People just like us; human rights for asylum seekers!

It is seven years since the release of a scathing report which found systemic weaknesses and deep-seated cultural and attitudinal problems among the staff of the Immigration Department.[1] The then Minister, Senator Vanstone announced that the newly created post of Immigration Ombudsman would have a strengthened role in immigration and detention matters. Amongst other changes, the Ombudsman was given a specific role in reviewing the cases of persons who had been in immigration detention for two years or more.[2]

Three years later another Immigration Minister, Chris Evans, announced a Cabinet decision aimed at "restoring integrity to Australia's immigration system"[3] This new policy was based on a rejection of the "notion that dehumanising and punishing unauthorised arrivals with long-term detention acted as a deterrent."[4] Henceforth the Immigration Ombudsman would be asked to review the cases of everyone in detention for more than six months. Children, including juvenile crew members of asylum boats would no longer be kept in detention centres, indefinite or arbitrary detention was ruled not acceptable, confinement to detention centres of anyone was to be used as a last resort and for the shortest practical time and "people in detention were to be treated fairly and reasonably ensuring the inherent dignity of the human person"[5] [6].

My (brief) term as Commonwealth and Immigration Ombudsman commenced in August 2010. From my first day in office it was clear that issues concerning indigenous Australians, social justice and asylum seekers would form the greatest challenges for the office. This paper seeks to explore from an Ombudsman perspective the human rights ***promises*** made by successive governments, their ***performance*** to date and concludes by considering ***prospects*** for the future. The narrator is a former Immigration Ombudsman who mistakenly believed that the government was genuine in its commitment to; "the compassionate and tolerant treatment of asylum seekers; administrative justice and to the honouring of Australia's international treaty obligations[7]".

The Ombudsman and Human Rights

To many in this audience, the notion that the Ombudsman could have a significant role in the protection of human rights of asylum seekers and refugees may be a novelty. Commonly, the human rights discourse is about the legislature acting to constrain abuse by the executive government and so protect individuals whilst the courts, through litigation, prevent abuse of rights. And in the context of immigration and asylum matters up until not many years ago that was the position. Legislative action by the Howard and Rudd governments and a Cabinet decision in 2008 driven by an activist Minister changed that. Or did they?

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[1] Enquiry into the Circumstances of the Detention of Cornelia Rau, report by Mick Palmer AO APM, July 2005

[2] Migration Amendment (Detention Arrangements) Act 2005

[3] New Directions in Detention-Restoring Integrity to Australia's Immigration System July 29 2008

[4] Ibid

[5] Ibid

[6] The Australian Government's seven key immigration detention values are:

1. Mandatory detention as an essential component of strong border control.
2. To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
   a. all unauthorised arrivals, for management of health, identity and security risks to the community;
   b. unlawful non-citizens who present unacceptable risks to the community; and
   c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review.
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6. People in detention will be treated fairly and reasonably within the law.
7. Conditions of detention will ensure the inherent dignity of the human person.

[7] Ibid

The Office of the Ombudsman (as I said in a speech on this issue last year[8]) is part of the growth in what some commentators are referring to as the 'fourth arm' or "fourth branch" of government, and which others characterise as the "oversight arm of the executive branch".

In either case, this growth is a significant recent development that is transforming the governance of executive government. Partly, it is a response to the increasing complexity of government endeavour and the speed of implementation and information. Governments have become involved in regulating very complex areas of human behaviour, such as the movement of people across the globe at a scale unprecedented in human history and in responding to increasingly inter-connected and complex global issues that require rapid, clever policy responses[9].

But I also think this fourth arm has developed in recognition that there were, and there continue to be, some very practical challenges to the effective protection of human rights by the legislative and judicial arms of government.

While the legislature is the key national forum for debate on issues, and for scrutinising the suitability of laws, it is more limited in its capacity to determine whether laws are correctly interpreted and administered[10].

The judiciary provides a key role in the protection of rights, but it is limited in its scope. Courts only decide the cases they consider and are to some degree limited in the remedies they may offer. And they don't supervise implementation of their decisions or recommendations[11].

