time, and will have for the foreseeable future.

190 Mr Metcalfe, Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Official Committee Hansard: Consideration of Additional Estimates*, 9 February 1999 at L&C143–144.

191 HREOC, above n82 at 222–223.

192 *Standard Minimum Rules* 41.

193 *Standard Minimum Rules* 37.

194 Attorney General's Department, Submission No 91 (undated) in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions*, above n181 at S843, S855–856.

195 For example, overcrowding at Port Hedland IDC in late 1994 forced the temporary commissioning of Curtin Airforce Base as an IDC: see McGeough P, 'The Heat's on as Boat People Raise Dust' *The Age* (31 December 1994) at 2; and Minister for Immigration, Commonwealth of Australia, *Boat People Processing Centre to be Activated at Curtin, Media Release*, B20/95 (28 March 1995). More recently, overcrowding at Villawood IDC is being dealt with by relocation to Port Hedland IDC and by the planned expansion of Villawood IDC: see HREOC, above n82 at 76; Minister for Immigration, Commonwealth of Australia, *Redevelopment of Villawood Immigration Detention Centre*, Media Release, MPS 49/98 (12 May 1998); and above n190. Maribrynong IDC is also overcrowded from time to time: Interview with former Maribrynong IDC detainee (22 February 1998).

196 According to DIMA, 'The worst scenario for our overall cost structure, no matter whether we continued with APS or whether we went with ACS, was to see a dramatic fall in populations in Port Hedland. That is what has eventuated.': above n190.

197 Joint Standing Committee on Migration, above n174 at 39.

it is happens frequently, is intense and is human rights focused. The priority that the Joint Standing Committee gives to monitoring IDC conditions would depend on what other demands were being made upon its time at any given time.[198] It is therefore unlikely that it will be subjecting IDC conditions to frequent scrutiny. As to intensity, this too depends on how much time the Joint Standing Committee has available. While the Committee's scrutiny of the IDCs was certainly intense in 1993 it was not in 1998. In particular, neither detainees nor any other non-DIMA/ ACS sources of information were drawn upon as part of the 1998 exercise.[199] Finally, the Joint Standing Committee's scrutiny has not, thus far, been human rights focused. From the outset of the 1993 inquiry the Joint Standing Committee took the stance that it was not its role to judge whether the ICCPR, CROC or other international treaties were being breached.[200] This is probably why the Joint Standing Committee saw no need to come to its own conclusions and make its own recommendations in relation to most of the human rights concerns raised in the course of the inquiry. Similarly, human rights standards barely rated a mention in the Joint Standing Committee's 1998 IDC inspection report. It certainly does not appear as if the Joint Standing Committee was assessing detention conditions against human rights standards. This is probably why the Joint Standing Committee was 'less critical than the Human Rights Commission about conditions in the IDCs' and found, in fact, that detention facilities and services were of an 'appropriate standard'.[201]

There is one Parliamentary Committee whose role it is to scrutinise Australia's implementation of its treaty obligations (including human rights obligations). That Committee is the Joint Standing Committee on Treaties.[202] For example, the Joint Standing Committee on Treaties recently held an inquiry into Australia's implementation of its obligations under CROC. Several submissions made to the inquiry dealt with possible CROC breaches to which detention of asylum seeker children, including the conditions of such detention, gave rise. The Committee's report referred to the content of these submissions, and suggested[203] that, as a matter of urgency, the government ought to look at all possible means of hastening asylum applications by children to ensure that they are not detained longer than necessary.[204] Rather unsatisfactorily, the Committee made no suggestions (let alone recommendations) for improving conditions of detention. Whatever the

198 Interview with Ian Sinclair (National Party), member of the Joint Standing Committee on Migration (30 October 1997).

199 Joint Standing Committee on Migration, above n174 at 2–4.

200 Senator McKiernan, Chairman, Commonwealth of Australia, Joint Standing Committee on Migration, *Reference: Inquiry into Detention Practices (Official Hansard Report)*, 24 August 1993 at 3.

201 Joint Standing Committee on Migration, above n174 at 39.

202 The Committee has nine Government members (one of whom is the Chair) and seven non-Government members: above n160 at 1320.

203 No formal recommendation was made on this point.

204 Joint Standing Committee on Treaties, *17th Report: United Nations Convention on the Rights of the Child*, (August 1998) at 390–398: <http://www.aph.gov.au/house/committee/jsct/rep17a.htm>.

eventual outcomes of the inquiry just mentioned, the likely infrequency of inquiry by the Joint Standing Committee on Treaties into the implementation of this or that human rights treaty means that such inquiries could not be an adequate mechanism for monitoring human rights compliance in the treatment of immigration detainees.

B. Enforcement

The political party of the executive government has not had in the recent past, and is unlikely to have in the foreseeable future, the numbers to control the Senate. It is, therefore, possible for government initiated legislation to be blocked in the Senate. The problem is that most government action does not require explicit legislative authorisation. The privatisation of the IDCs, for example, was achieved without the need for such authorisation. In theory, of course, Parliament has the power to legislate to circumscribe government freedom of action to whatever degree it regards as desirable. In practice, since the executive government necessarily has the numbers to control the House of Representatives, Parliament is incapable of passing legislation of which the executive government does not approve. In other words, the power of Parliament to enforce DIMA/ACS compliance with human rights standards in their treatment of immigration detainees is considerably restricted by the fact that the party of the executive government is always in control of the House of Representatives.

