

A fair deal for asylum-seekers?

A guest lecture by Commonwealth Ombudsman Allan Asher to
The University of Melbourne Law School

Thursday, 14 April 2011

■ INTRODUCTION

I would like to talk to you today about the role of the Commonwealth Ombudsman in protecting the individual rights of citizens and others who interact with the increasingly complex and diverse agencies of the Australian Government.

In particular, I want to focus on my role in relation to the significant numbers of asylum-seekers we now see arriving by boat on our shores, but first, some contextual information is in order.

My office is part of a 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 governments. Partly, I consider it 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.

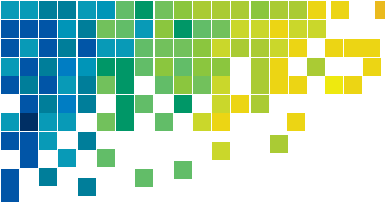
But I also think this fourth arm has developed in recognition that there were, and there continue to be, some very practical challenges to the effective protection of individual rights by the legislative and judicial arms of government.

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.

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

It is the necessity to address these limits to the capacity to provide effective oversight 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.

These oversight bodies fulfil the need for more flexible, fleet-of-foot responses to challenges to 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.



Of course, while we have seen a significant growth and development of this function in the past two decades, ombudsmen and government oversight functions have a much longer history.

The modern meaning of the word arose from its use in Sweden, with the Parliamentary Ombudsman instituted in 1809 to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch.

In 1962, New Zealand was the first English-speaking country to appoint an ombudsman. The first Ombudsman in Australia was appointed in Western Australia in 1971, and legislation to establish an office of the Commonwealth Ombudsman was enabled in 1976. The first Commonwealth Ombudsman commenced operations on 1 July 1977.

The ombudsman concept now exists in more than 120 countries and is considered an essential accountability mechanism in democratic societies, but not *only* in democratic countries.

Recently I was fascinated to find that while my office usually traces its origins through the European democratic line back to Scandinavia, there is a rich tradition of this sort of oversight in China, with a strong 'censorial' or 'supervising' branch of government dating back at least to the thirteenth century.

The role of this branch was to maintain surveillance of government activities and to ensure proper behaviour of government officials. So, as it turns out, the Chinese discovered a lot earlier than Western societies that independent oversight is critical to the effective functioning of governments.

■ OVERSIGHT OF ADMINISTRATIVE ACTIVITIES

As most policy-makers and lawyers will recognise, the job of reviewing and overseeing the administrative work of governments and their agencies and holding them to the highest standards of accountability can be complex and challenging. It can also be confronting.

It is a responsibility that reminds me of the fine line between power and abuse of power, and the inherent risks in all societies of inequities and injustices resulting from poorly-framed or poorly-administered government policies.

The issues we monitor in my office range from the most trivial of discomforts to the gravest miscarriages of justice, from complaints about postal services to claims of wrongful detention.

Paramount among the issues we monitor is the growing global number of asylum-seekers in search of refugee status—and the moral, political, legal and administrative challenges they present to governments such as Australia's when their boats arrive on our shores.

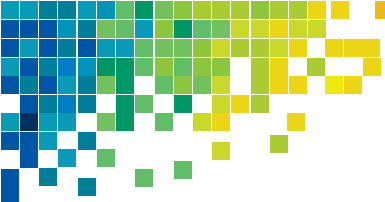
I will focus today on the critical role my office has acquired in recent years of monitoring the Australian Government's response to these challenges, most graphically manifest on one small island off our north-west coast.

With the world's media focused only last December on the tragic deaths of up to 50 men, women and children when their boat broke up on the island's coastline, I am sure you will need no reminding of the place of which I speak—Australia's remotely-located Christmas Island, off north Western Australia.

It is on this island that our Government detains and assesses thousands of Irregular Maritime Arrivals or 'IMAs', better known as asylum-seekers, or boat people.

It was on this island that the media again converged only a month ago, when the complex interplay of over-crowding, stretched resources and delays in the processing of asylum claims is likely to have been the root cause of seven days of detainee protests. A week punctuated, at times, by violent riots and burning buildings, and which led to the rapid deployment of Australian Federal Police reinforcements from the mainland, complete with tear gas and other ammunition to quell the violence.

It had been manifestly obvious in the months and years building up to this event that all was not well on Christmas Island.



It was also obvious to me that my office's role in monitoring and advising on Government inter-agency administrative processes was a critical tool of review and oversight in this offshore management matrix.

It has become painfully more obvious in the wake of these events that, despite our success in working with the Department of Immigration and Citizenship to bring about real improvements in the process and delivery of administrative services, our oversighting role had not prevented the foreseeable consequences of systemic breakdown.

The international headlines during the week of 12 March 2011 were exactly what we had feared, but had hoped would not eventuate.

■ AN IMMIGRATION OMBUDSMAN

The Commonwealth Ombudsman was first invited by the Australian Government to oversight 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.

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

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

In 2008, we were also asked to undertake regular reviews of the management of the cases of each client in immigration detention—a role we now undertake every six months.