It is the necessity to address these limits to the capacity to provide effective supervision of the executive branch, particularly given the challenges of complexity and speed, which has, in my view, driven the growth of this fourth arm or oversight function.

Oversight bodies (such as the Ombudsman, Information Commissioner and the Human Rights Commission) theoretically respond to the need for more flexible, fleet-of-foot responses to challenges of individual rights. And, importantly, they are designed to provide a much more accessible path for those who seek to question the reasonableness of government decisions or receive better explanations of decision-making processes.

This then was the ***promise***, I now turn to ***performance*** and ***prospects.***

In assessing the performance of the Ombudsman as a protector of the human rights of asylum seekers, I will focus on the significant numbers of asylum-seekers arriving by boat on our shores. It was obvious to me that the role of the Ombudsman in monitoring, investigating and reporting on Government inter-agency administrative processes was a critical tool of review and supervision of the many places of detention in which asylum seekers are held.

AN IMMIGRATION OMBUDSMAN

The Commonwealth Ombudsman was first invited by the Australian Government to supervise its highly sensitive immigration and mandatory detention procedures in 2005, in the wake of a series of events no democratic government would want to experience.

The Government had already begun an investigation into the Cornelia Rau affair—a case of wrongful detention of a permanent resident—when the circumstances of Vivian Alvarez came to light, so the official Inquiry was then extended to investigate both cases. The Commonwealth Ombudsman was called in from 2005, initially to investigate the Alvarez case, but also to complete investigations into 247 other cases of potentially wrongful immigration detention[12].

Following the release of a report into the Cornelia Rau affair, and vigorous debate about immigration detention and compliance in both parliamentary and public arenas, the Government conferred on the Commonwealth Ombudsman the additional title of Immigration Ombudsman. This was a new, specialist role with more intensive supervisory responsibilities of immigration administration.

The Australian Parliament enacted amendments to the *Migration Act 1958* in mid-2005 to give the Ombudsman the necessary statutory powers to review cases of detainees held in immigration

[8] A Fair Deal for Asylum-Seekers? University of Melbourne Law School April 2011

[9] The notion of the Fourth Arm of Government and new mechanisms of accountability have been explored in a number of speeches by former Commonwealth Ombudsman, Prof John McMillan. www.ombudsman.gov.au

[10] In the context of the current minority government and in relation to asylum issues, dysfunctional Parliament, the even limited capacity of Parliament to adequately protect the human rights of asylum seekers is doubtful

[11] In contrast to paralysis in Parliament, the courts have been surprisingly active in striking down government attempts to strip asylum seekers of appeal rights and more recently disallowing the Malaysia swap deal. An ongoing case in the High Court concerning security compromised refugees may add to this tally.

[12] See amongst other reports, Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau. Report July 2005

detention for more than two years, and to conduct follow-up reviews every further six months that a detainee remained in detention. [13]

These specialist powers were then broadened to include all immigration activities on Christmas Island, the central processing point for Irregular Maritime Arrivals.

In 2008, the Ombudsman was also asked to undertake regular reviews of the management of the cases of each client in immigration detention[14]. The agreement with the government, made at a time when it was expected that there would be 100 arrivals a year, was that reviews would be conducted every six months. At the end of 2011 there were more than 4700 irregular Maritime arrivals in immigration detention. More than 3200 detainees had been in immigration detention for more than six months, making a case-by-case assessment of such long-term detainees an impossible task. In a passage I wrote for the 2011 Ombudsman Annual Report I said:

> "the consequence of the large and rapid growth in Irregular Maritime arrivals is that, in relation to the work of the Immigration Ombudsman and in the absence of substantial additional resources to my office, I am unable to provide overall assurance to the public and the Parliament that fair and accountable administrative action is being taken by responsible Australian government agencies."

I am unable to provide a footnote for this reference as the text I provided is not included in the published Annual Report.[15]

Christmas Island Report

Over the past few years a key focus of the Immigration Ombudsman role was to review the management of people in immigration detention on Christmas Island.

For several years, the office had witnessed the asylum-seekers' situation on Christmas Island first-hand, and in an supervising role since October 2008, progressively reporting back to the government departments and responsible Ministers what had been found.

