

research report



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THE USE OF NON-JUDICIAL ACCOUNTABILITY MECHANISMS BY THE REFUGEE SECTOR IN AUSTRALIA

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in collaboration with



Refugee Council
of Australia

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Photo: Refugee advocates before Parliament House, 2018.

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Executive summary

How can we keep the executive accountable? This is the great democratic question of our times. It is a question with special force when it comes to the protection of minorities in an age where populism is increasingly conflated with a virulent brand of nationalism.

This report presents a study of one of the most contested areas of public policy in Australia, refugee policy, during one of its worst periods. It is a study of how the refugee sector has engaged with a suite of mechanisms established to keep the executive accountable, of how that engagement can be improved and made more effective, and of how those mechanisms themselves have performed. These mechanisms are designed specifically to keep the executive accountable, but are not judicial in nature, so are referred to as 'non-judicial accountability mechanisms'.

The non-judicial accountability mechanisms have been important in keeping the executive accountable throughout these dark years of refugee policy. They have produced key reports and provided important information that the government has not wanted in the public sphere. They have produced outcomes for individuals behind the scenes, and provided avenues to influence the government. Yet, as this report shows, they have been, and are being, tested.

The report performs several functions. First, it provides a detailed account of the engagement of the refugee sector with such mechanisms. It provides a qualitative study, drawing on interviews with key informants from the refugee sector across Australia. The authors would like to express their deep gratitude to these informants for taking precious time in their hectic schedules to participate in this study.

Together, these informants bring different perspectives and collectively decades of experience in engaging with these mechanisms. This account therefore provides a unique empirical record of the use of non-judicial accountability mechanisms.

Second, it provides practical recommendations for improving this engagement, and the effectiveness of such engagement. These recommendations include recommendations for the peak national body, the Refugee Council of Australia, which has partnered this study, and also for other non-governmental organisations, the mechanisms themselves, and for government.

The focus of these recommendations are:

- better training, support and collaboration within the sector
- institutional measures within the mechanisms to improve their engagement with the sector
- reforms to improve the effectiveness of these mechanisms.

Third, the report identifies the constraints and the limits of non-judicial accountability mechanisms. The effectiveness of such mechanisms depends on certain preconditions. These include awareness of such mechanisms, their accessibility, and the capacity (including time and support) to use these mechanisms. It also depends on the capacity of these mechanisms to work effectively, including through their institutional mandates, resourcing, and their relationships with the sector and with government.

Most importantly, these mechanisms ultimately rely upon the receptiveness of a government to consider their recommendations, and a recognition of the value and need for accountability. The report identifies ways in which accountability has been delayed, frustrated, and denied in the past years. The forms of democratic accountability exist, but the norms upon which they rest are eroding.

Recommendations

R1. AHRC, the Ombudsman's Office and UNHCR should adopt key performance indicators on engagement or provide other institutional incentives for their staff to engage proactively with the refugee sector, including refugee communities, around Australia.

R2. AHRC, the Ombudsman's Office and UNHCR should consider hiring more staff with refugee sector experience in order to enhance sector connections.

R3. RCOA and/or the various state & territory networks (see "Being collaborative" on page 10) should provide regular opportunities around Australia for the sector to meet with staff of AHRC, the Ombudsman's Office and UNHCR in order to improve access and facilitate the development of personal relationships.

R4. RCOA and/or the various state & territory networks (see "Being collaborative" on page 10) should facilitate greater understanding of the use of non-judicial accountability mechanisms, preferably involving representatives of the mechanisms in questions.

R5. Representatives from the various State/Territory networks should convene to discuss common challenges and learnings.

R6. Before making an FOI application for non-personal information, refugee sector members should search the FOI disclosure log of the relevant government department and the Right to Know website to see whether there has been a prior application for the same information.

R7. Refugee sector members should consider making FOI applications for non-personal information through the Right to Know website.

R8. Those who are not experienced in making FOI applications should make use of the advice and guidance available on the OAIC website.

R9. Those who are not experienced in making FOI applications should also consider obtaining feedback on draft applications from those who are experienced.

R10. RCOA should investigate a way to share information about FOI with its members, including what information has already been FOI'ed.

R11. The OAIC should consider making training on the use of the FOI process available to the public at regular intervals.

R12. The FOI sections of federal government agencies and the OAIC should be funded to a level that enables them to meet their statutory obligations in a timely manner.

R13. In order to provide a realistic opportunity for participation, at least a month should be allowed for the making of written submissions to parliamentary inquiries.

R14. Parliamentary inquiries should be resourced at a level which makes it possible for them to hold hearings in more capital cities than just Canberra.

R15. Where a Bill is the subject of a parliamentary inquiry, it should not be passed prior to the tabling of the inquiry report.

R16. The government should make formal final responses to all recommendations contained in parliamentary inquiry reports and should do so within three months.

R17. In order to make more efficient use of limited resources, the sector should consider intensifying collaboration with respect to lobbying parliamentarians, including through coordination of submissions to inquiries. The obvious vehicle for collaboration is RCOA.

R18. In order to make more effective use of the Senate estimates process, those who are not experienced in framing questions that elicit useful answers should consider collaborating with RCOA.

R19. In deciding whether to engage with a parliamentary inquiry, consideration should be given to the potential for indirect medium and long-term payoffs as well as the potential for direct short-term ones.

R20. The sector should consider using the AHRC as an avenue to address the impact on refugees and people seeking asylum of human rights violations which are not specific to that cohort (e.g. sexual harassment in the workplace).

R21. The AHRC and the Ombudsman's Office should update individuals and organisations providing information about the actions taken in response to ensure that informal information-sharing continues.

R22. In order to assist the public in assessing the responsiveness of government departments, the AHRC and the Ombudsman's Office should publish statistics on the implementation of their recommendations by department.

R23. The Ombudsman's Office should publish reports on its immigration detention facility visits.

R24. The Ombudsman's Office should return to the practice of providing immigration detainees with detailed and individualised detention review assessment reports.

R25. The AHRC and the Ombudsman's Office should be funded to a level that enables them to meet their statutory obligations in a timely manner.

R26. In order to give them an incentive to implement recommendations made by the AHRC and the Ombudsman, government departments should be required to include information in their annual reports about their acceptance/rejection/implementation of those recommendations.

R27. The websites of UNHCR's various offices should contain clear information about the precise circumstances in which the office in question can assist people seeking asylum, refugees and others and easy-to-follow instructions for seeking such assistance.

R28. In deciding whether to engage with UN human rights mechanisms, consideration should be given to the potential for indirect medium and long-term payoffs as well as the potential for direct short-term ones.

R29. In order to maximise the potential for long-term payoffs, the sector should systematically follow up on the government's implementation of relevant recommendations made by UN human rights mechanisms and should report back to the mechanisms on the government's performance.

R30. The government should ensure that its reports to the UN human rights treaty bodies are of high quality and made in a timely fashion.

R31. The Attorney-General's Department should keep its UN human rights recommendations database up-to-date, should expand it to include individual complaints relating to Australia, and should include information about the government's acceptance/rejection/implementation of recommendations.

Introduction

About this project

The refugee sector includes many people across Australia: people who work providing direct services to refugees and people seeking asylum, advocacy organisations, and many passionate individuals. Some have a long history of advocating for individuals. Some are community leaders. Others are friends of those affected. As well, refugees and people seeking asylum often advocate on their own behalf. It is a broad and diverse sector, but it is one under severe financial and emotional strain after years of harsh refugee policies.

As vulnerable individuals, refugees and people seeking asylum are generally unfamiliar with the different Australian organisations that may be avenues to address their issues. They, and their advocates, often need support to identify which avenues are worth pursuing and how to most effectively engage mechanisms. If they cannot engage with these mechanisms, they may be directly or indirectly deprived of rights and remedies. At its worst, this could result in them being deprived of their liberty or returned to persecution.

This is also a systemic challenge, because if refugees and people seeking asylum do not engage with these mechanisms, their problems are not visible or taken seriously. It can be difficult to convince the government there is a problem if it does not hear about these problems and does not have data or cases to suggest there is a problem.

However, there are also systemic challenges in using these mechanisms effectively. Non-judicial accountability mechanisms typically rely on persuading the government and cannot compel governments to act. Government policies and administrations that favour secrecy make it much more difficult for these mechanisms to ensure accountability and transparency. Governments can routinely reject recommendations, resist change or disclosure, or create enough administrative friction that people give up.

This can create a vicious spiral, as people lose faith in these mechanisms and stop using them, making it more difficult for these mechanisms to do their work.

In this context, it was timely to research the effectiveness of these mechanisms from the viewpoint of the 'consumer': the advocates who have engaged with these mechanisms. The aims of the project were to identify how advocates were engaging with them and their experience and assessment of these mechanisms, and to make recommendations that would improve the use and effectiveness of these mechanisms.

Methodology

This research project was a collaboration between Dr Joyce Chia, who was the Policy Director of the Refugee Council of Australia (RCOA) at the relevant time, and Dr Savitri Taylor of the La Trobe Law School. Its conduct was approved by the La Trobe University Human Ethics Committee (approval HEC18491).

The researchers reviewed relevant academic and grey literature and material available on the websites of the Australian Human Rights Commission (AHRC), the Australian Parliament, the Commonwealth Ombudsman (Ombudsman), the Department of Home Affairs (DHA), the Office of the Australian Information Commissioner (OAIC), the Office of the High Commissioner for Human Rights (OHCHR) and the Office of the United Nations High Commissioner for Refugees (UNHCR).

The researchers also conducted 45-minute to 90-minute semi-structured interviews with 15 key informants and obtained written input from an additional 20 key informants via surveys in the period from mid-February to mid-May 2019. The key informants, who participated on condition of anonymity, were RCOA members with service provision and/or advocacy backgrounds from the Australian Capital Territory (ACT), New South Wales (NSW), Queensland, Victoria and Western Australia (WA). Finally, the researchers drew on their own knowledge and experience of the sector.

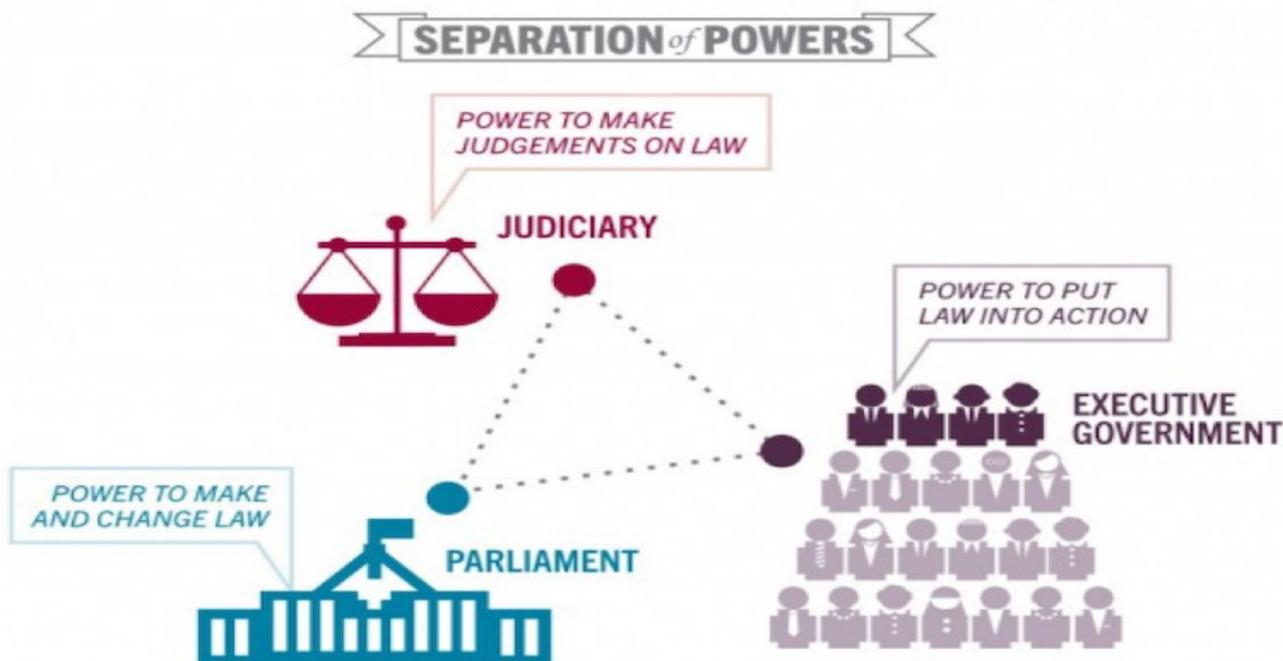
Outline of report

Part I of this report is an overview of the project's broad findings about the barriers to using non-judicial mechanisms faced by the sector and about how the sector can use non-judicial accountability mechanisms effectively. It ends with some recommendations to relevant actors on how barriers to use can be further reduced.

Part II sets out in turn the project's findings in relation to each of the non-judicial accountability mechanisms considered. The discussion of each mechanism ends with recommendations to relevant actors on how barriers to use can be reduced and/or the mechanism can be more effectively used.

Acknowledgments

The researchers would like to thank the interviewees and survey respondents for generously giving their time and sharing their knowledge and experience, Dr Jodie Boyd for her research assistance, and RCOA colleagues for their feedback on the draft report.



Overview

What is the executive?

The Australian Government, like most Western democracies, follows the principle of separation of powers, where the three arms of government (the parliament, the executive and the courts) are independent of each other. This is supposed to protect against abuse of power and ensure each arm of government can keep the other arms accountable. The diagram above outlines the three arms of government.¹

Australia is a parliamentary democracy. The members of Parliament are elected by the citizens of their respective electorates to represent them in the law-making process and those citizens get a periodic opportunity to change representatives.² Parliament in turn chooses some of its members to form the executive, delegates some functions to it, and holds it accountable for the manner in which it discharges those functions.³ In theory, the

executive is accountable to Parliament which is accountable to all Australian citizens.⁴

The executive arm of government is made up of the Prime Minister and the Cabinet (senior Ministers). Ministers are responsible for overseeing the departments and agencies under their portfolio. The fact that Ministers are also members of Parliament means there is not a strict separation of powers between the executive and the Parliament, which is often cited as a potential for abuse.

The executive administers and implements law and policy. For example, the Minister for Home Affairs is responsible for carrying out laws under the *Migration Act 1958*, as well as developing policy and practices to support those laws. As such, the executive can wield significant power under law, laws which can have significant impact on the lives of refugees and people seeking asylum.

The judicial arm of government refers to the courts, including the High Court and federal courts. The judiciary is responsible

¹ Source: Parliamentary Education Office, "What is an example of the separation of powers in Australia?", available at <https://questions.peo.gov.au/questions/what-is-an-example-of-the-separation-of-powers-in-australia/22>

² Phil Larkin, 'Ministerial Accountability to Parliament' in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU ePress, 2012) 95, 97.

³ Ibid.

⁴ Ibid.

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for interpreting the law, applying it to the case before it, and making binding decisions. Of relevance, an important function of the courts is to review the lawfulness of executive action. However, the courts are limited to only reviewing the legality of a decision, not the merits of such action. Administrative tribunals, such as the Administrative Appeals Tribunal, on the other hand, are quasi-judicial bodies which are responsible for reviewing the merits of an executive action.