7. Accountability to Australian Civil Society

A. IDC Advisory Committees

In its report entitled *Asylum, Border Control and Detention*, the Joint Standing Committee on Migration recommended the establishment of an IDC Advisory Committee.[205] The government did not establish a single IDC Advisory Committee as recommended, but did establish an IDC Advisory Committee for each IDC. The function of the IDC Advisory Committees was to provide advice on detainee welfare needs, and IDC conditions and services.[206] Each Committee included the relevant state compliance manager of DIMA, the DIMA officer who was the centre manager, the head of APS at the centre, representatives of community organisations and representatives of the detainee population.[207] The exact composition varied from IDC to IDC. The community representatives were chosen by DIMA,[208] and were not necessarily persons who visited the IDCs on a

205 Joint Standing Committee on Migration, above n164 at 193.

206 DIMA, *Annual Report 1996–97* at 98.

207 Above n170.

208 Interview with Maribyrnong IDC visitor B (30 September 1997).

regular basis.[209] The Committees supposedly met once a month.[210] By the end of 1997, however, the Advisory Committees at three of the four IDCs were meeting very irregularly (about every three months at best).[211]

The IDC Advisory Committees played a positive role while they lasted,[212] even though they did not have the power to force IDC management to act in accordance with their advice. It should be noted, however, that Advisory Committees rarely touched upon areas such as security and discipline,[213] ie the areas in which very serious human rights breaches are most likely.

In its 1998 report, HREOC recommended that IDC Advisory Committees be re-established as a means both of dealing with problems of detention service delivery and exposing the management of the IDCs to some degree of community scrutiny.[214] After privatisation, IDC Advisory Committees were, in fact, re-established at each of the IDCs. As before, each IDC Advisory Committee is composed of representatives of DIMA, the service provider (now ACM for ACS), the detainee population, and community organisations. As before, the community representatives on the IDC Advisory Committees are not necessarily persons who visit the IDC on a regular basis.[215] The fact that some Committee members lack direct knowledge of detention centre conditions is clearly a drawback. Nevertheless, if the pre-privatisation experience is any guide, the re-established IDC Advisory Committees will play a useful role in subjecting at least some aspects of IDC conditions to external scrutiny. There is, of course, the danger that history will repeat itself, with meetings called less and less frequently as time goes by.

B. IDC Visitors

Unless an immigration detainee is in separation detention,[216] he or she can be visited by friends, relatives, legal representatives and others who ask for him or her by name and who he or she is prepared to receive.[217] Often representatives from ethnic community associations will visit members of their own ethnic groups being held in immigration detention. Representatives of Australian Red Cross visit Maribrynong, Villawood and Perth IDCs weekly (and Port Hedland IDC less

209 Interview with Margaret Piper, Executive Director, Refugee Council of Australia (13 June 1995).

210 Interview with John Dolling, Uniting Church Pastor, Port Hedland (12 June 1995); and Interview with Maribyrnong IDC visitor B (30 September 1997).

211 Interview with Maribyrnong IDC visitor B (30 September 1997); Interview with Commonwealth Ombudsman Officer A (10 December 1997); and HREOC, above n82 at 237.

212 Interview with Commonwealth Ombudsman Officer A (10 December 1997); and HREOC, above n82 at 236.

213 Interview with Maribrynong IDC visitor B (30 September 1997).

214 HREOC, above n82 at 237.

215 Interview with Villawood IDC visitor C (19 October 1998).

216 Immigration Detention Standards 14 defines 'separation detention' as 'detention which restricts a person or group of persons to a particular area of the detention facility on initial arrival at, or prior to removal from, a facility.'

217 Provided for by Immigration Detention Standards 4.1 and 11.

often), offering the detainees its message and tracing services.[218] Representatives of religious organisations are also able to visit the IDCs,[219] and some conduct religious services on a regular basis.

Regular IDC visitors observe some of the conditions of immigration detention for themselves and also hear complaints from the detainees they visit. They are, therefore, providing some degree of external scrutiny of conditions of detention. It must be kept in mind, however, that the perspective from which most visitors assess IDC conditions is very much a humanitarian perspective, rather than a human rights perspective. This means that they cannot be relied upon to monitor human rights compliance as such.

As well as playing a monitoring role, there is scope for regular IDC visitors to channel the complaints of detainees and their own concerns to the relevant IDC Advisory Committee on an informal basis through members known to them.[220] Additionally, IDC visitors could potentially apply pressure on the government and/or ACS for improvements to conditions of detention. Some IDC visitors do express the concerns that they have about conditions of detention to DIMA and/or ACM in private settings. However, such privately expressed criticism does not necessarily result in DIMA or ACS taking steps to improve conditions.