At the time of the first visit in October 2008 there were 31 people in detention on Christmas Island. Two years later and notwithstanding the Government's new detention values which committed to using detention centres only as a last resort and for the shortest practicable period, there were 3,045 in detention, including 199 children under the age of 12 and an additional 125 teenagers under the age of 18. My report of the oversight of immigration processes on Christmas Island during the period October 2008 to September 2010 was presented to the Department of Immigration and Citizenship in September 2010 six months before the March riots.

When it was published in February, there were 2,757 detainees on Christmas Island—well in excess of the contingency capacity of 2,584, let alone the nominal operational capacity of 744—with some living in wet and mouldy tents.

The whole operation was already unsustainable, with the facilities stretched well beyond capacity and the conditions explosive.

As reported at that time, my greatest concern was for the mental health of so many clearly distressed detainees and the well-being of unaccompanied minors.

I recommended that DIAC should:

1. Conduct a thorough review of the Refugee Status Assessment (RSA) processes with the aim of accelerating each assessment and improving overall timeliness, especially the processing of security clearances for successful applicants.
2. Examine ways of releasing detainees who have received positive assessments from immigration detention on Christmas Island, perhaps into community detention on the mainland, subject to strict reporting conditions. A community detention strategy could also be considered for any person in similar circumstances detained in immigration detention facilities on the mainland.
3. Ensure that adequate numbers of accredited interpreters are available on Christmas Island to meet the needs of detainees during the processing of refugee claims and in the provision of support services such as medical assistance.

[13] 39 such reports were tabled in Parliament during June 2012. Details can be found on the website of the Commonwealth ombudsman.
[14] "I will also be seeking to engage the Ombudsman in the review of cases much earlier than the current review after two years of detention. Subject to consultation, reviews by his office after a period such as six months seems more preferable" Senator Chris Evans "New Directions in Detention-Restoring Integrity to Australia's Immigration System July 29 2008"
[14] Ibid
[15] In fact the tabled Annual Report differs in many respects from the final draft I approved

4. Process any unaccompanied minors or families with children on the Australian mainland. Pending the outcome of their RSA claims and security clearances, they should be placed in community detention.
5. Expedite the movement of as many detainees as possible from Christmas Island to the Australian mainland to address the overcrowding on Christmas Island.
6. Address a shortage of facilities on Christmas Island as a matter of urgency to provide appropriate services for detainees requiring health services, especially those relating to mental health[16].

When I released my report publicly in February 2011, it not surprisingly resulted in wide media coverage. In fact, it was the 5th top political story reported in the Australian media for the week of 30 January to 5 February, according to Ken Randall, President of the Australian Press Club and analyst for Media Monitors Australia.

I sounded an early warning to the Government that unless it moved the bulk of these people off Christmas Island immediately and into appropriate facilities on the mainland, the island might implode, with disastrous consequences.

I canvassed publicly the likely consequences of continuing administrative and processing delays but, unfortunately, the report was not able to deflect the events that followed. These were tragic consequences that our leaders, policy-makers and administrators are still struggling to comprehend, manifest in a significantly higher federal police presence on the island, yet another layer of administrative challenge, and a new urgency to deliver these people quickly and safely to a better place.

Following my Christmas Island report and the riots in March 2011, the Immigration Minister announced plans for a new detention centre for 1,500 single men on the outskirts of Darwin, the expansion of other facilities at Darwin Airport Lodge, and the opening of several other detention facilities, including one at Pontyville, north of Hobart, for 400 single men. These are in addition to the expansion of the Curtin detention facility in Western Australia. Though an improvement on the manyfold problems of keeping detainees on Christmas Island at least in the short-term, the common denominator of most of these onshore facilities remains. Like Christmas Island, they are too remote and inevitably present the same kind of logistical and communication problems experienced on the island. From administrates its perspective, remote centres are extraordinarily expensive to establish and maintain. The provision of food, equipment, staffing and security are all strained. From the perspective of asylum seekers, remoteness means long delays in obtaining medical care, great difficulties in dealing with legal representatives and agents and the general sense of alienation.