This report, however, deals with non-judicial accountability mechanisms, and as such has not considered the role of the courts and tribunals in holding the executive to account.

What are non-judicial accountability mechanisms?

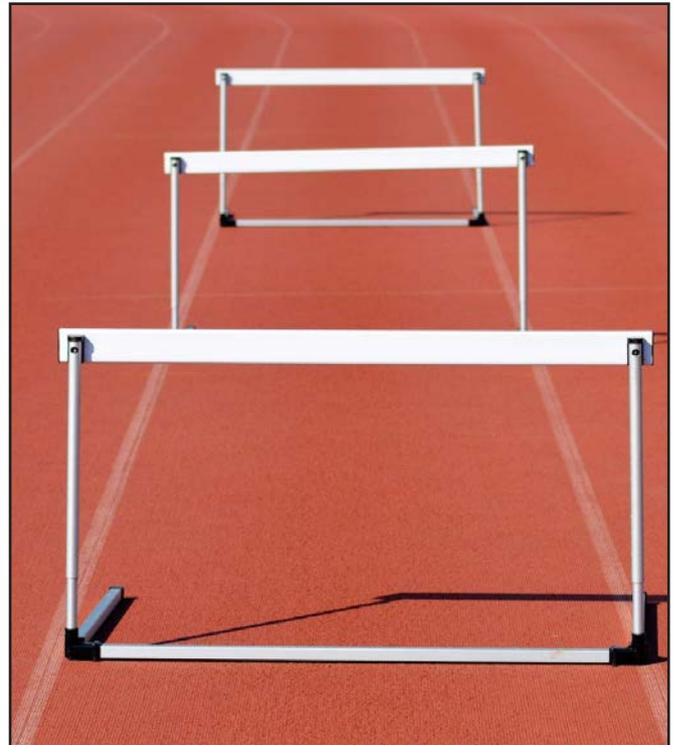
Non-judicial accountability mechanisms refers to a range of systems established to hold the executive accountable, outside of litigation in the courts. In this report we look at Freedom of Information legislation, the Parliament, AHRC and Commonwealth Ombudsman and international mechanisms, including UNHCR and the UN Human Rights Committee, among others.

The non-judicial accountability mechanisms have been important in keeping the executive accountable. They have produced key reports and provided important information that the government has not wanted in the public sphere. They have produced outcomes for individuals behind the scenes, and provided avenues to influence the government.

The effectiveness of such mechanisms depends on certain pre-conditions. These include awareness of such mechanisms, their accessibility, and the capacity (including time and support) to use these mechanisms. It also depends on the capacity of these mechanisms to work effectively, including through their institutional mandates, resourcing, and their relationships with the sector and with government.

Most importantly, these mechanisms ultimately rely upon the receptiveness of a government to consider their recommendations, and a recognition of the value and need for accountability. Non-judicial accountability mechanisms typically rely on persuading the government and cannot compel governments to act. Government policies and administrations that favour secrecy make it much more difficult for these mechanisms to ensure accountability and transparency. Governments can routinely reject recommendations, resist change or disclosure, or create enough administrative friction that people give up.

Nevertheless, non-judicial accountability mechanisms play a vital role in holding the executive to account, especially during this time when the government is implementing harmful policies and practices against refugees and people seeking asylum.



Barriers to using non-judicial accountability mechanisms

Lack of knowledge

The greatest barrier to making use of non-judicial accountability mechanisms is lack of knowledge. A mechanism cannot be used at all if people do not know it exists. Even if they do know that it exists, they may not use it because they do not know how to use it. The Asylum Seeker Interagency in NSW (see “Being collaborative” on page 10) has had special meetings to which it has invited representatives of bodies such as the AHRC and the Ombudsman’s Office to explain the basics, including what they can and cannot do. This kind of engagement is valuable in helping people to know of these mechanisms and how to use them.

Familiarity with the basics is rarely enough to make effective use of any of the mechanisms. Those informants who felt they were making the most effective use of a particular mechanism had usually acquired their know-how through experience. Unfortunately, few in the sector can afford the inefficiencies inherent in learning by doing. Some informants reported compensating for personal inexperience with a mechanism by seeking assistance from colleagues or others in the sector known to have the necessary knowledge or experience. It is hoped that this report will be another means of helping people know about these mechanisms and how to use them more efficiently.

Lack of contacts

A theme which emerged from this research was that informants were more likely to use a mechanism if they not only knew how but also knew who. One informant raised systemic issues with the AHRC rather than the Ombudsman's Office because the informant personally knew the relevant staff member in the former organisation but not in the latter. They said, 'I hate cold calling because it just does not work!'

Lack of time

Most organisations and individuals in the sector are already struggling to get their core work done and do not have the time to engage in peripheral activities. Service providers, in particular, regard engagement with non-judicial accountability mechanisms as peripheral rather than core to their work. The exception to this is legal service providers, who regard the use of freedom of information (FOI) legislation as an integral part of their core work.

In the case of some mechanisms, as people gain experience in using it, they need to invest less time in using it. However, even when efficiently used, the cost-benefit analysis may well weigh against using such mechanisms where the aim is to obtain a positive outcome for an individual client.

Lack of physical proximity

A couple of informants, one based in WA and the other in Queensland, drew attention to the fact that geography can be a barrier to access. The Ombudsman has offices in Adelaide, Brisbane, Canberra, Melbourne, Perth and Sydney but not in Hobart and Darwin.⁵ There are, of course, federal MPs and Senators based in every state, but Canberra is the only place they all congregate. The AHRC only has an office in Sydney⁶ and UNHCR's only Australian office is in Canberra. The UN human rights mechanisms are Geneva-based, although the special procedure mandate holders are able to, and do, make country visits, including to Australia (see "UN human rights mechanisms" on page 35).

⁵ Ombudsman, *Annual Report 2018-19* (Report, 2019) 20.

⁶ AHRC, *Annual Report 2018-19* (Report, 2019) 10.

Using non-judicial accountability mechanisms effectively

Being credible

The work of the non-judicial accountability mechanisms discussed in this report is done by people. Most of these people face more demands than they can possibly meet given the time and resources available to them. One of the themes which emerged from this research was that they manage the situation through informal filtering where they have discretion to do so. Advocates and service providers who are known and perceived as credible find it easier to get a response than those who are unknown or perceived as lacking credibility.

Some organisations and individuals have the advantage of a high-profile brand or reputation to which a widespread perception of credibility is already attached. Informants who fell into this category acknowledged that it usually made access easier and mechanisms more responsive than would otherwise be the case.

The first hurdle that other individuals and organisations have to overcome is that of being unknown. To overcome this hurdle, they need to cultivate and maintain relationships with the relevant people. Once known, an individual or organisation can earn credibility over time by demonstrating the following attributes.

- They possess special knowledge or expertise. For example, those delivering services possess knowledge of systemic issues identified through their client work. According to one informant, 'I can get a meeting with most people in Canberra because they know you are talking about what you are seeing on the ground.'
- They can be relied upon to only raise cases or issues which fall within the mechanism's mandate (if applicable) and are really important, so they are not perceived to be wasting time.
- When providing information, they can be relied upon to have checked the facts and got them right.
- When sensitive information is given to them, they can be trusted to use it only as permitted.

Credibility earned by an individual is not necessarily transferrable to their organisation in all contexts. According to one informant, who was in the process of handing their job over to another person,

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A few key politicians [have] said 'Look the information that I give to you is because I've got [many] years of relationship and trust. In a second, third, fourth meeting with someone from [your organisation] I am not going to give them that level of information.'

Being collaborative

Different organisations and individuals have different information, expertise, capacities, contacts, and reputations. Informants reported that where they lacked particular information, expertise or other attributes, they might informally approach another individual or organisation likely to be able and willing to supply what they lacked. In a similar vein, some informants reported that where they thought that another organisation was better placed to take up a systemic issue or to achieve a positive outcome for an individual, they would hand the issue or the case over to the other organisation. For example, one informant from an advocacy organisation said:

Between 2000 to 2010 it would just be us, so we would say 'We are not lawyers, we can't take it to the courts, what can we do? We'll take a complaint to the Human Rights Commission.' So that's why we used that mechanism up until that point. Post 2012 there are now more lawyers who are willing to step up. So often if it is a serious case, then we'll hand it over to [named non-profit legal service providers].

Finally, some informants explained that there were some situations in which it made sense for a certain organisation or organisations to take the lead and for their own organisation and others to come in as needed to supply information or provide support. For example, one informant said:

That's also part of the strategy you know what organisation should be the leader or the one doing the contacts... You normally get names that can open doors pretty easily. I'm happy for them to be the public face and do the work behind the scenes.

In ACT, Queensland, NSW, Northern Territory, South Australia, Victoria and WA, different configurations of organisations and individuals working in the sector have formed networks that meet regularly to share knowledge and to work together to achieve mutually desired outcomes. For example, the Asylum Seeker Inter-agency in NSW, which was formed about 20 years ago, has meetings every two months attended by 40 to 50 people.

Working with others is particularly useful for small organisations. One informant from a small service provision organisation said,

Liberty Victoria has a group of people who are interested in asylum seeker policies. I go to their meetings and anything I want to say about policy change and so on I say there. They are constantly doing policy interventions and so on; so, I see that as a more useful use of my time.

Pooling information is also useful for identifying systemic issues. One informant gave the following example:

So, there was a lot of communication when the three detention centres were up in Darwin about the use of restraints. And then talking to others and saying 'What are you seeing, what are you seeing, what are you seeing? OK, let's get that information to UNHCR or the Human Rights Commission' ... I think that's really important because then you can say well the pattern's only happening here or no it's happening all around Australia.

At the national level, RCOA hosts a monthly 90-minute teleconference of members interested in collaborating on issues relating to detention, regional processing and the onshore asylum process.⁷ This is a longstanding national forum for identifying trends, sharing ideas and experience, and identifying issues and opportunities for systemic advocacy.

In recent years, there has been a more focused effort on national collaboration within the sector. RCOA, for example, has supported several national advocacy workshops and working groups in recent years, bringing together a broader range of advocates and advocacy organisations to collaborate more intensely on priority policy areas. In addition it has supported the establishment of several ad hoc working groups for visa cancellations, citizenship delays and on refugee education. It has also run national conferences for the past three years.

As well, there are other collaborative networks. The Andrew & Renata Kaldor Centre for International Refugee Law coordinates a national teleconference on legal issues, while the Human Rights Law Centre supports a broader national teleconference including many advocates and advocacy organisations.

One informant said they sometimes raised cases or issues with non-judicial accountability mechanisms through RCOA rather than directly. Further, when raising cases or issues directly, they kept RCOA in the loop. The informant did both these things 'So we are not duplicating; we are not asking about the same situation ten times. You know that's really annoying.' Another informant explained that in relation to certain matters they tried to work with RCOA because 'they have the good connections.' Yet another said:

RCOA [has] ramped up so I would ring [them] and say 'I don't know what to do, tell us. We are happy to write to someone' or 'This is information, do you want it?'

The general view expressed by those who had worked in the sector for a long time was that it is much better at working collaboratively now than it has been in the past. For example, one informant observed: 'I think the collaboration that's happening around [MedEvac] I've never seen in 19 years.'

However, a number of informants observed that there were still challenges to be overcome. For example, the informant just quoted worked for a religiously affiliated organization and said 'I'm all for collaboration but sometimes because of our philosophical, ethical views that doesn't necessarily come together.' Another informant said:

There is also the problem where we [share out the work] and then organisations don't take up their action items and then you are like 'I could have done [that] work and now I am waiting'.

Yet another informant from a large service delivery organisation said:

Quite often we wait and rely on Refugee Council to do something and because of resources they don't and other organisations step in and then it causes conflict in the sector... Like I have honestly never worked in a sector where half the time it feels like we are battling the sector and individual advocates as much as we are the government.

The informant added that the factors fuelling conflict included 'different states' approaches to things', perceptions that this or that organisation was straying outside its proper lane, and the intense competition for funding within the sector which led to suspicion about other organisations' agendas.

Being comprehensive and cumulative in approach

When asked why they made use of this or that particular mechanism given the uncertainty (often unlikelihood) of an immediate and direct win, a common response from informants was that no one mechanism was a 'silver bullet' but that every avenue

⁷ Until mid-2019, there were two separate monthly teleconferences of one hour each. These have now been combined.

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pursued added to the overall pressure on the executive government to deliver the desired outcome. Moreover, where systemic change was being sought, the avenues which needed to be used were not just those considered in the present study but also media campaigning and grassroots mobilisation at one extreme and engaging in dialogue with DHA officials at the other.

Another theme which emerged in relation to systemic change was that big wins were more often secured through an accumulation of small wins over time than in one go. One informant said:

If we sort of think we need to go out there and bang make some big change now, it's not going to happen. It's 19 years of the fear rhetoric you know since the Tampa. So it's 19 years in the Australian psyche. This is how it is. It will take a long time to change. We just have to keep doing it... You know this space is meaningful work but it's probably only 20 per cent successful.

Taking the long view is important. Another informant said 'the most important thing is to recognise the wins that are not possible [now] but to lay the groundwork [now].'

Recommendations

Agencies

R1. AHRC, the Ombudsman's Office and UNHCR should adopt key performance indicators on engagement or provide other institutional incentives for their staff to engage proactively with the refugee sector, including refugee communities, around Australia.

R2. AHRC, the Ombudsman's Office and UNHCR should consider hiring more staff with refugee sector experience in order to enhance sector connections.

Sector

R3. RCOA and/or the various state & territory networks (see "Being collaborative" on page 10) should provide regular opportunities around Australia for the sector to meet with staff of AHRC, the Ombudsman's Office and UNHCR in order to improve access and facilitate the development of personal relationships.

R4. RCOA and/or the various state & territory networks (see "Being collaborative" on page 10) should facilitate greater understanding of the use of non-judicial accountability mechanisms, preferably involving representatives of the mechanisms in questions.

R5. Representatives from the various State/Territory networks should convene to discuss common challenges and learnings.

Mechanisms

Freedom of Information Legislation

The [Freedom of Information Act 1982 \(Cth\) \(FOI Act\)](#) is a tool which is used by the sector to request, on behalf of clients, personal information about them held by government departments. To a lesser extent, the *FOI Act* is also used by the sector to request governmental information which may be of use in broader service provision, policy and advocacy work.

At least one informant made FOI applications via the [Right to Know](#) website. The website enables tracking of all communication related to the application and makes the communications and any documents released publicly available. It should not be used, therefore, for requesting personal information.

Once government information is released to any person pursuant to an FOI application, it must, with some exceptions (e.g. personal information), also be made available within ten working days to the members of the public generally via an FOI disclosure log on the agency's website (*FOI Act* s11C).⁸ Informants who knew of the existence of disclosure logs used them as an additional source of information for policy and advocacy work. It is also worth searching the Right to Know website since documents which are requested through the website are available on it immediately upon release.

Twenty-two of our key informants had experience of making FOI applications, mostly to DHA. Some informants noted that, in practice, the government of the day's general attitude to transparency and also the culture of the particular government agency had a significant impact on the ease with which information could be accessed whether through making an FOI application or otherwise. The current Coalition government is regarded by the sector as having a more negative attitude to transparency than Labor had.⁹ Similarly, DHA is regarded as having a more negative

attitude than most other agencies.¹⁰ Informants observed that over time more and more information that DHA used to release publicly as a matter of course on its [website](#) or [LEGENDcom](#)¹¹ is now only accessible, if at all, through the use of FOI legislation.