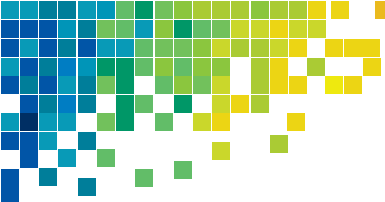
■ THE CHRISTMAS ISLAND REPORT

During the past year, the key focus of my office in its Immigration Ombudsman role has been to actively oversight the management of people in immigration detention on Christmas Island.

For several years, my office has witnessed the asylum-seekers' situation on Christmas Island first-hand, and in an oversighting role since October 2008, progressively reporting back to their caretakers what we have found.

At the time of our first visit in October 2008 there were 31 people in detention on Christmas Island. Notwithstanding the Government's new detention values announced in July of the same year, which committed to using detention centres only as a last resort and for the shortest practicable period, by the time of our most recent inspection in late November 2010 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 our 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 and released to the public in early February 2011, barely six weeks before the March riots.



The report acknowledged the Department for its full cooperation and the quite credible job it had done to manage the situation, despite the complex conditions, and provided six recommendations. These were designed to assist the Department to resolve the core administrative challenges and ensure that the people at the centre of all the drama would receive justice.

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.

[POWERPOINT SLIDES 2 – 4]

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 RSA 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.
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.

■ PUBLIC ATTENTION

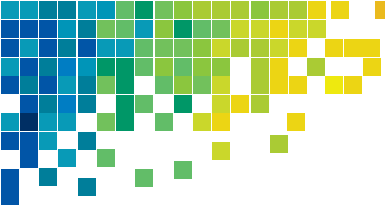
[POWERPOINT SLIDES 5 – 6]

When I released my report publicly in Australia in February this year, it not surprisingly resulted in blanket 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.

How asylum-seekers in detention are dealt with is now well and truly in the Australian public consciousness. What happens to them in the wake of my report and the subsequent unrest will happen in the full light of media and public scrutiny.

I should stress again that as Ombudsman, I do not have nor do I want the power to make Government policy, but through this office I want to strongly influence the way it is framed, interpreted and administered.

I sounded an early warning to our 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, my office 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.

Since my Christmas Island report and the riots in March, the Immigration Minister has 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.

I welcome the Government's announcement of new facilities and other expanded support services as an opportunity for improved immigration detention outcomes. The Government's stated intention to progressively relocate vulnerable detainees to community detention is especially promising for children and families. I am pleased to note that the latest figures provided by DIAC to my office yesterday indicate that the number of detainees currently in detention on Christmas Island have reduced to 1,888. Regrettably, this includes 251 minors, 142 of whom are unaccompanied.

Such changes will certainly mitigate the overcrowding on Christmas Island, at least in the short-term, but the common denominator of most of these onshore facilities remains. Like Christmas Island, they are too remote and will inevitably present the same kind of logistical and communication problems experienced on the island.

Let me say here that I have never underestimated the challenges of administering Christmas Island. It is unsurprising that the complexity of this task might lead to unexpected and unacceptable consequences regardless of the intentions.

US organisational theorist and sociologist Charles Perrow alerts us to the predictability of accidents in what he calls 'tightly-coupled systems', where each part of a system is tightly linked to many other parts, so that changes in one part quickly effect changes in another.

Perrow argues that tightly-coupled systems may respond quickly to disturbances or upsets in a way that may be disastrous. Loosely-coupled systems have fewer or less tightly connected links between their parts, and are therefore able to absorb unplanned events or behaviours more effectively and without becoming destabilised.

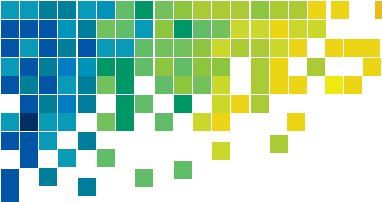
It may be that the Government's operation on Christmas Island is a clear example of Perrow's tightly-coupled system. That is, the complex interactions between agencies, the Government and local community, and between individuals and groups of asylum-seekers may be the cause of an increased risk of systemic breakdown. In the context of the Christmas Island riots, this is a perspective worth reviewing for any insights it may offer for future risk management.

■ MORAL DILEMMA: IMMIGRATION DETENTION VALUES

At this point, I'd like to make a few further observations pertinent to my Christmas Island report and the continuing moral dilemma for the Australian Government in administering the Christmas Island facilities.

It is my considered view that as long as there are families with children, unaccompanied minors and other vulnerable people in immigration detention facilities on Christmas Island, and as long as there are risks to their health and well-being as a consequence of inadequate services, the Department of Immigration and Citizenship 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.

[POWERPOINT SLIDES 7 – 9]

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.

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 situation on Christmas Island was allowed to deteriorate.

The Government announced its intention in 2010 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 am monitoring the situation closely.

My principal concern with Christmas Island, as 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.

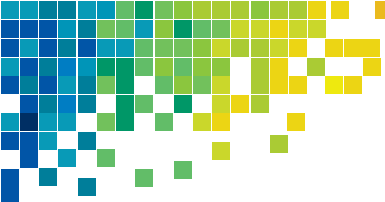
■ OMBUDSMAN'S INVESTIGATION INTO USE OF FORCE

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 my office's roles to test how well the controls work to ensure that these extraordinary powers are used in reasonable and lawful ways.