Moral Dilemma: Immigration Detention Values

At this point, I'd like to make a few further observations on the continuing moral dilemma for the Australian Government in administering the Asylum Policy.

It is my considered view that as long as there are families with children, unaccompanied minors and other vulnerable people in immigration detention facilities (however described), and as long as there are risks to their health and well-being as a consequence of inadequate services, the government as a whole and the Department of Immigration and Citizenship in particular, is in breach of the Australian Government's own detention values.

The Government announced those new values in July 2008, framing major reforms in its immigration detention policies that included publicly-funded measures to assist with processing asylum-seekers, an independent review of negative assessment decisions, and external scrutiny of the process by the Immigration Ombudsman.

The values not only committed the Government to using detention as a last resort and for the shortest practicable period, they incorporated the presumption that asylum-seekers would remain in the community rather than in immigration detention facilities while their immigration status is reviewed.

The Government has said that these key values will underpin the operations of the Department of Immigration and Citizenship and those that are contracted to provide detention services in any form. In spite of these values, however the circumstances of asylum seekers in detention have been allowed to deteriorate.

[16] Christmas Island Immigration Detention Facilities: Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island, October 2008 to September 2010, February 2011

The Government has acted on its intention to progressively relocate significant numbers of unaccompanied minors, families with children and other vulnerable groups to community detention on the Australian mainland for processing. It seems the Government is making a serious commitment to follow through on this intention and, along with many non-government organisations and human rights activists I regard this as welcome. That it has taken so long and then done with such reluctance suggests the immigration values are honoured on paper only.

My principal concern with all of Australia's detention facilities is to ensure that in using its exceptional powers, the Department of Immigration and Citizenship upholds the highest standards of public administration and accountability. This includes ensuring that every effort is made to prevent unnecessary physical or emotional harm to those held in restrictive detention.

Suicide and self-harm

Last year, on the anniversary of Minister Evans's new directions policy announcement, as Immigration Ombudsman I announced an investigation into the impact of long-term detention on the ongoing mental health of detainees.

I was alarmed that in the week of June 2011 when I visited Christmas Island more than 30 incidents of self-harm by detainees held there were reported to the contracted health services provider, International Health and Medical Services.

Since March 2011, Ombudsman staff has inspected the immigration detention facilities at Curtin, Leonora and Christmas Island. A significant issue of concern arising from each of these visits has related to the mental health and wellbeing of detainees.

More than 1,100 incidents of threatened or actual self-harm across all places of detention were reported in 2010-11, according to information provided by the Department of Immigration and Citizenship to the Ombudsman's office

Flowing from the Christmas Island monitoring role, investigation of complaints and regular review of people held in immigration detention for more than six months, three major issues of concern have been raised:

- the impact of long-term detention on the ongoing mental health of detainees
- what appears anecdotally to be a worrying level of self-harm within facilities, and
- what seems to be a relatively high number of suicides.

Mental health

It was no surprise to me last year when mental health advocate and 2010 Australian of the Year, Professor Pat McGorry, described detention facilities like Christmas Island's as '*mental illness factories*'. While perhaps a little rhetorical, Professor McGorry's comment was not far from the truth.

Recent international studies of the impact of immigration detention on people's health report high levels of anxiety, depression, post-traumatic stress disorder, self-harm and thoughts of suicide among detainees.

Longitudinal studies show the negative impact on detainees persists even three years beyond release, despite some initial improvement immediately after release, and worse outcomes associated with longer periods of detention.

These studies—encompassing detainees in Australia, the United Kingdom and the United States—found high levels of emotional stress among people in detention as well as people who had been released, and mental health difficulties, developmental and behavioural problems in children.

It is perhaps important to note here that the vast majority of the people currently in immigration detention will be found to be owed Australia's protection, and will be on the path to citizenship. Many will start down this path with a significant burden of mental health issues.

Self-harm

High rates of self-harm were also being reported by advocates in the sector, and by the media. Understanding the true picture in relation to self-harm and whether current policies and procedures are adequate to prevent self-harm is critical. More transparent reporting of incidents of self-harm in immigration detention is required.