Case study

DHA has a Status Resolution Support Services (SRSS) Program under which it funds contractors to provide services to people seeking asylum who meet certain eligibility requirements. DHA issues a SRSS Operational Procedures Manual for the guidance of contracted service providers. This is the kind of document which should be made publicly available as a matter of course (*FOI Act* s8A). In fact, SRSS providers are required to keep the contents of the Manual confidential. The rest of the sector wished, of course, to know the detail of the procedures for the purposes of their service provision, policy and/or advocacy work. On 30 April 2018, an FOI request was made for the SRSS Operational Procedures Manual (Version 7).¹² On 8 June 2018, the DHA FOI officer decided to make a partial release of the document (i.e. to release a redacted version).¹³ Version 7 of the SRSS Operational Procedures Manual was replaced by version 8 in 2019. Since it had previously decided that version 7 could be partially released, DHA could simply have made a partial administrative release of version 8. It chose not to do so. At the time of writing, there were multiple undecided FOI applications for version 8.

Informants also observed that agencies with a negative attitude to transparency can undermine the effectiveness of FOI legislation through a variety of devices such as not committing internal communications to writing,¹⁴ recording information they do not wish to release on post-it notes to be (unlawfully) removed if an FOI application is lodged, taking an obstructionist approach to FOI applications (including by overestimating processing charges)

⁸ DHA routinely fails to meet the ten working day time limit but does eventually post released documents to its log.

⁹ See also Paul Farrell, 'Immigration FOI Requests Refused as Scott Morrison Takes Tougher Line', *The Guardian* (online, 13 January 2014) <http://www.theguardian.com/world/2014/jan/14/immigration-foi-request-refused-despite-labor-approval>; Sophie Morris, 'Abbott Government Weakens FOI and Public Service Disclosure', *The Saturday Paper* (online 20 June 2015) <https://www.thesaturdaypaper.com.au/news/politics/2015/06/20/abbott-government-weakens-foi-and-public-service-disclosure/14347224002030>

¹⁰ See also Alison Sandy, 'Who Are the Most Secretive Agencies in Australia?', *Yahoo!7 news* (online, 10 December 2015) <https://au.news.yahoo.com/who-are-the-most-secretive-agencies-in-in-australia-30327966.html>

¹¹ LEGENDcom is an electronic subscription database of migration and citizenship legislation and policy documents.

¹² DHA, *SRSS Operational Procedures Manual* (Version 7, 1 May 2018) <https://www.homeaffairs.gov.au/foi/files/2018/fa180500113-document-released.pdf>

¹³ DHA, FOI Request FA180500113 Access Decision (8 June 2018) <https://www.homeaffairs.gov.au/foi/files/2018/fa180500113-decision-record.pdf>

¹⁴ See also Stephen Easton, 'FOI Laws; Fixing the Chilling Effect on Frank Advice', *The Mandarin* (online, 18 June 2015) <https://www.themandarin.com.au/40043-abbott-takes-secrecy-new-heights-public-servants-care/>

Use of non-judicial accountability mechanisms

and making dubious use of exemption provisions.¹⁵ They suspected DHA of doing all of the above. According to one informant from an advocacy organisation:

[If] the Department wants to make life difficult, they can do it. And they can put up ridiculous excuses to the point where we know a document exists or video footage exists because we've heard off-the-record that it does [but] we'll get some sort of excuse to say 'No there are too many documents on what happened that day, we would never be able to find that'.

The same informant said they had discovered that, where an organisation perceived by DHA as being neutral made a request for the same kind of information, it would have success. As a result,

What we tend to do more now that you have groups like [name] and others is to hand the case over to them and then they will do the FOI. Historically we would have done it. Now there are these other groups who are willing to do that and seem to have more success than we do.... Clearly with [our organisation] they are worried where it will end up.

The main challenges informants identified in using FOI legislation were i) framing FOI applications, ii) delays in decision-making, iii) refusals to release some or all information requested on the basis of exemptions contained in the *FOI Act* and iv) the practical futility of seeking review of negative FOI decisions.

Framing FOI applications

Framing an FOI request for specific documents which are known to exist is fairly straightforward. Often, however, an applicant is endeavouring to obtain any information which a government agency may hold about them (or their client) or about a topic.

It takes experience to frame an FOI request so that the information is obtained, and to avoid the government refusing to process the request because it would involve a substantial and unrea-

sonable diversion of agency resources (*FOI Act* s24AA). In the latter case, the agency is required to first give the applicant both an opportunity and assistance to revise their request so that the reason for refusal no longer exists (*FOI Act* 24AB). Nevertheless, one informant from a legal service provider expressed frustration about DHA's approach after the Coalition took office in 2013, saying:

The Department took a particularly strict approach where if you asked for 'all of my documents' then that would be a blanket refusal. Because their interpretation was that if you are asking for all of your documents then that captures all documents in the possession of the Department so they'd have to go searching every mail server around the world in every embassy. So it went from asking for documents which you don't know exist which is what FOI is about to specifying exactly what documents you were asking for.

The problem with framing a request too narrowly is that it may fail to elicit important documents or may elicit the response that no relevant document exists or can be identified.

Delays in FOI decision-making

In the usual case, FOI applications are meant to be acknowledged within 14 days of receipt and decisions on them are meant to be made within 30 days of receipt (*FOI Act* s15(5)). However, DHA often fails to comply with these statutory requirements. In many instances, delay can be attributed to under-resourcing of DHA's FOI section. Other causes of delay include: a slow response to the FOI section by the areas of DHA which have relevant information and/or other stakeholders who must be consulted; and the time taken by the liaison between the FOI section and stakeholders about possible reasons for refusing release of some or all of the information.¹⁶

In September 2012, OAIC investigated the Department's ability to handle non-routine requests.¹⁷ It found that only 20 per cent of applications handled in its Central Office were meeting the timeframes under law. The Department itself in 2011 commissioned a review by Ernst & Young to consider how it could im-

¹⁵ See also Sean Parnell, 'More Open Government? We're Still Waiting', *The Australian* (online, 18 October 2015) <https://www.theaustralian.com.au/business/media/more-open-government-were-still-waiting/news-story/5a7efd38f968ba23ddb98a2512149e62>

¹⁶ See, for example, Documents and correspondence from FOI request FA 17/08/00642-R1, https://www.righttoknow.org.au/request/documents_and_correspondence_fro

¹⁷ OIAC, *Processing of Non-Routine FOI Requests by the Department of Immigration and Citizenship: Report of an Own Motion Investigation* (Report no. OM12/0001, 26 September 2012), <https://www.oaic.gov.au/freedom-of-information/foi-reports/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship/>

prove its performance¹⁸ and commissioned another independent review in 2012.¹⁹

Statistics obtained through Senate estimates indicate that DHA continues to struggle with meeting timelines. In 2017-18, it finalised 11,937 out of 14,215 applications within the statutory timeframe, received an extension of time by agreement 1,396 times and had a further 27 extensions granted by the OAIC.²⁰ Its average processing times in 2015-16 was 43 days, in 2016-17 was 98 days, in 2017-18 was 58 days, and in the period 2018 to 8 April 2019 was 38 days.²¹ In 2018-19, it failed to meet statutory timeframes in dealing with 26 per cent of requests overall²² (and 56 percent of requests for non-personal information²³). On 25 October 2019, the OAIC announced that it had opened an own motion investigation into DHA's compliance with the FOI Act in its processing of requests for non-personal information.²⁴

Where information is being requested for the purposes of a visa application, delay can have the consequence that advisers are forced to put forward their client's case before obtaining the necessary information. Although one informant reported that they were mostly able to negotiate with DHA for clients' interviews to be postponed until their FOI applications had been processed, another informant reported that DHA would rarely agree to adjourn interviews on this basis and that tribunals would not adjourn hearings for long enough.

Case study

On 21 May 2017, the government announced an inflexible deadline of 1 October 2017 for the lodgement of protection visa applications by all unauthorised maritime arrivals who were subject to fast track processing.²⁵ At the time there were 7,500 individuals who were yet to lodge an application. DHA found itself unable to deal in a timely fashion with the enormous surge in FOI applications for personal information made on behalf of prospective visa applicants. It, therefore, sought to persuade prospective visa applicants to forego making FOI applications and to accept instead the administrative release of documents selected by it. Migration agents realised that, if visa applications were drafted without knowledge of all personal information held by DHA, clients might well face serious problems at later stages of the process. However, they were forced to accept the offer of administrative release because the alternative would have been missing the visa application deadline.

Reliance on exemptions

The *FOI Act* exempts documents from release if they affect national security, defence or international relations, or disclose commercially valuable information or the like (*FOI Act* ss33 – 47A). It also makes some other categories of documents conditionally exempt – that is, exempt if release in the particular case would be contrary to the public interest (*FOI Act* ss47B-47J). If exemptions are claimed for some parts of a document and not others, the exempt parts will be redacted before the document is released.

¹⁸ Ernst & Young, *Management Initiated Review of Freedom of Information: Department of Immigration and Citizenship* (Report, 26 September 2011), <https://www.homeaffairs.gov.au/reports-and-pubs/files/management-initiated-review-freedom-of-information.pdf>

¹⁹ Robert Cornall, *Independent Comparative Review of the Department of Immigration and Citizenship's Freedom of Information Procedures* (Report, August 2012), <https://www.homeaffairs.gov.au/reports-and-pubs/files/independent-comparative-review-foi-procedures.pdf>

²⁰ Answer to Question Number: AE19/44, 2018-19 Additional Estimates, Senate Legal and Constitutional Affairs Committee, Home Affairs Portfolio, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld5-Portfoliold20-QuestionNumber44>

²¹ Answer to Question Number: BE19/022, 2019-20 Budget Estimates, Senate Legal and Constitutional Affairs Committee, Home Affairs Portfolio, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld6-Portfoliold20-QuestionNumber21>

²² OAIC, *Annual Report 2018-19* (Report, 2019) 180.

²³ OIAC, 'Investigation into FOI processing by the Department of Home Affairs' (Media Release, 25 October 2019), <https://www.oaic.gov.au/updates/news-and-media/investigation-into-foi-processing-by-the-department-of-home-affairs>

²⁴ *Ibid.*

²⁵ Minister for Immigration and Border Protection, 'Lodge or Leave - Deadline for Illegal Maritime Arrivals to Claim Protection' (Media Release, 21 May 2017) <http://web.archive.org/web/20170708192313/http://www.minister.border.gov.au/peterdutton/2017/Pages/deadline-for-illegal-maritime-arrivals-to-claim-protection.aspx>

Use of non-judicial accountability mechanisms



According to informants, where politically sensitive information is concerned, DHA has a tendency to use the exemptions in the *FOI Act* on tenuous, if not spurious, grounds. There is evidence of this tendency in the FOI decision records available on DHA's disclosure log. For example, in FA 18/01/00206 the applicant asked for 'all inappropriate detention release decision reports completed by DIBP in 2016 and 2017' and in FA 17/10/00923 the applicant asked for 'all Ombudsman's reports dealing with mail for both Nauru and Manus RPCs [Regional Processing Centres]'.²⁶ In both cases, the FOI officer decided that parts of some documents, which were within the scope of the request, were conditionally exempt *and* that giving access would, on balance, be contrary to the public interest. *FOI Act* s11B specifies that factors *favouring* access to a document in the public interest

include informing debate on a matter of public importance. In both cases, the FOI officer assessment in relation to this factor was as follows:

I consider that the subject matter of the document does not, in itself, seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.

This is despite the fact that public interest does not mean 'of interest to the public, but in the interest of the public'²⁷ and despite the OIAC's clear guidance that

It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.²⁸

The futility of seeking review

With some exceptions, the *FOI Act* provides for free internal review of a negative decision by a different officer of the agency concerned (*FOI Act* ss52 – 54E). An internal review must be completed within 30 days of receipt of the review application unless the Information Commissioner (IC) grants an extension of time.

It is possible to skip internal review, which, of course, lacks true independence, and go directly to seeking free review by the IC (*FOI Act* Part VII). Although the OIAC is independent, it is also chronically under-resourced for the volume of work it has.²⁹ The average time taken to finalise an IC review was 6.2 months in

²⁶ DHA, FOI Request FA 18/01/00206 Access Decision (1 March 2018) <https://www.homeaffairs.gov.au/foi/files/2018/fa180100206-decision-record.pdf>; DHA, FOI Request FA 17/10/00923 Access Decision (4 April 2018) <https://www.homeaffairs.gov.au/foi/files/2018/fa171000923-decision-record.pdf>

²⁷ OIAC, *FOI Guidelines* (January 2019) <https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/foi-guidelines/foi-guidelines-combined-january-2019.pdf> para. 6.5 citing *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

²⁸ *Ibid.* para. 6.6.

²⁹ Senate Legal and Constitutional Affairs Legislation Committee, Proof Committee Hansard, Additional Estimates, 22 October 2019, 81 (Ms Falk). The OIAC is responsible for oversight of privacy matters as well as freedom of information matters and its present head, Angelene Falk, is the Australian Information Commissioner and Privacy Commissioner.

2016-17, 6.7 months in 2017-18³⁰ and 7.8 months in 2018-19.³¹ In February 2019 there were 18 cases that had not been allocated to a case officer after 11 months.³²

The IC has the power to refer an application for review of an agency FOI decision directly to the Administrative Appeals Tribunal (AAT). Otherwise, it is not possible to seek AAT review of agency FOI decisions, though it is possible to seek AAT review of IC decisions. There is a fee charged for AAT review, although this may be waived in certain circumstances. In 2018-19, the median time taken by the AAT to finalise an FOI case was 33 weeks with only 66 per cent of FOI cases finalised within 12 months.³³

It is also possible to seek judicial review of AAT decisions and certain IC decisions, though again fees are involved.

In practice, informants agreed that it was pointless to seek IC, AAT and/or judicial review of DHA decisions in relation to the release of information needed by a client for use in the visa application process. This is because the delays involved in obtaining review decisions will almost certainly exceed the timeframes of the visa application process. It was only where information was being sought for longer-term policy or advocacy work that informants bothered seeking IC review of agency FOI decisions.

Recommendations

Sector

R6. Before making an FOI application for non-personal information, refugee sector members should search the FOI disclosure log of the relevant government department and the Right to Know website to see whether there has been a prior application for the same information.

R7. Refugee sector members should consider making FOI applications for non-personal information through the Right to Know website.

R8. Those who are not experienced in making FOI applications should make use of the advice and guidance available on the [OAIC website](#).

R9. Those who are not experienced in making FOI applications should also consider obtaining feedback on draft applications from those who are experienced.

R10. RCOA should investigate a way to share information about FOI with its members, including what information has already been FOI'ed.

OAIC

R11. The OAIC should consider making training on the use of the FOI process available to the public at regular intervals.

Government

R12. The FOI sections of federal government agencies and the OAIC should be funded to a level that enables them to meet their statutory obligations in a timely manner.

³⁰ Christopher Knaus, 'Complaints about Under-Resourced FOI System Spike by 72% in a Single Year', *The Guardian* (online, 4 January 2019) <https://www.theguardian.com/australia-news/2019/jan/04/complaints-about-underresourced-foi-system-spike-by-72-in-a-single-year>

³¹ OAIC, *Annual Report 2018-19* (Report, 2019) 14.