Pressure works best when it involves the mobilisation, or threat of mobilisation, of public opinion. However, except in contexts such as making submissions to Parliamentary Committees, regular IDC visitors tend to be unwilling to put their name to public criticism of conditions of detention for fear that they may be denied future access to the IDCs.[221] This fear appears to be well founded. For example, pre-privatisation DIMA attempted at different times to limit the access to Port Hedland IDC of two priests both of whom campaigned for the rights of the Port Hedland detainees.[222] Post-privatisation both ACS and DIMA have the power to cut off visitor access to IDCs, and more than enough scope to invoke that power if IDC visitors were too vocal in their criticism of IDC conditions. Immigration Detention Standard 4.1 provides that detainees must be allowed to receive visitors 'except where the security or good order of the detention facility would be compromised'. Clause 9.4.4 of the General Agreement provides that the Contract Administrator (a DIMA officer) may, at his or her sole discretion, 'impose restrictions or conditions on the rights of access to Immigration

218 Ms Nolan & Ms Walsh, Red Cross, Commonwealth of Australia, Joint Standing Committee on Treaties, *Reference: UN Convention on the Rights of the Child (Proof Hansard Report)*, 9 July 1997 at TR808-809. This role has continued post-privatisation.

219 Provided for by Immigration Detention Standards 4.2 and 10.2.

220 Interview with Villawood IDC visitor C (19 October 1998).

221 Most of the IDC visitors interviewed for this research did not wish to have their names revealed for precisely this reason.

222 The Priests were Fr McNamara, who was parish priest at Port Hedland at the relevant time, and Fr Larry Reitmeyer, who was Co-ordinator of the Australian Catholic Refugee Office at the relevant time: McDougall R, RACS, Submission No 2, *Submissions to Senate Legal and Constitutional Legislation Committee, Migration Legislation Amendment Bill (No 2) 1996* at 3, 11–12; Grattan R, 'Boat People Denied Religious Aid: Priest', *The Age*, 25 June 1996 at 3; and Interview with Fr Larry Reitmeyer (17 June 1995).

Detainees of any third parties including, without limitation, the media and unsolicited lawyers or migration agents'[223]

C. *The Media*

MSI 92 provides that: 'Any media requests to interview detainees, to visit Immigration Detention Centres or for information, must be referred to the Director of the Public Affairs and Information Section in Central Office.'[224]

Reference has already been made to clause 9.4.4 of the General Agreement between the Commonwealth of Australia and ACS which allows DIMA to restrict media access to immigration detainees. Finally, clause 9.1.1 of the General Agreement provides that ACS must not release information on any aspect of the immigration detention function or the General Agreement or the Detention Services Contract or engage in any public comment or debate on these subjects without the prior written approval of the contract administrator.

The intent of the contractual and other provisions outlined above is clearly to restrict to the greatest extent possible the public's access to information about IDCs and immigration detainees. This inference is borne out, too, by DIMA's conduct both before and after privatisation. DIMA has always done its best to ensure that media representatives do not speak to IDC staff or inmates and do not enter IDCs.[225] It justifies this course on the basis that it is protecting those detainees who may, in fact, be refugees.[226] It argues that if the names or photographs of such individuals were to be published, they would be exposed to the risk of persecution.[227] The argument supposes, of course, that Australia is failing in some instances to identify and protect genuine refugees, since such refugees could only be exposed to a risk of persecution if sent back to their countries of origin.

Touching concern for refugees aside, the main reason that DIMA is reluctant to allow media access to IDCs is that it perceives the media as a threat to 'good order' at the IDCs and a threat to its activities such as immigration processing and removal.[228] DIMA has good grounds for regarding the presence of the media as a threat to 'good order'. Media interest probably does encourage immigration detainees to engage in, or continue with, dramatic protests such as hunger strikes.

---

223 In addition, DIMA officers are instructed that, if they 'have reason to believe that visitor access may compromise security or particular immigration activities, they should discuss the possibility of restrictions on visitor access with the relevant custodial authority': MSI 92 (9 March 1995) at para 17.2.

224 MSI 92 (9 March 1995) at para 18.2.

225 See, for example, Bunk S, 'The Long Wait' *The Australian Magazine* (12-13 December 1992) at 38, 40; McGeough P, 'The Heat's on as Boat People Raise the Dust' *The Age* (31 December 1994) at 2. Port Hedland IDC did have a media open day in 1997, but the media representatives who visited the IDC on that day are unlikely to have gained an accurate impression of day-to-day conditions: Price M, 'Open day at Hedland, with a Few Closed Doors' *The Australian* (30 June 1997) at 3.

226 Bunk, id at 38, 40.

227 Ibid.

228 See definition of 'incident' in Immigration Detention Standards 14.

Of course, the tactic of cutting detainees off from all contact with the outside world while dealing with hunger strikes and other such incidents[229] has the side effect of preventing external scrutiny of the methods used in so doing.