Suicide

Most critically, I was concerned about the high number of apparent suicides within the immigration detention network when compared to previous periods of high numbers in immigration detention and to other detention environments such as Australian prisons and police custody facilities.

All deaths in immigration detention are the subject of coronial inquiries, so offer my comments with that caveat. But a total of five suicides in seven months is worryingly high, and there is a need for independent assurance that everything possible is being done to prevent unnecessary deaths.

Why is it proving so difficult to achieve the ideals described by the Government's immigration detention values? The answer is practical and political. Detention facilities and logistic and administrative arrangements have been overwhelmed by an unpredictable increase in the volume of asylum seekers arriving by boat. Too many detainees are waiting too long for bureaucrats to process and review their paperwork. And changing policy or direction on any border control issue is fraught with political risk. The toxic and dysfunctional debates in Parliament plus malevolent reporting on asylum issues by some in the media means a rational public conversation on these important issues is badly compromised.

Administrative challenges do not, however, justify elasticity in interpreting or applying the detention values to which the Government has committed. As ombudsman, I felt that it was my responsibility to speak up when that happed.

More than 4,000 people are currently held in Australian immigration detention facilities. Common challenges include delays in finalising protection visas, assessments and decisions; a lack of detailed plans for managing rejected asylum seekers who can't be returned to their countries of origin; remoteness of accommodation; poor levels of decision making - evidenced by a high rate of decisions overturned upon review; and physical and mental health problems.

There is something fundamentally wrong. We need an evidence-based assessment of the extent and causes of these tragedies in detention facilities relative to the general population, and guidelines and protocols for preventing and managing them in future.

The investigation I commenced sought to assess the extent of this tragic problem, examine the root causes, and consider practical steps that the Department and its service providers SERCO and IHMS should take to identify and manage those at risk of suicide and self-harm. The aim was be to produce evidence-based, expert-endorsed advice on guidelines and protocols for reducing and preventing the number of incidents that are occur in detainee communities.

Issues for investigation were:

- the extent of the problem, including relative to the incidence of suicide and self-harm in the broader Australian community
- demographic information, including gender, age, country of origin, urban/rural background, language, and length of time in detention of people who participate in suicidal or self-harming behaviours
- potential determinants of this behaviour, including pre-existence of mental illnesses
- catalysts for suicidal ideation and self-harming behaviours, for example denial of visa applications, detention overcrowding, uncertainty about the future
- contagion issues and the impact of attempted or completed suicides and incidents of self-harm on the broader detention community
- prevention (such as screening for warning signs specific to populations, putting in place appropriate safety measures), intervention and post intervention initiatives, including access to counselling and other health services
- detention facility guidelines and protocols

- the availability of appropriately qualified and professionally trained staff
- the nature and different types of detention facilities, access to means to self-harm or suicide, physical environments, risk assessments and mitigation strategies/measures.

In announcing the investigation, I expected to release the investigation findings by the end of 2011.[17]

Sadly, the evidence is still rolling in that mental health issues abound amongst immigration detainees. Despite good progress on the investigation during 2011, no public report has yet been released. I am unable to say whether conclusions and recommendations have been submitted to the relevant departments for comment and implementation, nor whether the report will in fact be published. I look forward to some indication from the Ombudsman's office as to when the report will be concluded and publicly released.

Ombudsman's Investigation into use of Force

Following the Christmas Island riots in March 2011, Immigration Minister, Chris Bowen, appointed former departmental secretaries, Dr Hawke and Ms Helen Williams to investigate certain aspects of the riots. I formed the view that a wider investigation was necessary and that as my office had made eight visits to Christmas Island, we were very well placed to look into issues of the use of force and training as well as actions taken by the contractor SERCO. I expected that my inquiry would complement the review which was being conducted concurrently by Williams and Hawke into the management and security of the Christmas Island Immigration Detention Centre.

Officers of the Department of Immigration and Citizenship—and their contracted providers—are authorised to exercise exceptional, even extraordinary, powers.

