The role of civil society in monitoring human rights violations

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Introduction: The Australian human rights context

At the formation of the United Nations and during the drafting of the foundational international human rights treaties in the 1960s, Australian representatives were instrumental in bringing together disparate groups of nations with the goal of codifying and rendering enforceable states' obligations to individuals. Today, that legacy of State-based humanitarianism is all but lost in Australia, and it is left to non-state actors to uncover and pursue human rights violations.

In March 2009 former Attorney General Robert McClelland stated that the Gillard Government was "committed to becoming a party to the UN Optional Protocol to the Convention Against Torture."[1] Despite these lofty ambitions Australia is still not a party to the protocol, which mandates regular visits to all places of detention by independent national and international monitors whose aim is to prevent torture and other cruel, inhuman or degrading treatment or punishment.[2] Nor does Australia have a bill of rights that would create enforceable minimum standards of treatment. Human rights in Australia remain aspirational only.

Tony Abbott declared in April 2015 that other governments would "succumb to the cries of the human rights lawyers," but his would not.[3] His government has, more than others, rejected the prism of human rights as a way of assessing legislation and official action. Despite continuing to bid for a seat on the UN Human Rights Council, the Government has sought to discredit decisions and reports of the AHRC and UN Human Rights Committee that have found systemic violations of international law in Australia's mandatory detention regime.

There is a move towards human rights compliance in the Australian Capital Territory[4] and Victoria,[5] and which introduced legislation in 2004 and 2006 respectively requiring that new laws be compatible with human rights standards. The Federal Government has also taken steps to ensure legislative compliance with human rights,[6] but in practice bills are rubber stamped before being pushed through the parliament.[7]

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[1] Attorney-General Hon. Robert McClelland MP, *Launch of University of Western Sydney "Year of Respect and Inclusion"*, Speech at Parramatta Campus, 4 March 2009, available online at: http://www.uws.edu.au/__data/assets/pdf_file/0008/57149/090304_Attorney_General_Speech.pdf

[2] Article 1, UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 January 2003, entered into force 22 June 2006, UN Doc A/RES/57/199.

[3] Shalailah Medhora and Michael Safi, 'Tony Abbott declares only the Coalition strong enough to stop the boats', *The Guardian*, 9 April 2015, available online at: http://www.theguardian.com/world/2015/apr/09/tony-abbott-declares-only-the-coalition-strong-enough-to-stop-the-boats

[4] *Human Rights Act 2004* (ACT).

[5] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[6] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

[7] For example, the Attachment A of the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) states that the Bill complies with international human rights law, despite clear distortion of international precedent and disagreement by the UN and other international and domestic authorities.

Enforcement of human rights at any level remains the ambit of the Australian Human Rights Commission (AHRC) alone. This is problematic, as the AHRC cannot compel an outcome based on violations of human rights.[8]

The federal government's strategy is to ignore human rights, relegating them to 'less than law' status. Under the current legislative regime, that option is wide open to them.

Today's session

Today I want to focus on the lessons I've learned from working with asylum seekers in detention in Darwin. While the focus on asylum seekers in detention may seem tangential to most, the lessons are wholly transferrable to other sectors as we will see.

For the past eight months I have been working with the Darwin Asylum Seeker Support and Advocacy Network (DASSAN). Established in mid-2010 in response to the establishment of detention centres in Darwin, DASSAN is a network of volunteers committed to social justice for asylum seekers in the Northern Territory. Over the last 18 months DASSAN advocates and visitors have seen over 700 asylum seekers in detention, with an active caseload of 200 people for advocacy visits and 300 for friendly visits (with substantial overlap between categories). DASSAN has around 30 active detention advocates and 80 friendly visitors, all volunteers.