³² Senate Legal and Constitutional Affairs Legislation Committee, Proof Committee Hansard, Additional Estimates, 19 February 2019, 20 (Senator Patrick).

³³ AAT, *2018-19 Annual Report* (Report, 2019) 29.

Use of non-judicial accountability mechanisms

Report name	Committee	Split	Government response
Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and Any Like Allegations in relation to the Manus Regional Processing Centre (Report, 21 April 2017)	Senate Legal and Constitutional Affairs References Committee (non-government majority)	Dissenting report by government members	Interim response: considering response
Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions] (Report, 22 November 2016)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting reports by ALP and Greens	
Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (Report, 18 February 2016)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting reports by ALP and Greens	
Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru (Final Report, 31 August 2015)	Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (non-government majority)	Dissenting report by government members	Final response tabled on 4 August 2016
Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (Report, 11 December 2014)	Senate Legal and Constitutional Affairs References Committee (non-government majority)	Dissenting report by government members	Final response tabled on 14 May 2015
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions] (Report, 24 November 2014)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting reports by ALP and Greens	Interim response: considering response
Migration Amendment (Protection and Other Measures) Bill 2014 [Provisions] (Report, 22 September 2014)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting report by Greens	
Migration Legislation Amendment Bill (No. 1) 2014 [Provisions] (Report, 21 August 2014)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting report by Greens	
Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 [Provision] (Report, 18 March 2014)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting reports by ALP and Greens	
Migration Amendment Bill 2013 [Provisions] (Report, 12 February 2014)	Senate Legal and Constitutional Affairs Legislation Committee (government majority)	Dissenting report by Greens	



Parliament

In theory, if Parliament doesn't like something the executive government is doing, Parliament can pass legislation to prevent the government doing that thing. In practice, Parliament is generally incapable of passing legislation which the executive government does not want passed. This is because the executive government is usually selected by and from the ranks of the Members of Parliament (MPs) whose political party has a majority of seats in the lower house, and those same MPs almost always vote on the side of the government.

On the other hand, 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 Bills initiated by the government to be blocked in the Senate and for Regulations enacted by the government to be disallowed in the Senate. During the 45th Parliament, 67 of the Bills introduced by the government were

not passed.³⁴ Also during the 45th Parliament, 10 disallowance motions were moved and agreed to.³⁵

A lot of Parliament's work gets done through committees. There are a couple of Senate standing committees which routinely scrutinise the Bills introduced into Parliament³⁶ and subordinate legislation that is disallowable by Parliament³⁷ and report on their findings. The government expenditure estimates contained in main and additional appropriation bills are examined and reported on by the Senate legislation committees. The Senate Legal and Constitutional Affairs Legislation Committee is responsible for examining DHA estimates. It does this by asking questions of DHA officers either at the public hearings held three times a year or on notice.

Another thing that parliamentary committees do is to hold inquiries. This is a mechanism through which Parliament can investigate important matters for itself. In some cases, a select

³⁴ Parliament of Australia, *Senate StatsNet New* (Web Page) https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet_New#/bills/consideration?from=2016-08-30&to=2019-07-01&billType=Government&status=notpassed

³⁵ Ibid https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet_New#/motions?from=2016-08-30&to=2019-07-01&type=Disallowance&outcome=AGR. On the other hand, 22 disallowance motions were moved and negatived (Ibid https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet_New#/motions?from=2016-08-30&to=2019-07-01&type=Disallowance&outcome=NEG) and 77 were given and subsequently withdrawn (Ibid https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet_New#/motions?from=2016-08-30&to=2019-07-01&type=Disallowance&outcome=WDN).

³⁶ The Senate Standing Committee on Scrutiny of Bills (three government and three non-government members) scrutinises Bills to ensure that they do not unduly infringe on personal rights and liberties, do not make rights, liberties or obligations unduly dependent on undefined administrative power or non-reviewable decisions, etc.

³⁷ The Senate Standing Committee on Regulations & Ordinances (three government and three non-government members) scrutinises legislative instruments that are subject to disallowance by Senate to ensure that they are in accordance with statute, do not unduly infringe on personal rights and liberties etc.

Use of non-judicial accountability mechanisms

committee is formed in order to inquire into a particular matter. Parliament's standing committees also conduct inquiries.

For example, the Senate Legal and Constitutional Affairs Legislation Committee has conducted inquiries into many *Migration Act* amendment Bills and the Senate Legal and Constitutional References Committee has held inquiries into the regional processing centres. Other examples during the 45th Parliament include the inquiries of the Joint Standing Committee on Migration into the review processes associated with visa cancellations made on criminal grounds and migrant settlement outcomes.

Since the executive government is accountable to Parliament, it is supposed to cooperate with such inquiries but often does not.³⁸ For example, the current government's practice is to claim public interest immunity³⁹ whenever Parliament asks it about so-called 'on-water operations'.

As another example, the Parliamentary Joint Committee on Human Rights (PJCHR) has the task of examining Bills and legislative instruments which come before Parliament for compatibility with human rights and reporting to Parliament on its findings. To facilitate this, Bills and legislative instruments placed before Parliament must be accompanied by a statement that assesses whether the Bill or legislative instrument is compatible with the government's human rights obligations. However, the statements thus far tabled have tended to make poorly justified assertions of human rights compatibility. The UN Human Rights Committee has expressed concern about the quality of the compatibility statements and also the fact that Bills are sometimes passed into law before the PJCHR has reported on them.⁴⁰

Fortunately, parliamentary committees are able to draw on many more sources of information than the executive government. A committee holding an inquiry usually invites public submissions and has public hearings at which stakeholders and experts are invited to give evidence. The making of submissions and giving of evidence is covered by parliamentary privilege.⁴¹ Upon completing an inquiry, the committee in question reports on its findings and makes recommendations arising from those findings. For inquiries relating to refugee and asylum seeker matters in both the 44th and 45th Parliaments, what ended up happening in most cases was that the government members made one report while the non-government members made another report or reports disagreeing with the government members' report.

The government is supposed to respond in the Senate to Senate and joint committee reports containing recommendations to it⁴² within three months of the report being tabled.⁴³ It is supposed to respond in the House of Representatives to House of Representatives and joint committee reports within six months of the report being tabled.⁴⁴ However, the government does not always bother to make a formal final response.

In any event, the findings and recommendations of parliamentary committees are not binding on Parliament or the executive government. As noted in the table above relating to the 44th and 45th Parliaments, only two relevant parliamentary committee reports received a formal final response from the government.

The formal final response to the Senate Legal and Constitutional Affairs References Committee report on the incident at the Manus Island Detention Centre stated that, as the matter was still the subject of judicial and other proceedings, it would be inappropriate to respond to the Committee's recommendations

³⁸ CJ Sautelle, 'Offshore, Out of Reach? Parliamentary Oversight of Australia's Regional Processing Arrangements' (2017) 32(1) *Australasian Parliamentary Review* 112, 121-123.

³⁹ Department of Prime Minister & Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015), https://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/Guidelines_for_official_witness

⁴⁰ UN Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc. CCPR/C/AUS/CO/6, 9 November 2017. The UN Committee on the Elimination of Racial Discrimination has expressed concern that the recommendations of the PJCHR 'are often not given due consideration by legislators': UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia, UN Doc. CERD/C/AUS/CO/18-20, 26 December 2017. See further George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469 and Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72.

⁴¹ Parliament of Australia, Parliamentary Privilege (Web Page) http://www.aph.gov.au/About_Parliament/Work_of_the_Parliament/Parliament_at_Work/Parliamentary_Privilege.

⁴² Other than recommendations that a Bill be passed, rejected or amended as these will be addressed during parliament's consideration of the Bill: *President's Report to the Senate on the Status of Government Responses to Parliamentary Committee Reports as at 30 June 2019* (Report, 2019) 1.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

'at this time'.⁴⁵ The formal final response to the Select Committee report relating to Nauru sidestepped three out of 15 recommendations, rejected three, partially rejected another five on the basis that the matter was ultimately in the hands of the Nauruan government, and accepted four.⁴⁶

Twenty-seven of our key informants had interacted with parliamentary processes or parliamentarians in some way. The level of satisfaction with Parliament as an accountability mechanism varied greatly between informants. Eleven informants were slightly to extremely dissatisfied because they thought that the outcomes achieved were not commensurate with the amount of effort that went into engagement.

The main reason given for this was that most parliamentarians toed the party line, which in the case of the main political parties meant supporting policies adverse to refugees and people seeking asylum. In the words of one informant, 'What we are not getting enough of are the politicians who have the courage of their convictions to stand up against the populism.'

Conversely, twelve informants were slightly to moderately satisfied either because they had taken heart from the sector's success in securing passage of the Medevac Bill⁴⁷ or because they engaged with parliamentary processes and parliamentarians not with the expectation of securing immediate and clear wins but with the hope of ameliorating losses and perhaps achieving positive change over the longer-term.

Case Study

On 25 September 2014, the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill (Legacy Caseload Bill) was introduced into the House of Representatives by the government. Its purposes were the following:

- To expand the government's powers to detain and move vessels and people at sea.
- To reintroduce a temporary protection regime for unauthorised arrivals.
- To establish a statutory definition of 'refugee' that diverged from the international definition.
- To establish a 'fast track' process for decision-making on protection visa applications made by members of the 'legacy caseload' of unauthorised maritime arrivals.
- To expand the government's power to remove people from Australia, including by empowering it to remove people regardless of whether it breached Australia's international obligations of non-refoulement.

The sector mobilised to advocate against the Bill, including through making 241 submissions to a Senate Legal and Constitutional Affairs Legislation Committee inquiry which reported on 24 November 2014.⁴⁸

⁴⁵ Australian Government, *Australian Government Response to the Legal and Constitutional Affairs References Committee Report: Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (March 2015) <https://www.homeaffairs.gov.au/reports-and-pubs/files/gov-response-manus-island-incident.pdf>

⁴⁶ Australian Government, *Response to the Report of the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (December 2015) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Government_Response

⁴⁷ On 3 December 2018, Kerryn Phelps, Andrew Wilkie, Adam Bandt, Julia Banks and Rebekha Sharkie introduced the Migration Amendment (Urgent Medical Treatment) Bill 2018 (MedEvac Bill) into the House of Representatives: Department of Parliamentary Services (Cth), *Bills Digest* (Digest No. 56 of 2018–19, 11 February 2019) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bd056. Although the Bill did not get the support necessary to proceed, on 6 December 2018 Senators Tim Storer and Nick McKim moved amendments to the government's Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 adding provisions similar to those in the MedEvac Bill as schedule 6: Ibid. The Miscellaneous Measures Bill as amended passed the Senate and came before the House where it was further amended and passed on 12 February 2019. On 13 February 2019, the Bill as amended by the House was also passed by the Senate. The Bill received royal assent on 1 March 2019 and Schedule 6 came into force the following day. The legislation is intended to facilitate urgent medical transfers of asylum seekers from Papua New Guinea (PNG) and Nauru to Australia.

⁴⁸ Millwood Consulting, *Mapping the Advocacy Capacity of the Refugee and Asylum Seeker Sector in Australia* (Final Report, June 2015) 23.

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The Committee recommended that the Bill be passed with amendments and the government was forced to make some concessions in order to get the Bill through the Senate. However, most of the provisions the Government wanted were passed by both Houses on 5 December 2014 and came into force on 16 December 2014 (the day after the Bill received royal assent). This was achieved by the agreement of key crossbenchers.

Briefing individual parliamentarians

Twenty of our key informants said that they had briefed individual parliamentarians. In some cases, they had done so as part of a lobbying trip to Canberra by a delegation of several organisations. For example, a delegation which included a community group, a legal group and an advocacy group went to Canberra in 2014 to lobby against the Legacy Caseload Bill (see case study above).

It is important to choose one's bedfellows carefully in such situations. According to an informant from a service delivery organisation,

So it worked really well from that point of view of the groups coming together but the danger of going to a meeting with [named advocacy organisation] is that we were kicked out of some meetings saying 'we are not going to meet with [named advocacy organisation] because it has a political agenda'.

A different strategy mentioned by some informants was division of labour between organisations. One informant said:

For example, [our organisation] has some contacts with people in the Coalition.... We also have connections with the Labor right faction in Sydney. So we'll take the lead on dealing with those MPs and [another named organisation], for example, will deal with some Labor left MPs in Melbourne...So yeah we coordinated very closely with a number of organisations on specific issues and targeted specific individuals in the parties with the same message.

That informant added:

At the Labor Conference there were a number of pay-offs...There was language [in the Platform adopted by Labor] that came from the sector. The debate around reassessment of people who were post IAA [Immigration Assessment Authority], the issue itself was something that the party was not aware of or not thinking about and it meant there was a real flashpoint in this issue area.

A couple of informants mentioned that they had facilitated people with lived experience communicating directly with parliamentarians. One said:

And being in some of those meetings, I think it's been quite transforming for some of those MPs. It's really interesting. I mean they already are concerned and sympathetic or some were [but] to have someone in front of you explaining what it's like for them, it can be quite profound. Not for everyone [but] it can be for some people.

Several informants said that their strongest advocacy efforts were directed at parliamentarians because they were the decision-makers.⁴⁹ When asked which parliamentarians in particular were targeted for advocacy, the usual response was those known to have an open mind on a particular issue, known to have an interest in, for example, issues relating to children where the issue in question is children in immigration detention, and/or known to be sympathetic in broad terms to refugees and people seeking asylum.

A common theme was the need to educate parliamentarians about either the basics or technicalities of an issue (depending on the parliamentarian) or about realities on the ground. For example, one informant said they briefed sympathetic government and non-government parliamentarians about what was happening on the ground on Manus Island whenever they returned from a trip there. They also briefed the parliamentarians on the impact on their clients of the fast track process. According to the informant, 'You know we just assume that MPs know what fast track is, know what's really happening on Manus; they don't.' Similarly, another informant had discovered that many sympathetic parliamentarians did not understand that the Safe Haven Enterprise Visa was not going to provide a pathway to a permanent visa in most cases.

⁴⁹ Some informants noted that it was useful to cultivate relationships with political staffers as a route to influencing parliamentarians.

Non-government parliamentarians, in particular, may well lack necessary information. Not only do they have limited access to governmental information, they are also unlikely to have enough staff and other resources to research measures for themselves.⁵⁰ One informant said that their organisation was proactively and frequently contacted by Labor and other non-government parliamentarians for briefings and advice.

Ensuring that parliamentarians are well-informed is necessary but not sufficient for achieving desired outcomes. Parliamentarians also need to be persuaded that what is being requested of them is politically feasible. One informant said they had learned over time that berating politicians for doing politics achieved nothing. Headway could only be made by acknowledging political constraints (e.g. 'I understand you need to do what the party will decide') and then helping and being helped by parliamentary allies to achieve the maximum possible within those constraints.

While they are unlikely to take public action inconsistent with their party's position, sympathetic parliamentarians within the major political parties may provide useful intelligence on what issues are worth pursuing with their party and how best to do so, raise issues within the party themselves or work to change the party's position behind the scenes.