As noted in the August 2007 Ombudsman report called *Lessons for public administration—Ombudsman investigation of referred immigration cases*, there is a need for adequate training, proper management and oversight, good information systems, quality assurance and, importantly, effective controls over the use of these powers.

It is one of the human rights protection roles of the Ombudsman to test how well the controls work to ensure that these extraordinary powers are used in reasonable and lawful ways. To this end, I commenced an investigation into use of force by both the Australian Federal Police and the Government's immigration detention service provider, SERCO, on Christmas Island during the week of 12 March 2011. I wanted to provide assurance that in using force, both agencies acted appropriately and demonstrated due process and considered decision-making.

Acknowledging the complexity of the interplay between multiple agencies and organisations, the investigation was to pay particular attention to cross-agency coordination between the three relevant organisations—the Department of Immigration and Citizenship, the Australian Federal Police and SERCO.

I resigned from the office of Ombudsman towards the end of 2011. As with the investigation into suicide and self-harm, It was my expectation that the report of my investigation would be concluded and forwarded to the relevant Departments for comment prior to the public release by the end of the year. Seven months on, so far as I know, the report has not been released and nor am I able to find any reference to it on the Ombudsman website. It is to be hoped that, although delayed, the report will in time be concluded and made public.

Refugees with negative security clearance

The plight of the 53 refugees who remain locked away in indefinite detention despite a complete absence of any criminal convictions or even charges against them represents another major failing in Australia's human rights regime. The immigration Ombudsman has no jurisdiction in relation to decisions made by ASIO. However, affected refugees are subject to the Ombudsman's statutory review process for those in detention for two years or more. Many such reviews have been conducted and reports tabled in Parliament concerning these individuals. To date ministerial responses have

[17] Inquiry to Examine Suicide and Self –Harm in Immigration Detention. Commonwealth Ombudsman, July 29, 2011

been limited to acknowledgement of the fact of continuing detention and unreasoned assertions of the peril to national security which would flow from any changed policy. At the beginning of this paper I argued that there were limitations in the role of the legislature and judiciary. In the case of security compromised refugees however, it may be that the work of a recent Parliamentary enquiry leads to serious reform in this area or failing that a current case before the High Court may at last bring relief.

Conclusions and prospects

At the outset, I sought to establish that the legislature and the executive intended the Immigration Ombudsman to be an important force in the protection and promotion of human rights and justice for asylum seekers. I described legislative and administrative steps which appeared to support that conclusion. I then went on to point out that in reality adequate support from the government was not forthcoming in a number of critical areas. Most particularly, relevant ministers were at times resistant and resentful of the work undertaken by the Ombudsman whenever criticisms were made of the administration of aspects of asylum policy. Further, despite finding extra resources for almost every other aspect of management of asylum policies-including tens of millions of dollars for management to Christmas Island, huge increases to security and policing budgets and for the contract administrator, no new resources could be found to support the impossible workload of the office of the Ombudsman to support six monthly reviews of asylum seekers, to conduct regular visits to all detention sentence or the resources to deal fully with the growing complaints load.

What do the Government's seven key immigration detention values really mean today? Are they milestones to a fairer society, or 'parenthood' statements overtaken by reality? The challenges associated with immigration detention are unlikely to diminish, so perhaps the time has come to review, clarify and produce new operational guidelines designed to ensure the values can be fully implemented.[18]

My conclusion is that the Immigration Ombudsman has the legal powers, experience and skills to play a significant role in maintenance and management of the human rights of asylum seekers. Nonetheless, without the active support of the Executive or failing the executive, the Parliament, the role will continue to fall short of its potential.

I believe that the best prospects for promoting the human rights of asylum seekers would come in a renewed commitment to those elements of the immigration values which have been forgotten or ignored. Clearly the Immigration Ombudsman has not been able to ensure their proper implementation and I think it's time for the Parliament to act by giving them legal force in addition to the policy and moral force they currently lack.

For my part, I remain ready willing and able to work with anyone who wants to promote the human rights of asylum seekers, but, I also remain ready willing and able to work against those who don't.

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[18] Government beaches its own care principles? Ombudsman investigates. Commonwealth Ombudsman, April 14, 2011