Between January and May 2015, DASSAN advocates facilitated legal representation for over 140 asylum seekers, assisted 40 to access their information through freedom of information (FOI) and medical documentation requests, were involved in 50 Human Rights Commission complaints, and assisted law firms to identify and retain clients for group actions to challenge the lawfulness of their continued detention. DASSAN advocates have been pivotal in raising awareness amongst the detention population of free services like NT Legal Aid. The truth, is without civil society advocates regularly visiting detention, very few asylum seekers would have access to legal representation or complaints services.

Detention monitors

Three principal bodies undertake monitoring of detention conditions within Australia: the Australian Red Cross, the Immigration Ombudsman and the Australian Human Rights Commission. While the Red Cross visits places of detention regularly and reports its findings, those reports are private in nature and findings have no compulsive power. The Immigration Ombudsman monitors detention in two capacities: it receives and investigates complaints; and conducts semi-regular assessments of people who have been in immigration detention for two years or more under s486O of the *Migration Act 1958* (Cth). S486O assessments do not apply to people held offshore; their timer starts when they enter an Australian detention facility. Neither of these functions carry the power to make binding findings or recommendations. The Australian Human Rights Commission also investigates complaints but has no binding powers either.

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[8] See, for example, the case of *Basikbasik v Commonwealth of Australia* [2014] AusHRC 77; Gillian Triggs, 'Indefinite detention oversight no easy matter,' *The Canberra Times*, 15 January 2015, available at: http://www.canberratimes.com.au/comment/indefinite-detention-oversight-no-easy-matter-20150114-12nxsw.html

So while a façade of human rights monitoring exists, it is merely superficial. To reach that entry point can be an insurmountable effort for many behind the wire. At the Wickham Point detention facility in the Northern Territory, posters advertising the Ombudsman's mandate and contact details have been removed, and the Human Rights Commission's functions are summarised in a 200 word paragraph translated into three languages on a single A3 poster. The only Red Cross poster advertises its tracing program.

Many asylum seekers are all too aware of the existence of their human rights and the fact that they're being violated in detention. However, few are aware of the 'proper channels' for addressing human rights violations and how to access them, and the overwhelming majority are reticent to complain about anything as they fear it will prejudice their refugee status determination or the length of time they have to stay in detention. Although the government denies that this is the case, I have seen it happen time and time again. 'Punishment' for engaging in formal processes or speaking to the media can range from glitches in processing to problems with the character assessment or harsher detention placements.

Immigration detention in the Northern Territory

There is currently only one detention centre in the NT, 40km outside of Darwin, the Wickham Point Immigration Detention Facility, which holds around 750 people at the moment. It resembles a prison more than detention facility, surrounded by four metre high electrified fences topped with razor wire. When it rains, droplets fall from the razor wire and evaporate with a zap on the electric conduit with torturous regularity. 'Unscaleable' steel fences regulate entry and exit from each compound, complete with airlock-style gates to prevent unauthorised access to all 'high risk' areas.

The centre is built from concrete and steel, including the room called the 'cage' where medications are dispensed from 9am to 10pm. Routines are institutionalised, which adds to the degrading and de-humanising atmosphere in the centre. The line often snakes around the medical centre and is usually an hour long. Asylum seekers report that people with complex needs can spend up to three to four hours a day in the line for medication. They also spend up to three hours a day lining up for meals, including family groups with small children. Until recently families often reported that if their children didn't stay in line they could not eat.

These are examples of the minor indignities suffered by immigration detainees on a regular basis, the improvement of which we can seldom successfully advocate. The more substantial problems arise when people slip into 'detention fatigue' (DIBP terminology). After three months in detention visitors notice a substantial decline in mental health. After a year the problems are pronounced; depression has well and truly set in, and most are also suffering from anxiety and/or post-traumatic stress disorder. Many are on high doses of anti-psychotics, anti-depressants and sleeping tablets. When they have 'had enough', people will often ask their friends for their doses of sleeping tablets and take dozens at a time. Between mid-March and mid-April 2015 DASSAN is aware of around 50 suicide attempts among the 750 people at Wickham Point.[9]

The detention population in Darwin is particularly vulnerable in terms of mental and physical health. It is made up of three relatively equal populations (in terms of size): 'transitory persons' brought from Manus and Nauru for medical treatment unavailable offshore; asylum seekers who have been re-detained after prolonged community detention; and long-term detainees with complex cases yet

[9] Precise statistics have been sought in partnership with the Guardian under Freedom of Information laws.

to be resolved. Almost everyone here has been in detention for 16 months or more, with some up to five years.