DIMA also has good grounds for regarding the media as a threat to immigration processing. For example, detained asylum seekers may court publication of their name and image by the media, and then assert that they have a well-founded fear of being persecuted if returned to their country of origin because the media stories would have made the government of that country aware that they had sought refugee status in Australia. In other words, even if an asylum seeker's original claim to refugee status is weak, clever use of the media can furnish him or her with another basis for the claim.[230]

Finally, DIMA is correct in thinking that the media presents a threat to removal activity. As Greg Sheridan pointed out some time ago, if 'inconvenient television cameras' were to show the public 'the sight of weeping women and children dragged off to their unfortunate fates' the public might object.[231] In other words, the publication of 'sob stories' by the media can be used as a means of appealing successfully to the generosity and compassion of the public, thereby mobilising public opinion in favour of particular outcomes for particular individuals for just long enough to attain those outcomes.[232] It is this possibility above all that DIMA attempts zealously to guard against.

The fact that DIMA has been largely successful in its endeavour to screen IDCs from the view of the media says as much about the media as it does about DIMA. It is more than likely, for example, that Port Hedland was chosen as a location for an IDC not only in the hope that the remote location would discourage escape,[233] but also in the hope that it would discourage 'pesky photographers'.[234] The strategy was not a success at first. In the early 1990s, when unauthorised boat arrivals and Port Hedland IDC were both novelties, media representatives were prepared to go to the expense of travelling to Port Hedland in order to speak to detainees through the boundary fences.[235] Some even went to the effort of obtaining entry into the IDC by tagging along with lawyers who were visiting clients.[236] However, those days are long past. The remoteness of the location now very adequately discourages an excess of media interest in Port Hedland IDC.

---

229 This tactic was used in response to the December 1996 disturbance at Port Hedland IDC: HREOC, above n82 at 101. It has also been used on other occasions, for example, in responding to hunger strikes at Port Hedland IDC in March 1997 and Villawood IDC in August 1997: HREOC, above n82 at 108–110.

230 See further Crock M, *Immigration and Refugee Law in Australia* (1998) at 153 and the citations therein.

231 Sheridan G, 'Serial Murderers Receive More Reasonable Treatment' *The Weekend Australian* (14–15 March 1992) at 6.

232 See above section 6(A)(1).

233 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (February 1994) at 192.

234 Sheridan, above n231 at 6.

235 Bunk, above n225 at 38, 40.

236 Id at 41.

The media still publishes stories relating to immigration detainees, but only in response to stimuli such as riots and protests at IDCs[237] or public criticism of IDC conditions by important individuals and organisations.[238] The fact that media scrutiny is far from close and frequent means that the media's ability to mobilise public opinion is not presently a reliable mechanism for ensuring that the human rights of immigration detainees are respected on a day-to-day basis. In any event, the fact that mobilisation of public opinion presently depends on the ability of the 'story' to invoke feelings of generosity and/or compassion in the public means that attempted mobilisation is unlikely to be effective in cases where the breach of human rights does not cause obvious and acute suffering.

8. *Accountability to Global Society*

Australia is made accountable for its implementation of its human rights treaty obligations through the reporting mechanisms contained in the *ICCPR*,[239] *CAT*[240] and *CROC*.[241] Like the reports of most other states, Australia's reports tend to be self-serving.[242] However, in assessing Australia's reports the human rights treaty bodies are able to draw upon alternative reports made by non-governmental organisations with human rights agendas. Notwithstanding this, both submission

237 See, for example, Irving M, 'Boat people in Mass Walkout' *The Australian* (15 May 1995) at 3; McLean L, 'Boat People Charged over RAAF Base Riot' *The Australian* (12 June 1995) at 3; O'Brien N, 'Boat People Protesters Denied Food' *The Australian* (3 July 1995) at 3; Gibson R, 'Tamils Begin Fasting In Refugee Bid' *The Age* (16 October 1997) at A7.

238 See, for example, Le Grand C, 'Judge Damns Refugee Camps' *The Australian* (20 July 1995) at 1; Ellicott J, 'Illegal Immigrant Overhaul' *The Australian* (8 December 1995) at 4 (re Commonwealth Ombudsman's December 1995 report); Harris T, 'Rights Chief Sues Officials on Boat People' *The Australian* (31 May 1996) at 4; MacDonald J, 'Mass Suicide Bid at Migrant Centre' *The Age* (9 May 1998) at 9 (re HREOC's 1998 report).

239 *ICCPR* Art 40 provides that state parties must report to the Human Rights Committee on the progress made on the enjoyment of rights contained in the *ICCPR* within one year of entry into force for the state party concerned, and thereafter as requested by the Human Rights Committee.

240 *CAT* Art 19 provides that state parties must report to the Committee Against Torture on the measures they have undertaken to give effect to the rights contained in *CAT* within one year of entry into force for the state party concerned, and every four years thereafter.

241 *CROC* Art 44 provides that state parties must report to the Committee on the Rights of the Child on the progress made on the enjoyment of rights contained in *CROC* within two years of entry into force for the state party concerned, and every five years thereafter.