To this end, I have this week notified the relevant Government Ministers and agency heads that I intend to use my *'own motion'* powers to conduct 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 want 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 will 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 expect that this own motion inquiry will complement the review currently being undertaken by Ms Helen Williams and Dr Allan Hawke into the management and security of the Christmas Island Immigration Detention Centre.

■ SUICIDE AND SELF-HARM

In my office's Christmas Island monitoring role, through our 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.

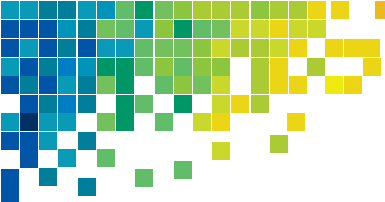
Self-harm

High rates of self-harm are also being reported to me 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. I would welcome more transparent reporting of incidents of self-harm in immigration detention.

Suicide

Most critically, I am 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.

I am aware that all deaths in immigration detention are still 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 was and is being done to prevent these unnecessary deaths.

With this in mind, I am considering also looking further into how the Department of Immigration and Citizenship and SERCO have sought to ensure that the physical facilities within which asylum-seekers are held are appropriately designed to prevent suicide, and the extent to which they have developed and implemented appropriate programs to identify and manage those at risk of suicide.

This is perhaps particularly poignant given the very significant reduction of deaths in Australian prisons and police custody achieved following the important and ongoing reform process introduced in the late 1990s as a result of the Royal Commission into Aboriginal Deaths in Custody. In these corrections facilities a focus on improvements to physical infrastructure—such as the removal of hanging points, data collection and public reporting of data, and the introduction of appropriate client management programs has made a big difference.

For example, hanging as a cause of death in prisons has decreased since 2000, with the numbers recorded in the past three years among the lowest on record. It's a similar story with the number of deaths in police custody and custody-related operations.

■ A REFORMIST OMBUDSMAN

You may be concluding by now that I am continuing the work of my predecessors in pursuing a reformist and risk-taking model of ombudsman activity.

Many people mistakenly believe the role of ombudsmen is limited to reacting to individual complaints and making recommendations for individual remedies or systemic problems.

Increasingly, ombudsmen are working to get ahead of the game by seeking to better identify and understand areas of potential risk. We look for trends that are negative or unsatisfactory, do further research, investigate, and then try to turn things around.

We act to ensure that government has fair warning of the likely consequences of its administrative practices, and that it fully recognises the stakes. Where possible, we also offer solutions. We don't make government policy, but we do seek to inform the policy process and outline options for better addressing identified risk.

Once upon a time we regularly heard the refrain '*Oh, but the Ombudsman has no teeth*', meaning, no legislative bite. Perhaps that is still true, in the legislative sense, but in these days of global transparency it is less the watchdog's bite that is feared than the bark. In Australia, the Ombudsman not only has a comprehensive and integrated approach to encouraging and oversighting good governance, but over the past decade we have developed an increasingly influential voice in Parliamentary and other public arenas.

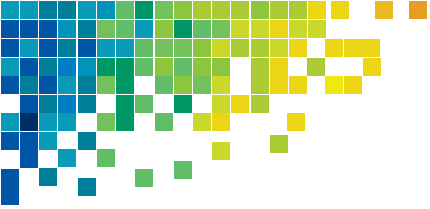
In other words, we have a persuasive bark, and we use it to be heard.

■ CONCLUSION

Complaint handling is still the core function of my office—we received 37,468 complaints about more than 150 government agencies in the 2009–10 financial year, of which we investigated 4,489.

The office has greatly diversified, which partly explains why it has doubled in size in recent years, but you only need to talk to my hat-maker to realise how diverse this Ombudsman's functions have become. Apart from my Commonwealth and Immigration Ombudsman's hats, I also wear the Law Enforcement, Defence Force, Taxation, Australian Capital Territory, Postal Industry and Overseas Students Ombudsman's hats. And currently being stitched is my Public Interest Disclosure Ombudsman hat.

However, it is the *own motion* inquiries generated by such diverse responsibilities that reflect the extent to which ombudsman principles are now embedded across all layers of government administration.



Ombudsman roles have evolved internationally a long way since their long ago beginnings in Sweden—and China—but our goals haven't changed much. We simply reflect the societies in which we live and their greater expectations of fair and accountable government.

The focus of this talk has been on the role of the Commonwealth Ombudsman in overseeing the administration of immigration detention on one small but troubled Australian island in the Indian Ocean, closer to Java than it is to our capital, Canberra.

Today, Christmas Island is the litmus test of the Australian Government's custodial responsibilities for international asylum-seekers.

Unless we also address the urgent mental health issues staring us in the face from that island and across our mainland detention centres, we will pay a high price for failing it.

It is my challenge as Commonwealth Ombudsman to pursue the Australian Government to do what it must to enact the processes that ensure the safety and well-being of all human beings on the receiving end of its policies.

This includes a fair deal for asylum-seekers.

[END]