An example given by one informant was of sympathetic Liberal parliamentarians raising issues related to SRSS within the party. The informant was part of a delegation which obtained a meeting with the Minister to discuss the issues and believed that it had come about because of internal pressure from within his party. The informant said:

So clearly you could see that there had been some effect even though it hasn't ultimately got the outcome that we want. And you know even though the policy has been so horrible, I think you know it's quite conceivable that it's taken the edge off the very worst.

Another informant who worked for an organisation with a very large base of individual members leveraged that membership by mobilising them to meet with their local MP about particular issues

So they know that there are people in their electorate who are interested in the issue and will make some noise about it. And that might trigger one of those politicians to then contact us saying 'Hey, I had some of your activists come and visit me, can you send me more information'.

Yet another informant expressed the view that the political appetite to make change had increased as the public had become more sceptical of existing government policy. They said:

If you'd tried to get meetings with key ALP politicians on asylum or refugee policy a few years ago you'd get more noes than yeses; whereas now, if you go to Canberra, you'll have [a] full day of meetings.

Using the Senate estimates process

Eighteen informants said that they had made use of the Senate estimates process to obtain information by getting sympathetic non-government Senators to ask the questions they wanted answered. Informants with more than one Senate contact divided their questions up between the contacts. RCOA uses every Senate estimates session as an opportunity to obtain information. When a session is coming up, it flags this during teleconferences etc and asks for suggestions for questions. Informants, who did not themselves have the necessary contacts, reported providing their questions to RCOA to pass on to its Senate contacts.

Not all contacts can be equally relied upon to ask the questions which have been provided to them in the form in which they have been provided—or at all. One informant reported that it was possible to increase the likelihood of their questions on a particular issue being asked by generating media interest in the issue beforehand.

While use of the Senate estimates process can procure information which would otherwise not be made publicly available, it has become a less effective avenue recently than it has been in the past. In the case of sensitive issues, the supposed 'answers' now often sidestep the questions.

According to one informant: 'Like before you could get such quality information; now they are coached or they are masters at giving little or no information.' It is sometimes possible to avoid vague answers by asking specific and detailed questions. However, officials can and do refuse to answer questions on the

⁵⁰ Moira Rayner, *Rooting Democracy: Growing the Society We Want* (Allen & Unwin, 1997) 91-2.

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basis, for example, that it would be an unreasonable diversion of departmental resources to compile the answers or that doing so would breach confidentiality between governments or contracting parties.⁵¹

For example, when asked to provide the total number of people in community detention for the past three financial years, DHA replied that '[d]ue to the movement of clients in and out of community detention arrangements over this period, generating and quality assuring the data requested would represent an unreasonable diversion of resources.'⁵² Instead, it referred to monthly snapshots which identify the numbers of people in community detention at a point in time.

Sometimes DHA refuses to answer questions that it has previously answered. For example, in 2019 it refused to provide the annualised cost of people in various categories of detention or living in the community,⁵³ although it had provided the answer to the same question in a previous year.⁵⁴

Using the parliamentary inquiry process

Twenty-one of our key informants said they had made written submissions or given oral evidence to parliamentary inquiries. One informant had also facilitated a large number of immigration detainees making individual written submissions to an inquiry. Testimony by those with lived experience can be powerful. However, it does have the downside of exposing them to the risk of retribution, notwithstanding the theoretical protection of parliamentary privilege. It should also be kept in mind that parliamentary privilege cannot protect witnesses located outside Australia from actors who are not bound by Australian law.⁵⁵

Sometimes informal coordination of submissions has taken place, for example through the Kaldor Centre teleconference.⁵⁶ In some cases, a single written submission will be made collectively by a group of similar agencies or a submission made by one agency will be endorsed by others. The advantages of this approach are the efficient use of sector resources and the delivery of a unified message. On the other hand, the making of individual submissions gives agencies more scope to put forward the details of their own knowledge and experience and it may also be the case that committees treat the volume of submissions as an indicator of the level of concern about a matter.⁵⁷

Inquiries often have tight timeframes and set deadlines for the making of written submissions that are almost impossible to meet. One informant was not convinced that committee members read written submissions in any event. They preferred giving oral evidence 'where you can provide more examples and there is that interaction'. Oral evidence is also more likely to get media coverage. Unfortunately, most committee hearings are held in Canberra and many in the sector do not have the time or money to travel to Canberra for the purpose of giving evidence.

One advocacy organisation made submissions to parliamentary inquiries not because it thought that inquiry reports would lead directly to positive outcomes but because inquiries were an important opportunity to get information on the public record, force the government to respond to that information, and get media interest. Several informants expressed the view that simply getting information out into the public domain that otherwise would not be there was a valuable step towards eventual accountability.

One legal service provider always made submissions to inquiries into Bills before parliament because:

⁵¹ See DHA, FOI Request FA 18/08/01348 Access Decision (25 January 2019) <https://www.homeaffairs.gov.au/foi/files/2019/fa180801348-decision-record.PDF> for an insight into DHA's development of responses to estimates questions on notice. One internal email observed 'Even though the question is long, the response could probably be the "Department does not discuss operational matters"': Ibid.

⁵² Answer to Question on Notice AE19/98 (Senate Legal and Constitutional Affairs Committee, Additional Estimates, 29 March 2019) <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld5-Portfoliold20-QuestionNumber98>.

⁵³ Answer to Question on Notice BE19/016 (Senate Legal and Constitutional Affairs Committee, Budget Estimates, 24 May 2019) <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld6-Portfoliold20-QuestionNumber16>.

⁵⁴ Answer to Question on Notice SE17/215 (Senate Legal and Constitutional Affairs Committee, Supplementary Estimates, 8 December 2017) <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld1-Portfoliold13-QuestionNumber214>;

Answer to Question on Notice SE17/216 (Senate Legal and Constitutional Affairs Committee, Supplementary Estimates, 8 December 2017) <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld1-Portfoliold13-QuestionNumber215>.

⁵⁵ CJ Sautelle, 'Offshore, Out of Reach? Parliamentary Oversight of Australia's Regional Processing Arrangements' (2017) 32(1) *Australasian Parliamentary Review* 112, 115.

⁵⁶ See also Millwood Consulting, *Mapping the Advocacy Capacity of the Refugee and Asylum Seeker Sector in Australia* (Final Report, June 2015) 33.

⁵⁷ Ibid 34.

[our] submission would then be used by staffers/advisers, by minor parties and cross-benchers that then would contact [us] and ask for advice and briefings and amendments in the Senate and that sort of thing.

The same informant added that while the main inquiry report tended not to be useful, a dissenting report by Opposition parliamentarians had the potential to be a useful accountability tool if the Opposition subsequently came into power. Others made the same point, with one saying 'at least we have [them] on the record as saying we support this as a recommendation'.

R18. In order to make more effective use of the Senate estimates process, those who are not experienced in framing questions that elicit useful answers should consider collaborating with RCOA.

R19. In deciding whether to engage with a parliamentary inquiry, consideration should be given to the potential for indirect medium and long-term payoffs as well as the potential for direct short-term ones.

Recommendations

Government/Parliament

R13. In order to provide a realistic opportunity for participation, at least a month should be allowed for the making of written submissions to parliamentary inquiries.

R14. Parliamentary inquiries should be resourced at a level which makes it possible for them to hold hearings in more capital cities than just Canberra.

R15. Where a Bill is the subject of a parliamentary inquiry, it should not be passed prior to the tabling of the inquiry report.

R16. The government should make formal final responses to all recommendations contained in parliamentary inquiry reports and should do so within three months.

Sector

R17. In order to make more efficient use of limited resources, the sector should consider intensifying collaboration with respect to lobbying parliamentarians, including through coordination of submissions to inquiries. The obvious vehicle for collaboration is RCOA.

Use of non-judicial accountability mechanisms

Australian Human Rights Commission and Commonwealth Ombudsman

The AHRC is an independent statutory authority established under the [Australian Human Rights Commission Act 1986 \(Cth\)](#) (*AHRC Act*). It is a function of the AHRC to 'inquire into any act or practice that may be inconsistent with or contrary to any human right' (*AHRC Act* s11(1)(f)).⁵⁸

Performance of the inquiry function may come about because the AHRC has received a complaint about an act or practice, or the Attorney-General has requested an inquiry, or the AHRC thinks an inquiry would be desirable (*AHRC Act* s20(1)). Until recently, the AHRC was *required* to report to the Attorney-General about an article 11(1)(f) inquiry, its findings and recommendations, and any remedial action being taken by the person to whom the findings and recommendations were notified.

In 2017 the *AHRC Act* was amended to make reporting on such inquiries by the AHRC to the Attorney-General discretionary and likewise to make the tabling by the Attorney-General in Parliament of any such report discretionary (*AHRC Act* s20A & s46). Fortunately, the President of the AHRC remains able to publish such reports as they see fit.⁵⁹

The AHRC also make regular inspection visits to immigration detention facilities in Australia.⁶⁰ Finally, the AHRC often works quietly and informally behind-the-scenes endeavouring to achieve positive human rights outcomes.⁶¹

The Office of the Ombudsman is an independent statutory office established under the [Ombudsman Act 1976 \(Cth\)](#) (*Ombudsman Act*). The Ombudsman has the function of investigating administrative actions by government departments in response to complaints or of their own motion (*Ombudsman Act* s5). 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 and the relevant Minister. The Ombudsman may include in the report any recommendations they think fit. If, within a reasonable time of receiving the Ombudsman's report, a department has not taken appropriate and adequate remedial action, the Ombudsman can advise the Prime Minister of this and can also present their investigation report to Parliament (*Ombudsman Act* s16 & s17).

Part C of the [Migration Act 1958 \(Cth\)](#) requires the Secretary of DHA to report on the circumstances of a person's immigration detention to the Ombudsman once their detention period reaches two years, and at six-monthly intervals thereafter. As soon as practicable after receiving a report, the Ombudsman is required to assess the appropriateness of the detention arrangements and to provide that assessment to the Minister.

In 2016-17, a period of between seven and 12 months elapsed between the Ombudsman receiving the DHA report and the Ombudsman's assessment being tabled in parliament in 43 per cent of cases.⁶² A period of more than 12 months elapsed in another

⁵⁸ 'Human rights' is defined as meaning the rights and freedoms recognised in the *International Covenant on Civil and Political Rights (ICCPR)*, declared by the [1959 Declaration of the Rights of the Child](#), the [1971 Declaration on the Rights of Mentally Retarded Persons](#) or the [1975 Declaration on the Rights of Disabled Persons](#), or recognised or declared by an international instrument in respect of which a declaration under section 47 is in force (*AHRC Act* s5). There are section 47 declarations in force for the *Convention on the Rights of Persons with Disabilities*, the *Convention on the Rights of the Child* and the [1981 Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief](#).

⁵⁹ Explanatory Memorandum, Human Rights Legislation Amendment Bill 2017 (Cth), para. 54.

⁶⁰ While this is not a role specified in the *AHRC Act*, the AHRC is able to rely on a combination of the powers conferred by that Act to undertake it: Meg Brodie, 'Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire' (2015) 38(3) *University of New South Wales Law Journal* 1215, 1240. In 2013 and 2014, the then AHRC President sought access to the RPCs in Nauru and PNG. The Attorney-General's Department advised that the AHRC did not have jurisdiction outside Australia: Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, Additional Estimates, 25 February 2014, 152 (Mr Bowles); Simon Cullen and Naomi Woodley, 'Manus Island Riots: Two Investigations Underway as Government Sticks by its Policies', *ABC News* (online, 19 Feb 2014) <http://www.abc.net.au/news/2014-02-19/manus-island-riots-two-investigations-underway/5268566>. However, the AHRC can and does investigate from Australia complaints made by transferees living in Nauru and PNG: AHRC, 'Complaints from asylum seekers on Nauru and Manus Island', *News* (online, 6 March 2013) https://web.archive.org/web/20130307154221/https://www.humanrights.gov.au/about/media/news/2013/19_13.html

⁶¹ Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, Supplementary Estimates, 20 October 2015, 22 (Professor Triggs).

⁶² Ombudsman, *An Analysis of Assessments by the Ombudsman under s 486O of the Migration Act 1958 Sent to the Minister for Immigration and Border Protection in 2016-17* (Report, August 2017) 10 https://www.ombudsman.gov.au/__data/assets/pdf_file/0012/50250/486O-analysis-2016-17-final-for-website.pdf

23 per cent of cases.⁶³ The Ombudsman has acknowledged a year-on-year trend of decreasing timeliness attributing this to an increasing workload.⁶⁴

A detention assessment may include any recommendations the Ombudsman thinks fit.⁶⁵ However, the Minister is not bound by the recommendations (*Migration Act* s486O(4)). The only thing that the Minister must do is table a modified version of each assessment in Parliament. On 10 April 2019, the Minister tabled 40 assessments of which 11 contained recommendations. In two cases the person concerned had already departed Australia, in three cases the recommendations were rejected, in three cases the recommendations were under consideration, and in the remaining three cases the recommendations were being implemented.⁶⁶

Finally, staff employed by the Ombudsman's Office make inspection visits to immigration detention facilities in Australia and to the regional processing centres on a six-monthly cycle. On 21 December 2017, Australia ratified the [Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\)](#), though it claimed a three-year grace period for implementation of its obligations.⁶⁷ Under *OPCAT*, Australia is obliged to designate one or more independent bodies as National Preventative Mechanisms (NPTs) with the power to visit places 'where persons are or may be deprived of their liberty' (arts 3 and 4). The Ombudsman has

been designated the NPT responsible for undertaking inspections of Commonwealth places of detention.⁶⁸ Once Australia's grace period runs out, the Ombudsman's inspections of immigration detention facilities will be in the capacity of the NPT. The Ombudsman has indicated that his Office is working with the AHRC to ensure that the inspections are 'undertaken with an appropriate human rights emphasis'.⁶⁹

Twenty-three key informants had engaged with the AHRC in some way and 19 had engaged with the Ombudsman's Office in some way. The general view was that both agencies are under-resourced for the work they are expected to do and neither has much influence with the Coalition government. In the case of the AHRC, the general view is supported by other evidence. In May 2016, the AHRC President testified at an estimates hearing that the Commission's funding had 'declined over many years' and that it did not have the funding necessary to 'properly meet our statutory obligations'.⁷⁰ DHA formally rejected 8 of the 24 recommendations made in AHRC's May 2019 *Use of Force in Immigration Detention* report, partially rejected another two, accepted three, and noted the remainder.⁷¹ It rejected 27 of the 31 recommendations made in the AHRC's July 2019 *Lives on Hold* report,⁷² deflected three to another department and gave an ambiguous response to the remaining one.⁷³

The Ombudsman's Office too has complained of inadequate funding at various times in the past⁷⁴ and its current under-re-

⁶³ Ibid.

⁶⁴ Ibid; *Ombudsman, An Analysis of Assessments by the Ombudsman under s 486O of the Migration Act 1958 Sent to the Minister for Immigration and Border Protection in 2015-16* (Report, July 2016) 10 https://www.ombudsman.gov.au/__data/assets/pdf_file/0016/40174/486O-analysis-2015-16.pdf. The Ombudsman chose not to publish a similar analysis of assessments for 2017-18 and 2018-19.

⁶⁵ In 2017-18, the Ombudsman made recommendations in only 340 (36 per cent) of the 943 assessments tabled: *Ombudsman, Annual Report 2017-18* (Report, 2018) 44.