242 Australia's Fourth Report under the *ICCPR* (its most recent submitted) contains no mention of conditions of immigration detention apart from brief mention of immigration detainees' access to legal advice: see Commonwealth of Australia, *Australia's Fourth Report under the International Covenant on Civil and Political Rights January 1996 – December 1996* (1998) para 63: <http://law.gov.au/publications/ICCPR4/Welcome.html>. Australia's First Report under *CROC* (its most recent submitted) deals with the immigration detention of children without admitting any facts which would be indicative of breaches of *CROC*: see Commonwealth of Australia, *Australia's First Report under Article 44(1)(a) of The United Nations Convention on the Rights of the Child* (December 1995) paras 1362–1365. Australia's First Report under *CAT* (its most recent submitted) does not say anything about immigration detention: see Commonwealth of Australia, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: First Report by Australia* (April 1991).

and consideration of reports happens in such an untimely fashion[243] and so much ground has to be covered in the consideration of a report that it would be unsafe to rely on the reporting mechanisms as effective devices for monitoring the extent to which a state party is complying with its treaty obligations in this or that specific context.

As well as being accountable through the reporting mechanisms, Australia is accountable through individual complaints mechanisms set up by the *Optional Protocol to the ICCPR*[244] and *CAT*.[245] The UN Human Rights Committee and the UN Committee Against Torture are each considering a complaint by, or on behalf of, a person subjected to immigration detention in Australia to the effect that the conditions of detention violated rights contained in the *ICCPR* and *CAT* respectively.[246] There are a couple of reasons for the paucity of complaints. The first is that few immigration detainees have access to the assistance necessary to make complaints to human rights treaty bodies. The second is that years can elapse between the making of a complaint and the final resolution of it, rendering the mechanism of limited use in obtaining an effective remedy for the individual whose human rights have allegedly been breached. Complaints to the treaty bodies are, therefore, more often driven by human rights advocates seeking an extra weapon to be deployed in the political battle for system change, than they are driven by the person named as victim in the complaint.

The greatest deficiency of the international accountability mechanisms is that neither the observations made by the human rights treaty bodies on the reports of state parties nor the views they express on individual complaints are binding on the state parties concerned. The Australian government is quick to rely on this fact as a reason for disregarding inconvenient interpretations of their treaty obligations.[247] Nevertheless scrutiny by the human rights treaty bodies does serve a couple of functions, even in the absence of enforcement mechanisms. First, the scrutiny contributes to the pressure on Australia to conform to its carefully cultivated international image of being a law-abiding, human rights respecting member of the international community.[248] Second, since the findings of the treaty bodies, especially in relation to individual complaints, are reported by the Australian media to the Australian public, the scrutiny makes a contribution towards educating the Australian public about human rights issues.

---

243 The delays can add up to years: Commonwealth of Australia, *Reference: UN Convention on the Rights of the Child (Proof Hansard Report)*, Joint Standing Committee on Treaties, 28 April 1997, TR 21 (testimony of Mr Lamb, Department of Foreign Affairs and Trade).

244 This treaty entered into force on 23 March 1976. Australia ratified the treaty with effect from 25 December 1991.

245 *CAT* Art 22. A declaration of acceptance of Art 22 was deposited for Australia on 28 January 1993 with effect from that date.

246 The author of Communication 772/1997 under the Optional Protocol to the *ICCPR* claims, inter alia, that the alleged victim was detained incommunicado for a period of 85 days in violation of *ICCPR* Art 10. The author of Communication 102/1998 under Article 22 of CAT refers, inter alia, to trauma and stress suffered by the alleged victim in immigration detention in Australia (that is, possible breach of *CAT* Art 16).

9. *The Way Forward*

A. *System Change*

(i) *Legislated Standards*

The group with the greatest interest in ensuring enforcement of those Immigration Detention Standards that reflect international human rights law is, of course, detainees themselves. Presently, however, breaches of Immigration Detention Standards are not actionable by immigration detainees, because they are contained in a contract to which immigration detainees are not parties. By contrast, were Immigration Detention Standards to be legislated in terms giving detainees a right of action for their breach, it would create the potential for accountability to be achieved through litigation, especially in the form of class actions. Whether the potential would be realised is another matter. The same fear that presently makes immigration detainees reluctant to complain to HREOC and the Ombudsman, that is, the fear that their substantive visa applications will be adversely affected if they are perceived as trouble makers, may well make them reluctant to engage in this sort of litigation.

(ii) *A Dedicated External Accountability Mechanism*

It should be made clear at the outset, that what is proposed is a mechanism which replaces the IDC Advisory Committees, but is additional to other existing accountability mechanisms. A multiplicity of accountability mechanisms maximises the likelihood that strict observance of minimum human rights standards will be achieved,[249] because, while any one accountability mechanism may fail, all the rest should provide some insurance against such failure.[250] The downside of multiple accountability mechanisms is the potential for everybody's

---

247 See, for example, Commonwealth of Australia, *Reference: UN Convention on the Rights of the Child (Proof Hansard Report)*, Joint Standing Committee on Treaties, 28 April 1997, TR 22–24 (testimony of Mr Campbell, Attorney-General's Department and Mr Lamb, Department of Foreign Affairs and Trade) explaining why the government did not have to give effect to any comments made by the Committee on the Rights of the Child upon consideration of the Australia's report under *CROC*. See also the Australian Government's response to the UN Human Rights Committee findings in *A v Australia, Communication No 560/1993* UN Doc CCPR/C/59/D/560/1993 (1997). Australia refused to accept the Committee's conclusion that the detention of a Cambodian boat person, Mr A, for a period in excess of four years was 'arbitrary' within the meaning of *ICCPR* Art 9 and refused to give effect to the Committee's recommendation that Mr A be paid compensation: Australian Government, *Response of the Australian Government to the Views of the Human Rights Committee in Communication No 560/1993 A v Australia* (17 December 1997) para 11.

248 See the introduction to the Department of Foreign Affairs and Trade, *Human Rights Manual* available at http://www.dfat.gov.au/hr/hr_manual.html and also the other documents available at http://www.dfat.gov.au/hr to gain an impression of the manner in which Australia relies on its contributions to international efforts to protect human rights to obtain high standing in the international community.

249 See above section 3.

250 Brennan G, 'Institutionalising Accountability: A Commentary' (1999) 58(1) *Australian Journal of Public Administration* 94 at 96–97.

business to be regarded by everybody as being *primarily* somebody else's business and consequently to end up being nobody's business.[251] The independent government agencies, parliamentary committees, and international bodies dealt with above all face competing demands on their limited resources. This exacerbates the likelihood that the safeguarding of the human rights of immigration detainees will not be given priority by anybody. What is needed in addition, therefore, is *one* body whose entire raison d'être (or close to it) is the safeguarding of the human rights of immigration detainees.

A proposal that both the Ombudsman and HREOC have put forward is the establishment of an official visitor scheme for the IDCs much like the schemes in place in prisons.[252] Would such a scheme be a valuable addition to existing accountability mechanisms? It is suggested that everything depends on the detail. In order to be of value, the scheme should have the following features:

(i) There should be a Panel of Visitors for each IDC. The Panels should replace the present IDC Advisory Committees, because continuance of IDC Advisory Committees alongside Panels of Visitors would create the kind of role confusion which is the enemy of accountability.[253]

(ii) The members of the Panels should be selected by a committee independent of DIMA and the contractor, for example, a committee composed of representatives of HREOC, the Ombudsman, and Australian Red Cross. Selection should be a transparent process and the selection criteria should be directed at ensuring that the Panels are independent-minded and as a group possessed of the legal and other expertise necessary to carry out their duties. Members should be appointed for terms of at least five years, with premature termination (by the Governor-General) possible only on limited grounds such as misbehaviour, physical or mental incapacity, and absence from duties without leave.

(iii) As recommended by HREOC, the Panels should visit the IDCs twice each month.[254] However, they should also have the power to make unannounced visits. Moreover, Panels should have the power to go into all parts of the IDCs, talk to all IDC staff, talk to all detainees and look at all IDC records for the purpose of carrying out their duties. Such powers are by no means unprecedented,[255] and are necessary to minimise the contractor's ability to stage manage visits.

(iv) It should be a duty of the Panels to receive complaints from detainees about breaches of Immigration Detention Standards which have affected them as individuals, to investigate those complaints, and to report their findings and

---

251 Vagg J, *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands* (1994) at 13.

252 Interview with Commonwealth Ombudsman Officer A (22 October 1998); HREOC, above n82 at 240–242.

253 See Brennan, above n250 at 95.

254 HREOC, above n82 at 242.

255 For example, such powers are possessed by the Boards of Visitors and the Inspectorate of the English prison system: Vagg, above n251 at 49.

any recommendations for individual remedy to the Minister for Immigration.[256]

(v) It should also be a duty of the Panels to inspect general detention conditions, to assess those conditions for compliance with the Immigration Detention Standards and Australia's international legal obligations more generally, and to report their findings and recommendations for achieving compliance to the Minister for Immigration.[257]

(vi) In order to ensure that the Minister for Immigration does not simply ignore reports,[258] the Minister for Immigration should be required either to implement the recommendations of Panels or to explain to both Houses of Parliament why he or she has decided not to do so. Hopefully, in at least some instances, a desire not to give non-government parliamentarians the opportunity for political point scoring will influence the Minister to implement recommendations.

(vii) The Panels should also have the duty to make their reports public in a timely fashion.[259] This will serve a two-fold purpose. It will, of course, expose detention conditions to the scrutiny of the public at large, thus creating opportunities for mobilisation of public opinion in favour of reform. Equally importantly, it will expose the work of the Panels of Visitors to the scrutiny of informed and concerned sections of the public, thus providing some safeguard against capture of the Panels by the contractor and/or DIMA.

(viii) All of the foregoing should be provided for by legislation in order to make more difficult the future watering down or abandonment of this accountability mechanism.

B. Political Will

The system changes suggested above could only ever constitute a partial solution to the problem of protecting the human rights of immigration detainees. Jon Vagg has concluded on the basis of his comparative study of accountability in prison systems that, in order for mechanisms of accountability to be effective in achieving improvements in general prison conditions, governments must have the political will to support the mechanisms and to act on the information that they provide.[260] It has been demonstrated in this article that the same is true in the context of achieving protection for the human rights of immigration detainees in Australia.