⁶⁶ David Coleman, 'Response to Ombudsman's Assessments Made under section 486O of the *Migration Act*' (Statement to Parliament – No. 3/2019).

⁶⁷ Declaration under *OPCAT* art 24: Rebecca Minty, 'Involving Civil Society in Preventing Ill Treatment in Detention: Maximising OPCAT's Opportunity for Australia' (2019) 25(1) *Australian Journal of Human Rights* 91, 94.

⁶⁸ *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019* (Cth). The Ombudsman has also been made the Coordinator of the NPTs designated by the Australian states and territories: Ibid.

⁶⁹ Ombudsman, 'Implementing OPCAT' (Conference Paper, Annual Prisons Conference, 9 July 2019) http://www.ombudsman.gov.au/__data/assets/pdf_file/0013/102037/Prisons-Conference-speech-9th-July-2019.pdf

⁷⁰ Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, Budget Estimates, 5 May 2016, 5 (Professor Triggs). See also, Margaret Simons, 'When the Politics Got Personal', *The Monthly*, (online, December 2017-January 2018) <https://www.themonthly.com.au/issue/2017/december/1512046800/margaret-simons/when-politics-got-personal>; AHRC, *Annual Report 2016-2017* (Report, 2017) 35.

⁷¹ AHRC, *Use of Force in Immigration Detention* (Report, May 2019) 142-156.

⁷² AHRC, *Lives on Hold: Protecting the Human Rights of Refugees and Asylum Seekers in the 'Legacy Caseload'* (Report, July 2019)

⁷³ DHA, *Home Affairs Response to the Australian Human Rights Commission Report - Lives in Limbo: Protecting the Human Rights of Refugees and Asylum Seekers in the 'Legacy Caseload'* (April 2019) https://www.humanrights.gov.au/sites/default/files/2019-07/HOME_AFFAIRS_RESPONSE_180419_LEGACY_CASELOAD_OHR-19-00021.pdf

⁷⁴ Ombudsman, *40 Years of the Commonwealth Ombudsman* (2017), https://www.ombudsman.gov.au/__data/assets/pdf_file/0023/44852/40th-Anniversary-Book.pdf

Use of non-judicial accountability mechanisms

sourcing is evident from the decreasing timeliness of its detention review assessments. It may, however, have slightly more traction with DHA than AHRC. DHA accepted all of the recommendations made in the own motion investigation report released in 2018-19⁷⁵ and in the report released in 2017-18⁷⁶ and in two of the three reports released in 2016-17.⁷⁷ On the other hand, it rejected the recommendations in the third report released in 2016-17.⁷⁸

Several informants expressed the view that both the AHRC's and Ombudsman's level of engagement with, and responsiveness to, refugee issues and the sector had varied over time. This reflected the background and attitudes of individuals in key roles, especially the roles of President and Ombudsman respectively.

At the present time, the AHRC is perceived as being less outspoken than under its immediate past President, Gillian Triggs,⁷⁹ but as remaining more transparent, approachable and helpful than the Ombudsman's Office. In relation to the latter, one informant commented: 'When we've asked them about their [immigration detention facility] inspection methodology, the [Ombudsman's Office] has been very defensive and dismissive of concerns. We have not found them easy to engage with.' A number of other informants made similar comments with some naming Allan Asher, who was Ombudsman from August 2010 to October 2011, as the last Ombudsman who was interested in engagement with the sector and really active and outspoken on refugee issues.⁸⁰

Using the formal complaints processes

Only six key informants in relation to the AHRC and seven in relation to the Ombudsman indicated that they had assisted individuals to make formal complaints, beyond simply informing them of the existence of the complaints process. One of these informants had, in fact, encouraged individuals to make formal

complaints to the Ombudsman on a particular issue as a way of getting the issue on the Ombudsman's radar. At least 200 complaints were made as a result of which the Ombudsman launched an own motion investigation into the issue. However, the same informant and a couple of others noted that people seeking asylum were often reluctant to make formal complaints, because they felt vulnerable to retribution by the individual or organisation against whom the complaint was made.

A range of reasons were proffered by informants who said they did not assist individuals in the making of formal complaints or did so less now than in the past. Some of these reasons related to the informant's own position; for example, their organisational mandate or resourcing constraints. However, other reasons related to the complaints process. In particular, they raised the length of time taken to resolve complaints and the fact that, even if a complaint is resolved in the complainant's favour, the government is not required to implement the remedy recommended. One informant with several clients who had received AHRC findings in their favour said that the clients did get a sense of vindication from the findings but were frustrated that 'they didn't mean anything to their migration processes'. Other informants noted that, once told that the government did not have to listen to the AHRC or the Ombudsman, clients did not see any point in making a complaint in the first place.

According to its Annual Report, in 2018-19 the AHRC resolved 98 per cent of complaints within 12 months of receipt (exceeding its target of resolving 85 per cent within that timespan).⁸¹ The most recent annual report to provide more detail than this was the one for 2014-15. The AHRC reported that, in that period, 99 per cent of complaints were resolved within 12 months of receipt with the average time between receipt and resolution being 3.7 months.

⁷⁵ Ombudsman, *Annual Report 2018-19* (Report, 2019) 32.

⁷⁶ Ombudsman, *Annual Report 2017-18* (Report, 2018) <https://www.ombudsman.gov.au/publications/reports/annual/all-reports/docs/2017-18/part-4-what-we-do>

⁷⁷ Ombudsman, *Annual Report 2016-17* (Report, 2017) <http://www.ombudsman.gov.au/publications/reports/annual/all-reports/docs/2016-17/part-4-what-we-do>

⁷⁸ Ibid.

⁷⁹ The Australian government responded to Gillian Triggs' outspokenness by attempting to discredit the AHRC. This was a matter of concern to the UN Human Rights Committee: UN Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc. CCPR/C/AUS/CO/6, 9 November 2017, paras 13 and 14.

⁸⁰ Prior to taking up his appointment, the current Ombudsman, Michael Manthorpe, was the Deputy Secretary of the Department of Immigration (the previous incarnation of DHA). This is the first time that an appointment has been made directly from a frontline departmental position: Stephen Murray, 'Forty Year Ombudsman Tradition Trashed by Turnbull', *Boilermaker Bill's Rum Hospital* (Blog Post, 4 May 2017) <https://boilermakerbill.wordpress.com/2017/05/04/forty-year-ombudsman-trashed-by-turnbull/> It has caused some in the sector to question the impartiality of the Office when dealing with DHA matters.

⁸¹ AHRC, *Annual Report 2018-2019* (Report, 2019) 36

The Ombudsman's Office sets itself service standards for resolving complaints ranging from three business days to 12 months depending on the amount of work required for finalisation.⁸² In 2018-19, it met these standards in 89 per cent of cases.⁸³

Neither the AHRC nor the Ombudsman's Office publish breakdowns by government department of the time taken to resolve complaints. However, in its *Annual Report 2014-15*, the Ombudsman's Office complained about the time it took for the then Department of Immigration to respond to its investigation of complaints with most responses being made outside the 28 day agreed time frame and 10 per cent of responses taking more than 60 days.⁸⁴ There is also some evidence of the Department hindering the AHRC's progress in complaint investigation through delaying tactics and the like.⁸⁵

Unfortunately, it is not possible on the basis of the publicly available evidence to compile statistics on what proportion of recommendations made by either agency to provide a remedy to complainants are actually accepted by the government.

Providing information to the AHRC and/or the Ombudsman

The AHRC has conducted several own motion inquiries into issues relevant to the situation of people seeking asylum and refugees in some way and has solicited public submissions as part of the inquiry process. Understandably there have been more submissions from the refugee sector where an inquiry has related to issues of special relevance to the situation of refugees or people seeking asylum than where it has related to broader issues which may also affect them.⁸⁶ The AHRC has also been proactive in engaging with the refugee sector. It has held stakeholder consultations itself and the Specialist Adviser – Immigration has regularly attended refugee sector meetings in order to keep in touch with issues arising on the ground and to raise awareness about the AHRC's functions.

The Ombudsman has conducted several own motion investigations into issues of relevance to the situation of people seeking asylum and refugees. In addition, the Ombudsman's Office has invited refugee sector actors to stakeholder consultations and its

staff have attended refugee sector meetings to which they have been invited, but, in recent times at least, the Office has engaged less with the sector than the AHRC.

Seventeen key informants in relation to the AHRC and 10 in relation to the Ombudsman's Office indicated that they had provided information to the agency about individual cases or systemic issues through the above-mentioned channels or by contacting a known member of the agency's staff directly.

One informant explained that, because of the vulnerability of people seeking asylum to retribution for formal complaints, passing information about individual cases to the AHRC or the Ombudsman's Office informally was a better strategy than encouraging the making of a formal complaint. For example:

We understand that [your agency] is going to be visiting Villawood [Immigration Detention Centre]. Here are three guys [who have] raised interesting complaints with us. You might want to talk to them during your visit.

The agency approached depended on the issue (given the differing mandates of the agencies) and, in some cases, the timing. For example:

If we know that the Human Rights Commission won't be going back to Yongah Hill [Immigration Detention Centre] for another 12 months, well it's pointless really raising it with them, if we know the Ombudsman's team is going to go there in the next four weeks.

Other informants reported using the same strategy of providing information informally. However, informants noted that they were rarely told what action, if any, AHRC or the Ombudsman's Office had taken in response to the information they had provided, with the Ombudsman's Office being even less communicative than the AHRC.

⁸² Ombudsman, *Annual Report 2018-19* (Report, 2019) 34.

⁸³ Ibid

⁸⁴ Ombudsman, *Annual Report 2014-15* (Report, 2015) <https://www.ombudsman.gov.au/publications/reports/annual/all-reports/docs/2014-15/what-we-do>

⁸⁵ Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (Cambridge University Press, 2018) 276.

⁸⁶ For example, most of the 239 submissions made to AHRC's 2014 National Inquiry into Children in Detention were made by people seeking asylum or individuals and organisations working with them. By contrast, of the 456 submissions made to AHRC's 2018 National Inquiry into Sexual Harassment in Australian Workplaces, only one appears to have been made by a member of the refugee sector (Jesuit Refugee Service Australia).

Use of non-judicial accountability mechanisms

Even where the AHRC or the Ombudsman's Office is known to have intervened in a situation, it is often hard to be sure to what degree any improvement was the result of such intervention as opposed to other factors. For example, one service provider who had liaised closely with the AHRC in relation to the cases of child clients at risk of being transferred to Nauru said:

Look, it is hard to say whether it was [the then President of the AHRC's] intervention or a combination of her plus UNHCR plus the person in the Department who was agitating as well as much as she could. But the combination of the three certainly resulted in a number of children not being sent to Nauru.

Another informant commented that:

[a former Ombudsman] has taken credit for achieving release from detention where all other avenues had 'failed' to yield results without recognising that the context in which release had been negotiated was widespread national and international condemnation of Australia's mandatory detention policy.

Using information made available by the AHRC and/or the Ombudsman's Office

On its [website](#), the AHRC publishes reports on its own motion inquiries, immigration detention facility inspection visits and resolution of individual complaints. It also publishes inquiry-related material such as any public submissions made. Finally, it publishes media statements, fact sheets and other material for the purpose of making clear its views on topical human rights issues and/or educating the public at large about those issues.

On its [website](#), the Ombudsman's Office publishes own motion investigation reports and deidentified detention review assessment reports as well as media statements, fact sheets and the like. However, it does not publish reports on its immigration detention facility inspection visits or its resolution of individual complaints.

Eighteen key informants indicated that they had used information made available by the AHRC on its website and through other channels (e.g. stakeholder consultations) in their individual client work, policy work and/or advocacy work⁸⁷ and 13 key informants indicated the same in relation to information made available by the Ombudsman's Office.

The reports published by the AHRC were highly regarded, with one informant saying:

They are careful in their research...They've done an inquiry and come up with this and it's probably worth citing. Whereas there are other groups where you might say 'I'd like to verify that before even citing them.'

This high regard is also reflected in evaluation studies of AHRC's research reports.⁸⁸

One factor which makes AHRC's reports less useful to the sector than they would otherwise be is lack of timely publication. For example, the report on the inspections of detention facilities which the AHRC conducted in the latter part of 2018 was only published on 18 June 2019.⁸⁹ The main reason for lack of timeliness is that, where the AHRC makes adverse findings, it is required to give those against whom the findings have been made a reasonable opportunity to respond before proceeding to publication. DHA tends to drag its feet on providing responses and the AHRC has thus far indulged it in an attempt to maintain the working relationship.

Several informants noted that the Ombudsman's detention review assessment reports had been particularly useful in the past. For example, one legal service provider used to find the detention review assessment reports relating to their clients to be of great use in litigating on behalf of those clients because they contained more information than the client could actually provide about their situation and also carried weight as the objective findings of a government agency. That informant and others also mentioned that they had used the assessment reports when seeking ministerial intervention on behalf of their clients though they were not convinced that the reports carried any weight with the Minister.

⁸⁷ An example of an AHRC report being used in advocacy work is a February 2015 joint statement made by 200 organisations led by RCOA responding to the release of the AHRC's *Forgotten Children* report: Millwood Consulting, *Mapping the Advocacy Capacity of the Refugee and Asylum Seeker Sector in Australia* (Final Report, June 2015) 27.

⁸⁸ AHRC, *Annual Report 2017-2018* (Report, 2018) 36.

⁸⁹ AHRC, 'Risk Management in Immigration Detention Report Released' (Media Release, 18 June 2019) <https://www.humanrights.gov.au/about/news/media-releases/risk-management-immigration-detention-report-released>

However, these informants all noted that in recent times even the version provided to the person whose detention was being reviewed had become too cursory to be of any use. This is borne out by other evidence. In 2018, the Ombudsman's Office wrote to long-term detainees informing them that, commencing in July of that year, it was no longer providing individuals with detailed reports of their circumstances in detention but instead was sending to the Minister a letter that raised any broad concerns, a schedule of the individuals who had been assessed, and any recommendations that the Office deemed appropriate.⁹⁰ The reason for this 'streamlining' appears to be resourcing constraints.

Recommendations

Sector

R20. The sector should consider using the AHRC as an avenue to address the impact on refugees and people seeking asylum of human rights violations which are not specific to that cohort (e.g. sexual harassment in the workplace).

Also see recommendations in "Overview".

AHRC/Ombudsman's Office

R21. The AHRC and the Ombudsman's Office should update individuals and organisations providing information about the actions taken in response to ensure that informal information-sharing continues.

R22. In order to assist the public in assessing the responsiveness of government departments, the AHRC and the Ombudsman's Office should publish statistics on the implementation of their recommendations by department.

R23. The Ombudsman's Office should publish reports on its immigration detention facility visits.

R24. The Ombudsman's Office should return to the practice of providing immigration detainees with detailed and individualised detention review assessment reports.

Also see recommendations in "Overview".

Government/Parliament

R25. The AHRC and the Ombudsman's Office should be funded to a level that enables them to meet their statutory obligations in a timely manner.

R26. In order to give them an incentive to implement recommendations made by the AHRC and the Ombudsman, government departments should be required to include information in their annual reports about their acceptance/rejection/implementation of those recommendations.

⁹⁰ A copy of one such letter is on file with RCOA.