---

256 Unfortunately, giving Panels the power to make binding decisions in relation to individual complaints may fall foul of the Australian *Constitution*.

257 It would be unworkable to give Panels of Visitors any greater authority than this since responsibility for the operation of the IDCs lies ultimately with the Minister.

258 This has often been the fate of official visitors' reports both here and overseas: see, for example, Harding, above n23 at 61; Grant D, *Prisons: The Continuing Crisis in New South Wales* (1992) at 141.

259 Panels should, of course, be required to edit their reports to the extent necessary to ensure that individual detainees are not identifiable.

260 Vagg, above n251 at 324.

How, then, can those with a human rights agenda encourage the development of the necessary political will? The answer, it is suggested, is to educate public opinion. Government policies and actions tend to be guided by the government's understanding of how those policies and actions will impact on voting at the next election. The government will continue to do whatever it takes to ensure that unlawful non-citizens are available for removal from the country, and will seek to do it cheaply, as long as it believes that this is what the public expects. Further the government will have no compunction about giving higher priority to the attainment of these objectives than it gives to protecting the human rights of unlawful non-citizens, as long as it believes that this is something that the public will tolerate. Those who wish to ensure the protection of the human rights of immigration detainees should, therefore, give high priority to the task of teaching the public at large to use human rights principles, rather than their hostility towards unlawful non-citizens,[261] as the relevant frame of reference for thinking about the treatment of unlawful non-citizens.

There is political science research which indicates that the way that issues are framed in the mass media has a significant influence on the way the public frames those issues.[262] Over a long period, a clearly articulated message from credible sources conveyed through the mass media can be a significant factor in changing public opinion on a particular issue.[263] Some of those working to protect the human rights of unlawful non-citizens are, of course, already engaged in the enterprise of influencing public opinion through the mass media.[264] What is important for them to keep in mind is that mobilising public opinion through appeals to public generosity and compassion will achieve little more than positive outcomes for particular individuals in the short-term. It is necessary to ensure that every individual story fed to the mass media is framed in terms of the human rights principles involved, if a more fundamental shift in public opinion is to be achieved in the long-term. What is important for all of us to reflect upon is the fact that it is necessary to make a very big noise to influence public opinion, because 'the public are a very large and diverse body of people most of whom pay little attention to public affairs most of the time'.[265] The more voices there are speaking the human rights message at every possible opportunity through every possible medium, the greater the chance that the message will get through to those who need to hear and understand it.

---

261 See above n156.

262 See Jacobs L & Shapiro R, 'Toward the Integrated Study of Political Communications, Public Opinion, and the Policy-making Process' (1996) 29(1) *PS: Political Science & Politics* 10; Chong D, 'How People Think, Reason and Feel about Rights and Liberties' (1993) 37(3) *American Journal of Political Science* 867 at 890.

263 See Jacobs & Shapiro, above n262; Page B, Shapiro R & Dempsey G, 'What Moves Public Opinion?' (1987) 81(1) *American Political Science Review* 23.

264 See above sections 5(C), 6(A)(1), 7(C) and 8.

265 Evans H, 'Parliamentary and Extra-Parliamentary Accountability Institutions' (1999) 58(1) *Australian Journal of Public Administration* 87 at 88.

10. Conclusion

For the first year of its first service term, ACS appeared to be doing a slightly better job of operating the IDCs than its predecessors. Although ACS had put in place security measures that were more stringent than those used by APS,[266] it had at the same time improved several aspects of service delivery in a way that benefited detainees.[267] It cannot simply be assumed, however, that future changes in conditions will be changes for the better.[268]

It has been the contention of this article that effective accountability mechanisms are required to dissuade the contractor from succumbing to the temptation of giving administrative convenience and profitability priority over the human rights of immigration detainees. It has also been the contention of this article that the contractor's accountability to DIMA is not an adequate safeguard of the human rights of detainees, because DIMA in its turn may not be proof against the temptation of giving the attainment of security and cost objectives priority over safeguarding those rights. An evaluation of present external accountability mechanisms establishes that they are not sufficiently effective in ensuring that the human rights of immigration detainees are respected by both the contractor and the government. This is not, of course, the same as saying that the present mechanisms for external accountability are entirely ineffective. The Joint Standing Committee on Migration, in its report *Asylum, Border Control and Detention*, noted that DIMA had taken steps to address concerns about conditions of detention that had been raised in earlier reports on the IDCs.[269] IDC conditions improved further between the Joint Standing Committee's 1993 inquiry and HREOC's 1996–7 inquiry,[270] and further still following the latter

266 Interview with Commonwealth Ombudsman Officer A (10 December 1997); Interview with Eve Lester, Research and Policy Officer, Jesuit Refugee Service (4 March 1998); Interview with Villawood IDC visitor C (19 October 1998).

267 Commonwealth of Australia, *Official Committee Hansard: Consideration of Additional Estimates*, Senate Legal and Constitutional Legislation Committee, 9 February 1999, L&C142 (testimony of Mr Metcalfe, DIMA) citing findings of the Commonwealth Ombudsman, HREOC, and the Joint Standing Committee on Migration; Interview with Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre (22 October 1998); Interview with former Maribyrnong IDC detainee (22 Feb 1998).