Office of the United Nations High Commissioner for Refugees

Australia is a party to the [Convention relating to the Status of Refugees](#) and the [Protocol Relating to the Status of Refugees](#). Article 35 of the *Refugee Convention* obliges states parties to cooperate with UNHCR in the exercise of its functions, in particular its duty of supervising the application of the *Refugee Convention*. It also expressly obliges states parties to provide UNHCR with relevant information and statistical data upon request.

UNHCR has headquarters in Geneva and offices in 500 other locations in 131 countries,⁹¹ including an office in Canberra. The Canberra office, which has 10 to 15 paid staff and a small number of paid interns, is headed by Louise Aubin, who represents the High Commissioner for Refugees.⁹² It is responsible for Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, PNG, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. It promotes refugee protection in the region by monitoring relevant law, policy and practice and engaging in capacity building activities.

In relation to Australia, UNHCR has been a strong public critic of the regional processing arrangements with Nauru and PNG⁹³

and also the treatment of the 'legacy caseload' of unauthorised maritime arrivals in Australia.⁹⁴ However, its more usual approach to discharging its duty of supervision is to have discussions with government behind the scenes. As one informant commented:

It's really tough for them. Because the stronger stance they take against the government, the less influence they have. They need to find a point at which they can actually make a difference to people's lives and ensure protection.

While one informant thought that UNHCR had not got the balance right being 'too apolitical and worried about their funding rather than making strong statements in support of refugees and people seeking asylum', most thought that UNHCR was not afraid to speak the truth as the organisation saw it. In particular, a number of these informants expressed the view that UNHCR had played a valuable accountability role by placing information about regional processing on the public record and 'calling out' the Australian government for its conduct. For example, one informant said:

Those reports that they've done on Manus and Nauru have been really important and really valuable. I mean some of our members provide me the firsthand accounts and then you have the government saying something completely different! And I think when you have a body like UNHCR who provides that more authoritative report that corroborates, you know, what our own members are saying, it's really important and valuable. Even though the government will still dismiss it ... I think for a lot of people it is sort of a little bit harder to just dismiss it.

There were two points of general consensus. First, that UNHCR did not have the resources necessary to fulfil its mandate properly but did the best that it could within the constraints it faced. Second, that, despite its best efforts, UNHCR had not been very effective in getting the current Australian government to comply with its *Refugee Convention* obligations, primarily because the government had very little respect for its supervisory role.

⁹¹ UNHCR, *Global Report 2018* (Report, 2019) 4.

⁹² The High Commissioner until 31 December 2020 is Filippo Grandi: 'The High Commissioner', *UNHCR* (Web Page) <https://www.unhcr.org/en-au/the-high-commissioner.html>

⁹³ UNHCR, 'Monitoring the Forcible Transfer of Asylum-Seekers by Australia', *UNHCR* (Web Page) <https://www.unhcr.org/en-au/forcible-transfer-of-asylum-seekers-by-australia.html>

⁹⁴ UNHCR, 'Monitoring Asylum in Australia', *UNHCR* (Web Page) <https://www.unhcr.org/en-au/asylum-in-australia.html>

Twenty-three of our key informants had engaged with UNHCR in some way. Most had engaged with the Canberra office, many had engaged with the Geneva office, and a few had engaged with UNHCR offices elsewhere in the world. A couple of key informants, who had engaged with the UNHCR in Canberra, Geneva and elsewhere over a long period time, noted that the responsiveness and effectiveness of UNHCR offices was heavily dependent on the individuals holding key roles. Both expressed the view that the Canberra office had benefited in recent years from having very strong representatives of the High Commissioner but that such had not always been the case.

Seeking assistance with particular cases/case-loads

Ten key informants indicated that they had sought UNHCR's assistance in achieving a desired outcome for a particular individual or group. In most cases the assistance had been sought from the UNHCR office in Canberra for individuals or groups located in Australia or a regional processing country, but, in some cases, assistance had been sought from another office for individuals or groups located elsewhere.

One informant gave an example from ten years back of asking the Canberra office to intervene to prevent a removal from Australia scheduled for the following morning. The office had responded at about 10pm on the day of the request indicating that it would do what it could. The case had a happy ending. UNHCR managed to secure a stay of removal and, while the person in question was detained for a considerable period of time thereafter, he was eventually granted a permanent protection visa. By contrast, a couple of informants, who had more recently sought assistance from the Canberra office in relation to individual cases involving imminent removal or detention, had found that the office was unable to respond quickly enough.

Other factors can also affect UNHCR's ability or willingness to intervene in particular cases. One experienced informant gave the example of UNHCR's reluctance in the early 1990s to assist in cases involving Cambodian people seeking asylum in Australia because it took the position that it was safe to return to Cambodia and was 'shipping people back' from Thailand to Cambodia at the time. The same informant referred to UNHCR's public support for the Australian Labor government's arrangement with Malaysia,⁹⁵ as an example of UNHCR displaying a tendency both to formulate its position on issues relating to Australia in the context of its wider agenda and to favour pragmatism over principle. Another experienced informant said:

It has to reach a certain threshold for UNHCR to get involved and often it has to represent a systemic state of affairs because they don't have the capacity to deal with every case. So, we've learned over the years which cases they would be more interested in and which cases they potentially can get an outcome for.

That informant's organisation only made requests for UNHCR intervention with the Australian government about three times a year. For example, 'if it is a resettled South Sudanese who commits a crime, is thrown into detention and could be detained indefinitely, we'd go to UNHCR and say "Hey, this is one of *your* refugees".' The same informant noted that, while UNHCR intervention had achieved positive outcomes in some past cases, 'it will depend on the government of the day and I think the reality is under the current government they are not that interested in UNHCR's opinion on anything.' Reflecting a similar belief, a couple of informants said they did not seek UNHCR intervention in individual cases because such intervention was unlikely to achieve better outcomes than their organisations could achieve on their own.

⁹⁵ In July 2011, the governments of Australia and Malaysia entered into a legally non-binding arrangement, which provided for the transfer to Malaysia of up to 800 people arriving irregularly in Australia by boat after the date of signing. The arrangement also stated that in exchange for Malaysia's assistance Australia would, over a period of four years, resettle 4,000 of the over 80,000 UNHCR recognised refugees living in Malaysia at the time of signing. Pursuant to the arrangement, transferees to Malaysia were to be given the opportunity to have asylum claims considered by UNHCR and to have access to resettlement if found to be refugees. The arrangement and associated operational guidelines also provided that Malaysia would respect the principle of *non-refoulement*, treat transferees 'with dignity and respect and in accordance with human rights standards' and given them access to school and employment. UNHCR supported the Malaysia arrangement because it regarded it as a way into eventually improving the situation of all refugees and people seeking asylum living in Malaysia. As things transpired, Australia was prevented from transferring irregular boat arrivals to Malaysia by the High Court decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

Providing information to UNHCR

In late June or early July each year, UNHCR holds a three-day consultation in Geneva with NGOs from around the world.⁹⁶ In order to participate, an NGO must be a member of the International Council of Voluntary Agencies, which co-organises the consultations, or have consultative status with the UN Economic and Social Council and a demonstrated interest in the area, or be an implementing or operational partner of UNHCR.⁹⁷ RCOA coordinates the participation of the Australian NGO representatives, of whom there were 27 in 2019 (including 14 people from a refugee background).⁹⁸

At various times, UNHCR's Canberra office has held one- to two-day consultations in Canberra with 50 to 150 NGO and other invitees. In addition, a member of the Canberra office staff participates as an observer in DHA-NGO dialogues. The High Commissioner's representative or other members of the Canberra office staff are also invited to and often attend conferences and other events organised by the sector.

Twelve key informants indicated that their organisations had provided information to UNHCR about systemic issues identified through their work either during events such as those mentioned above or by making direct contact with UNHCR's office in Canberra and/or Geneva depending on the issue. Not all Australian matters are of interest to Geneva but Australian policies which have export potential such as regional processing arrangements are. The main purpose of providing information to UNHCR was to inform its ongoing dialogue with the Australian government.

Using information made available by UNHCR

UNHCR's [Refworld website](#) is the go-to place for researchers and lawyers seeking UNHCR's policy and guidance documents or material relevant to refugee status determination.⁹⁹ UNHCR also has a [global website](#) and many country and regional sites with content of more general interest. The [Canberra office website](#)

provides information on what it does and has sections with the media releases and publications that it has generated. The publications include position papers, submissions made by UNHCR to parliamentary inquiries, and reports on some of UNHCR's monitoring visits to the regional processing countries.¹⁰⁰

Sixteen key informants mentioned that they had used information made available by UNHCR in individual case work or broader policy/advocacy work. For example, one informant said:

I think their work on the conditions in offshore detention is really valuable for us to provide accurate information and statistics to our constituency. People ask very often 'why this, why that?' And we would rely on UNHCR rather than, you know, an NGO for example.

Recommendations

UNHCR

R27. The websites of UNHCR's various offices should contain clear information about the precise circumstances in which the office in question can assist people seeking asylum, refugees and others and easy-to-follow instructions for seeking such assistance.

Also see recommendations in "Overview".

⁹⁶ UNHCR has foreshadowed a move to holding regional consultations and having a smaller consultation in Geneva later in the year in 2020: RCOA, *Report on Australian NGO and Refugee Advocacy in Geneva – June-July 2019* (Report, 11 July 2019) <https://www.refugeecouncil.org.au/unhcr-advocacy-2019/>

⁹⁷ UNHCR, *A Guide for Participants - UNHCR Annual Consultations with NGOs* (2018) <https://www.unhcr.org/en-au/events/conferences/5aa7e1377/2018-unhcr-annual-consultations-ngos-guide-participants.html>

⁹⁸ RCOA, *Report on Australian NGO and Refugee Advocacy in Geneva – June-July 2019* (Report, 11 July 2019). Up to 2019, RCOA has also coordinated meetings between Australian representatives and the representatives of UNHCR's regional bureaux during the period of the consultations: *Ibid.* However, all regional bureaux are being relocated to the respective regions in the latter part of 2019 with only the Europe bureau remaining in Geneva: *Ibid.*

⁹⁹ Country of Origin information is now made available at <https://www.ecoi.net/> in partnership with Austrian Red Cross.

¹⁰⁰ The frequency of UNHCR's monitoring visits varies depending on perceived need. Some monitoring reports have been made public, but others have not based on the potential protection implications for people of concern to UNHCR.

UN human rights mechanisms

Australia is a party to seven of the nine¹⁰¹ core international human rights treaties.¹⁰² The ICCPR and the [Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT) are of particular relevance in the present context as they contain *non-refoulement* obligations which apply to all persons not just ‘refugees’ within the meaning of the *Refugee Convention and Protocol*.

The UN Human Rights Committee supervises the implementation of the ICCPR and the UN Committee against Torture supervises implementation of CAT. States parties are required to report to these treaty bodies every four years on their implementation of their treaty obligations.¹⁰³ Like the reports of most other states, Australia’s reports tend to be self-serving. However, in assessing Australia’s reports, the treaty bodies are able to draw upon information submitted by other actors. Unfortunately, the observations made by the treaty bodies on the reports of states parties are not binding on the states parties concerned. Another problem is that both the submission and consideration of reports happens in such an untimely fashion 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 any particular treaty obligation.

As well as being accountable through the reporting mechanisms, Australia is accountable through individual complaints mechanisms set up by the [\[First\] Optional Protocol to the ICCPR](#) and by article 22 of CAT. Pending final resolution, both the UN Human

Rights Committee, which deals with individual complaints relating to the ICCPR, and the UN Committee Against Torture, which deals with individual complaints relating to CAT, will request the state party concerned to take interim or provisional measures if that is necessary to avoid ‘irreparable harm’ to the alleged victim.¹⁰⁴

Where a complainant alleges that a state party is about to *refouler* them, the committee to which the complaint has been made will usually request that the state party halts removal proceedings until the complaint is heard and resolved. Australia has procedures in place for considering interim measures requests relating to removal,¹⁰⁵ but does not always accede to such requests.¹⁰⁶ Another problem is that the views that the treaty bodies express on individual complaints are not binding on the states parties concerned. Both Labor and Coalition governments have relied on this fact as a reason for refusing to provide remedies to those whose complaints are upheld by a treaty body.¹⁰⁷ According to Remedy Australia, Australia has provided a remedy in only 13 per cent of the complaints upheld against it.¹⁰⁸

Under OPCAT, Australia has an obligation to allow the UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) to visit ‘any place under its jurisdiction and control where persons are or may be deprived of their liberty’ (article 4). In July 2019, the SPT announced that it would be visiting Australia in the coming months.¹⁰⁹

As well as the human rights treaty bodies, there are the ‘special procedures’ of the UN Human Rights Council. Some of these have

¹⁰¹ ‘The Core International Human Rights Instruments and Their Monitoring Bodies’, OHCHR (Web Page) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

¹⁰² Australia is not a party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* or the *Convention for the Protection of All Persons from Enforced Disappearance*.

¹⁰³ In the case of CAT, the reporting interval is specified in art 19. In the case of the ICCPR, the actual obligation under art 40 is to report whenever the Committee requests with Committee practice being to do so every four years.

¹⁰⁴ OHCHR, ‘Civil and Political Rights: The Human Rights Committee’ (Fact Sheet no. 15 rev. 1, May 2005) 25-26, <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>; OHCHR, ‘Fact Sheet no. 17: The Committee Against Torture’ (Fact Sheet, n.d.) <http://www.ohchr.org/Documents/Publications/FactSheet17en.pdf>

¹⁰⁵ Answer to Question Number: AE18/099, 2017-18 Additional Estimates, Legal and Constitutional Affairs Legislation Committee, Home Affairs Portfolio, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld2-Portfoliold20-QuestionNumber10>

¹⁰⁶ Phil Lynch, ‘Australia’s Duplicitous Approach to the UN’, *The Drum* (online, 13 August 2012) <http://www.abc.net.au/news/2012-08-13/lynch-human-rights/4190968>.

¹⁰⁷ Adam Fletcher, *Australia’s Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) 46

¹⁰⁸ Remedy Australia Web Page <https://www.remedy.org.au/>

¹⁰⁹ OHCHR, ‘UN Torture Prevention Body Announces Upcoming Country Visits’, *News and Events* (online, 1 July 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24769&LangID=E>

Use of non-judicial accountability mechanisms

taken an interest in Australia's treatment of refugees and people seeking asylum, including the [Special Rapporteur on the Human Rights of Migrants](#), the [Special Rapporteur on Torture](#), and the [Working Group on Arbitrary Detention](#). Finally, commencing in 2008, the UN Human Rights Council has conducted a Universal Periodic Review of the human rights performance of every UN member state over a five-year cycle. As in the case of the human rights treaty bodies, these other human rights mechanisms have powers of recommendation only and their recommendations are often rejected by Australia.¹¹⁰

It should be noted that the work of all the UN's human rights mechanisms suffers from chronic under-funding.¹¹¹

Seventeen of our key informants had engaged with UN human rights mechanisms in some way.

Using individual complaints processes

Five key informants said they had used the individual complaints processes.

Informants who had used, or contemplated using, the complaints processes were well aware that years can elapse between the making of a complaint and the final resolution of it.¹¹² One legal service provider said it was, therefore, only worth considering in, for example, long-term indefinite detention cases. The informant had not used the complaints processes because they thought that getting a finding in their client's favour would not help the client with the current government.