268 At at least one IDC there have already been changes for the worse. Detainees at Maribyrnong IDC report that conditions have been deteriorating in recent months. In particular, security measures are becoming more and more intrusive and restrictive: Letter from Martin Clutterbuck, lawyer, Refugee and Immigration Legal Centre dated 4 April 1999 containing seven case studies.

269 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (February 1994) at 171. The reports cited were a report made to DIMA by the Australian Institute of Criminology entitled *The Future of Immigration Detention Centres in Australia* (July 1989), a confidential draft report made to DIMA by HREOC in relation to site inspections of two IDCs (March 1992), and a report made by an Australian Council of Churches delegation on a visit made by them to Port Hedland IDC (March 1992): Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (February 1994) at 166–170.

270 Herington A, Assistant Commonwealth Ombudsman, 'The Effects of Detention', paper presented at *Desperately Seeking Asylum: The Future of Refugee Policy in Australia*, Deakin University, Melbourne, 17 October 1997.

inquiry.[271] It is unlikely that there would have been improvement at all, were it not for the external scrutiny. However, it is noteworthy that improvement has occurred unevenly, slowly, and with a fair amount of backsliding. Some significant human rights concerns (for example, solitary confinement and transfers to prison) have been raised by various external bodies over many years, but have never been adequately addressed by DIMA. The concerns that have been addressed have been addressed in little steps over a long period of time. Finally, there have been backward steps as well as forward steps. Some problems (for example, mental health care and overcrowding) are at least partially fixed in response to criticism, but keep re-emerging.

Although legislated standards and a legislated official visitor scheme may go some way towards addressing the deficiencies identified, tinkering with accountability mechanisms is only part of the solution. The other part of the solution is for all those with a human rights agenda to endeavor to bring about a fundamental adjustment of the boundaries set by public opinion on governmental policies and actions in relation to unlawful non-citizens.

Postscript: 13 December 1999

In the months since this article was written, the number of unauthorised arrivals seeking protection in Australia has increased markedly. Although the number is still low by world standards, the government has quite deliberately set out to create a sense of public crisis. Thus far it has been successful. According to DIMA's *Annual Report 1998-99*, its monitoring of newspapers, radio and television showed 'high take-up of material provided by the Department across all media'. DIMA's spin doctoring is apparent in the media's framing of its discussions of issues relating to unauthorised arrivals with headlines such as: 'Human Cargo: Return to Sender'[272] and 'Neighbour's unwelcome toss over the back fence'.[273] The government's purpose in feeding public hostility towards unauthorised arrivals appears to be to push the senate to allowing quite draconian responses to the problem of people smuggling. The strategy is working. The ALP was pressured into withholding support for a Democrat motion to disallow regulations which provide that a successful protection visa applicant, who is not immigration cleared at the time of making the application, can only be granted a temporary protection visa of three years duration in the first instance.[274] Similarly, the Border Protection

271 Sidoti C, 'Unlucky voyagers to the Lucky Country' *The Age* (28 May 1998) at 17.

272 See Saunders M & Toohey P, 'Human Cargo, Return to Sender' *The Australian* (12 November 1999) at 1.

273 See Greenlees D, 'Neighbour's Unwelcome Toss Over the Back Fence' *The Weekend Australian* (20–21 November 1999) at 4.

274 Migration Regulations, Sch 2 Pt 785. These Regulations commenced on 20 October 1999. The Democrats motion to disallow was defeated in the Senate on 24 November 1999. Evidence for the assertion that the ALP succumbed to the pressure of public opinion generated by the government can be found in McGregor R, 'Labor in Two Minds on Boatpeople' *The Australian* (17 November 1999) at 5; McGregor R & Balogh S, 'Rough Waters Ahead for Illegals' *The Australian* (23 November 1999) at 4 and Senate Hansard of 24 November 1999.

Legislation Amendment Bill 1999, passed by both the Senate and the House of Representatives on 25 November 1999, inter alia, inserts provisions into the *Migration Act* 1958 which deem Australia not to have protection obligations towards certain non-citizens.

The continuance of the government's mandatory detention policy has meant that the increased number of unauthorised arrivals seeking protection has translated into an increased number of unlawful non-citizens in detention. Curtin IDC near Derby in Western Australia was reopened on 26 September 1999. It has a capacity of 1000 detainees. In addition, a new IDC built outside the town of Woomera in South Australia has been in operation since 30 November 1999. Woomera IDC presently has a capacity of 400 detainees, but can be expanded to house 1500 detainees. ACM is providing the detention services for both of these IDCs.

In this climate of pseudo-crisis, in which Australia even seems willing to risk breaching its international protection obligations, it is obviously more important than ever to have accountability mechanisms in place. These must be capable of ensuring that the observance of human rights standards in the treatment of the increasing numbers of immigration detainees does not deteriorate. It is also patent that generating political will through influencing public opinion formation will be a critically important part of any endeavour to achieve such accountability mechanisms.