Another informant who had contributed to the making of three such complaints in the 1990s thought that it was worth doing despite the Australian government's propensity to ignore findings against it, saying:

Because if you build the case eventually the edifice has to come crumbling down, doesn't it, that says it's ok? ... I do think that you have to have that long-term vision that even if the case fails, even if it doesn't work, you are building a picture and you have to have that long view.

However, the informant added:

Your first duty is to the person you are making a complaint for not the big picture, so you are upfront with the individual you are talking to and say 'This might make no difference but you will be contributing to building a picture of what's going on. Are you still willing to do it?'

Providing information to UN human rights mechanisms

Eleven key informants said that they had provided information relating to refugee and asylum seeker issues to UN human rights mechanisms. Two said they visited Geneva for that purpose, among others. In fact, one of the two spent a couple of weeks in Geneva every year. That informant said their organisation then continued to follow up long-distance 'to try and keep the interest there and to be able to feed some of the information we have.' They also said that their organisation had 'pushed hard' to have special procedure mandate holders to come to Australia and to file reports in order to keep an international spotlight on Australia.

A few informants said they hadn't proactively sought to provide information to UN human rights mechanisms but had met with special procedure mandate holders who had visited Australia and reached out to the sector.

Case Study

Professor François Crépeau, then the Special Rapporteur on the Human Rights of Migrants, was scheduled to make an official visit to Australia from 27 September to 10 October 2015 but postponed the visit 'owing to protection concerns'. According to a UN report

[The Special Rapporteur] had not received a written guarantee that no one cooperating with his mandate would be at risk of intimidation or reprisal in the form of sanctions under the 2015 Border Force Act, which stipulates that detention centre service providers who disclose protected information can be sentenced to two years in prison. The Special Rapporteur stressed that the perceived threat of reprisals against persons who would want to cooperate with him in relation to his official visit would be unacceptable.¹¹³

¹¹⁰ Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) 47.

¹¹¹ See for example, 'Human Rights Oversight in Peril Amid UN Budget Shortfall', *The Globe Post* (online, 17 May 2019) <https://theglobepost.com/2019/05/17/human-rights-un-budget-shortfall/>

¹¹² OHCHR, 'Civil and Political Rights: The Human Rights Committee' (Fact Sheet no. 15 rev. 1, May 2005) 25.

¹¹³ UN Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights*, UN Doc A/HRC/33/19 (Report, 16 August 2016) para. 20.

Australia subsequently gave the guarantee sought and the visit took place in November 2016.¹¹⁴ The Special Rapporteur consulted widely before making a report to the Human Rights Council containing his findings, conclusions and recommendations. The Australian government's response to the report boiled down to saying that it did not see any need to implement the recommendations.

There were two points of general consensus among informants. First, UN treaty body members and special procedure mandate holders were responsive to the sector's concerns and did excellent work. Second, their influence on Australian government policy was limited to non-existent. Despite making the latter observation, one informant explained why it was worth persisting in the following terms:

Sometimes these things just need to be said. Obviously, you want it to change. You want it to have an effect, but it's more than that too. It's if there are these injustices, if human rights are not being respected, I think there's a moral obligation to speak out about it.... So, part of it is the issues need to be documented and [to be] in the public realm, because, if you're not working directly in this area, then you could profess ignorance if that information isn't there. So, the information being there is a starting point. It's not all of it, but, if it's not there, nothing's going to change.

Using information made available by UN human rights mechanisms

Thirteen of our key informants said they had used information made available by UN human rights mechanisms in individual case work or broader policy/advocacy work. One informant who drew on such material for protection visa applications said:

I mean we use it in submissions but then the Department always ignores it anyway. But we still use it because 'I dare you to refuse it. This is the [information], you go and refuse it.' I know they are going to refuse it, but I want to make it harder for them to refuse it.

¹¹⁴ Ibid.

¹¹⁵ This database has not been updated since 2014.

Recommendations

Sector

R28. In deciding whether to engage with UN human rights mechanisms, consideration should be given to the potential for indirect medium and long-term payoffs as well as the potential for direct short-term ones.

R29. In order to maximise the potential for long-term payoffs, the sector should systematically follow up on the government's implementation of relevant recommendations made by UN human rights mechanisms and should report back to the mechanisms on the government's performance.

Government

R30. The government should ensure that its reports to the UN human rights treaty bodies are of high quality and made in a timely fashion.

R31. The Attorney-General's Department should keep its [UN human rights recommendations database up-to-date](#),¹¹⁵ should expand it to include individual complaints relating to Australia, and should include information about the government's acceptance/rejection/implementation of recommendations.

Use of non-judicial accountability mechanisms

Other non-judicial accountability mechanisms

Most of our informants were asked whether they had used non-judicial accountability mechanisms other than those discussed above. We deliberately left it to informants to define the term for themselves and said 'if in doubt, please include'.

Three informants mentioned the [Australian National Audit Office](#) (ANAO) as an example of a Commonwealth oversight body they had usefully interacted with in relation to issues affecting people seeking asylum. The ANAO consists of the Auditor-General, who holds office under the [Auditor-General Act 1997 \(Cth\)](#), and staff. Among other things, it is able to conduct performance audits of Australian government entities and report on these to parliament. The ANAO consults with the public in setting its annual audit program and also invites contributions from the public when conducting performance audits. Since 1 July 2016, the ANAO has reported on six performance audits which focused on DHA.¹¹⁶ In 2019-20, it is assessing the effectiveness of the delivery of the Humanitarian Settlement Program and the appropriateness of DHA's procurement management in relation to immigration processing centres.

Some informants mentioned bodies which had been set up administratively to give advice to government on immigration portfolio issues. A number of these no longer exist. The Immigration Health Advisory Group, which was established in 2006 in response to recommendations made in the Palmer and Comrie inquiry reports,¹¹⁷ was disbanded in late 2013.¹¹⁸ The Ministerial Council on Asylum Seekers and Detention, which was set up by the Labor Government in 2009,¹¹⁹ ceased to function in April 2018 when the term of its then members expired.¹²⁰

The Joint Advisory Committee for asylum seeker management under the Regional Resettlement Arrangement in Papua New Guinea (PNG JAC) and the Joint Advisory Committee for Nauru Regional Processing Arrangements (Nauru JAC) were set up under Australia's Memoranda of Understanding with PNG and Nauru respectively.¹²¹ The PNG JAC had a membership of Australian and PNG officials and two independent experts acting as observers.¹²² However, by agreement between the Australian and PNG governments it 'transitioned to regular senior officials level meetings' in mid-2017.¹²³

The Nauru JAC had a membership of Australian and Nauruan government officials, independent subject matter experts and

¹¹⁶ ANAO, *Delivery of Health Services in Onshore Immigration Detention* (Report No. 13, 2016–17); ANAO, *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services* (Report No. 16, 2016–17); ANAO, *Offshore Processing Centres in Nauru and Papua New Guinea: Contract Management of Garrison Support and Welfare Services* (Report No. 32, 2016–17); ANAO, *The Australian Border Force's Use of Statutory Powers* (Report No. 39 2016–17); ANAO, *The Integration of the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service* (Report No. 45, 2017-18); ANAO, *Efficiency of the Processing of Applications for Citizenship by Conferral* (Report no. 25, 2018-19).

¹¹⁷ Palmer inquired into the circumstances of the immigration detention of Australian permanent resident, Cornelia Rau. Comrie inquired into the circumstances of the involuntary removal from Australia of Australian citizen, Vivian Alvarez Solon.

¹¹⁸ 'Independent Immigration Health Advisory Group disbanded', *ABC Radio AM* (online, 16 December 2013) <http://www.abc.net.au/am/content/2013/s3912079.htm>

¹¹⁹ Paul Farrell, 'Government's Council of Asylum-Seeker Advisers Has Stood Empty for Five Months', *The Guardian* (online, 16 April 2015) <https://www.theguardian.com/australia-news/2015/apr/16/governments-council-of-asylum-seeker-advisers-has-stood-empty-for-five-months>

¹²⁰ Answer to Question Number: BE19/095, 2019-20 Budget Estimates, Senate Legal and Constitutional Affairs Legislation Committee, Home Affairs Portfolio, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld6-Portfoliold20-QuestionNumber94>

¹²¹ [Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues](#), 6 August 2013; [Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues](#), 5 August 2013.

¹²² Department of Immigration and Border Protection, Submission no. 23 to Senate Legal and Constitutional Affairs References Committee *Inquiry into Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and Any Like Allegations in relation to the Manus Regional Processing Centre* (2016) para. 94.

¹²³ Answer to Question Number: SE18/032, 2018-19 Supplementary Budget Estimates, Senate Legal and Constitutional Affairs Legislation Committee, Home Affairs Portfolio, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld4-Portfoliold20-QuestionNumber32>; Answer to Question Number BE19/102, 2019-20 Budget Estimates, Senate Legal and Constitutional Affairs Legislation Committee, Home Affairs Portfolio, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld6-Portfoliold20-QuestionNumber101>

representatives of UNHCR and the Commonwealth Ombudsman.¹²⁴ In July 2018, by agreement between the Australian and Nauruan governments, it was replaced by ‘new governance arrangements includ[ing] an Independent Advisory Panel’.¹²⁵ However, as was the case with the independent members of the Nauru JAC, the Independent Advisory Panel is too lacking in formal or informal authority to serve a useful accountability function.

The [Independent Reviewer of Adverse Security Assessments](#), which still exists, was set up by the Labor government in 2013 to review adverse security assessments issued by the Australian Security Intelligence Organisation (ASIO) in relation to people who would otherwise be eligible for the grant of a protection visa. The position has no statutory basis and all the reviewer can do is to form a view about the appropriateness of an assessment and make it known to the Director-General of Security. Nevertheless, the two informants who mentioned it thought the existence of the mechanism made a difference. According to one of them, the knowledge that there was an independent person able to review its assessments seemed to have caused ASIO to be more careful in making them or insisting on their continued applicability as the case may be.

Five informants indicated that they had attempted, with varying success, to get state/territory level children’s commissions/child protection agencies to intervene with DHA in relation to matters involving children seeking asylum. Some state/territory authorities refuse to get involved on the basis that immigration matters are the domain of the federal government. However, others have been willing to try to hold DHA to account. For example, in response to concerns about children in immigration detention raised by the media and people in the community, Victoria’s Commissioner for Children and Young People asked DHA for access to immigration detention facilities in Victoria so that she

could assess detention conditions for herself.¹²⁶ DHA acceded to her request.¹²⁷

Royal Commissions at both the federal and state level have also been used or considered to be used as opportunities to obtain some level of accountability for the government’s treatment of particular groups of people seeking asylum. An opportunity used in the past has been the [Royal Commission into Institutional Responses to Child Sexual Abuse](#), which was set up by the Australian government in January 2013 and reported in December 2017. One informant, who had interacted with that Royal Commission, said of the outcome:

In their report there was some reference [to abuse of children seeking asylum], but it wasn’t really addressed to the extent that we [would have liked]. And, look, it was a massive, massive job that they did. You have to concede that within that their resources were stretched... There were some departmental processes that because [they were] brought to the Royal Commission’s attention I think there was a little bit of work in the Department, ‘Oh shit we better do that’... I can’t remember exactly what it was... So it kind of did actually have a minimal effect. It wasn’t completely without any effect at all.

Currently running Royal Commissions to which some in the sector have made or may make submissions are the [Royal Commission into Aged Care Quality and Safety](#) (federal – due to report on 30 April 2020), the [Royal Commission into Victoria’s Mental Health System](#) (due to report in October 2020) and the [Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#) (federal – due to report on 29 April 2022).

¹²⁴ Department of Immigration and Border Protection, Submission no. 23 to Senate Legal and Constitutional Affairs References Committee *Inquiry into Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and Any Like Allegations in relation to the Manus Regional Processing Centre* (2016) para. 90.

¹²⁵ Answer to Question Number: SE18/032, 2018-19 Supplementary Budget Estimates, Senate Legal and Constitutional Affairs Legislation Committee, Home Affairs Portfolio. In late 2018, the Panel included Paris Aristotle, Dr Maryanne Loughry, Professor Suresh Sundram, Gillian Calvert, Associate Professor Mary Anne Kenny and Leeanne Martin: Ibid.

¹²⁶ Interview with Liana Buchanan (Jon Faine, ABC Radio Melbourne, 21 May 2019).

¹²⁷ Bhakthi Puvanenthiran, ‘Peter Dutton is Repeating False Claims There Are No Children in Detention’, *MSN News* (online, 18 June 2019) <https://www.msn.com/en-au/news/australia/peter-dutton-is-repeating-false-claims-there-are-no-children-in-detention/ar-AAD2RJv>. The Commissioner had no right of access because her mandate is conferred by Victorian legislation whereas immigration detention facilities are Commonwealth facilities: Interview with Liana Buchanan (Jon Faine, ABC Radio Melbourne, 21 May 2019).

Case study

Members of the sector in Victoria responded to the consultation on the terms of reference of the Royal Commission into Victoria's Mental Health System (RCVMHS) by requesting that people seeking asylum be specified as priority group.

This did not happen,¹²⁸ but the RCVMHS did devote two days of its public hearings to LGBTIQ+ and culturally and linguistically diverse communities.¹²⁹

Members of the sector also advocated with the RCVMHS to adjust its practices in order to make it easier for people not proficient in English to interact with it and adjustments were in fact made.

Finally, through the Network of Asylum Seeker Agencies in Victoria (NASAVic), the sector coordinated and collaborated in the making of submissions to the RCVMHS.

Finally, some informants regarded the media as being an important mechanism for holding government to account and made use of it for that purpose. While the media is an important accountability mechanism in itself, it was left out of the scope of the present study because its role is not formalised within the structures of government or by international treaty. It should be noted, though, that the accountability mechanisms considered in this study are often most effective when they generate media coverage that can place pressure on governments. Public awareness and opinion is most effectively reached through mass media, but the fragmentation of the media in Australia and the hollowing out of the mainstream media have created new challenges in exposing maladministration and breaches of human rights.

Conclusion

This report has examined the use of non-judicial accountability mechanisms from the perspective of its 'consumers' in one policy area. It is a policy area in which accountability is essential, because of the impact on people's lives and the enormous imbalance of power. At the same time, it is a policy area in which accountability is contested, because it is a policy area that is politically contentious.

The report canvasses systemic, institutional and cultural issues that make it difficult to achieve accountability. These accountability mechanisms could be more accessible, and this could be achieved through better understanding of their role and relationship-building. However, there is a strong perception that these mechanisms are also increasingly ineffective, in part due to delays and frustration, and in part due to an increasingly antagonistic attitude by the government. Constraints on time and resources mean the refugee sector increasingly have to make strategic choices about which mechanism will provide the most value.

This report makes several recommendations to improve the use, and the usefulness, of these mechanisms. There is much scope for improvement, but ultimately the effectiveness of these mechanisms rests on a shared agreement about the need and value of accountability. Refugee policy has strained this agreement, for it is exactly when accountability is most contested that the democratic commitment to accountability will be most tested.

¹²⁸ Governor of the State of Victoria, Letters Patent of the Royal Commission, 22 February 2019, https://engage.vic.gov.au/download_file/13152/2135

¹²⁹ RCVMHS, 'Public Hearing Schedule – July 2019' (Media Release, 14 June 2019) https://rcvmhs.vic.gov.au/download_file/74/419



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