Engaging civil society

The concept of civil society action in Australia is nascent in the human rights field. Civil society encompasses all non-government actors including domestic and international NGOs, advocacy organisations and individuals. Despite the existence of umbrella organisations such as the Refugee Council of Australia, organisations continue to act in silos throughout the country. This has created multiple logistical headaches in terms of individual actions relating to the treatment of asylum seekers, and is a problem advocates are now trying to grapple with. A major task of peak bodies and other NGOs at the moment is to bring together lawyers and others working on legal actions and formal complaints to minimise duplication of efforts and to coordinate a national strategy for the prosecution of human rights violations against asylum seekers in detention.

There are limited legal avenues available to redress serious problems in a narrow range of cases, however successive governments since the Howard era have eroded the legal protections and services available to asylum seekers, especially for those going offshore.[10] The Immigration Advice and Application Assistance (IAAAS) scheme no longer exists, and community law centres are no longer able to assist in matters relating to migration law (due to program de-funding). This is not necessarily an insurmountable problem at the moment, as no asylum seekers are actually having their applications processed. The delay is at such a high level that the Minister must personally lift the bar and invite asylum seekers to apply for a protection visa.[11] The Department and Minister blame the stalling on a lack of interpreters, however the reality is that the Department decided to stop processing applications two years ago and is now starting to resume it and deal with the backlog. To prepare for an eventual 'unfreezing' of processes, detention advocates are assisting asylum seekers with statutory declarations and visa application processes in anticipation of an invitation to apply for a substantive visa.

This means that the bulk of actionable problems in the detention system at the moment lie in conditions of detention. In the cavernous disjuncture between the daily grind of detention and formal legal action exists the space of *complementary advocacy,* where independent advocates and civil society can take meaningful action in a human rights framework to improve the lives of people behind the wire.

Actionable problems regularly encountered at the Wickham Point detention centre include problems with healthcare provision (either an absence of care, or clear deficiency in standards of care); mistreatment in detention; systemic deficiencies in standards of service provision; inappropriate or unsafe detention transfers; and a smattering of the types of diverse civil and criminal matters that one would expect in any community.[12]

Civil society has a critical role in both identifying and addressing human rights violations in the immigration detention system. After identifying that actions or experiences amount to human rights

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[10] Under s198 of the *Migration Act 1958* (Cth).

[11] The Minister has the power to invite asylum seekers to apply for a visa under s195A, to direct that they be placed in community detention under s197AB and AF, or to direct that they not be sent offshore under s198AE of the *Migration Act 1958* (Cth).

[12] Darwin Asylum Seeker Support and Advocacy Network (DASSAN), *Asylum seeker advocacy in the Northern Territory: Beyond 2014*, DASSAN, December 2014, available online at: http://dassan.weebly.com/dassan-report.html

abuses, DASSAN advocates take care to explain the risks and benefits of undertaking complaint action, and equip asylum seekers to commence those processes themselves. The value of such empowerment to self-advocate cannot be overestimated; a modicum of control over their lives and situations can be enormously beneficial in terms of individuals' mental health, and creates a sustainable advocacy pathway.

Sometimes the most difficult task for us as advocates is finding a real, effective way to action complaints. Where the government has legislated to progressively remove detention safeguards, finding novel resolution pathways is a crucial task for complementary advocates that demands collaboration and lateral thinking. Good strategy can also drive innovation (see case studies below).

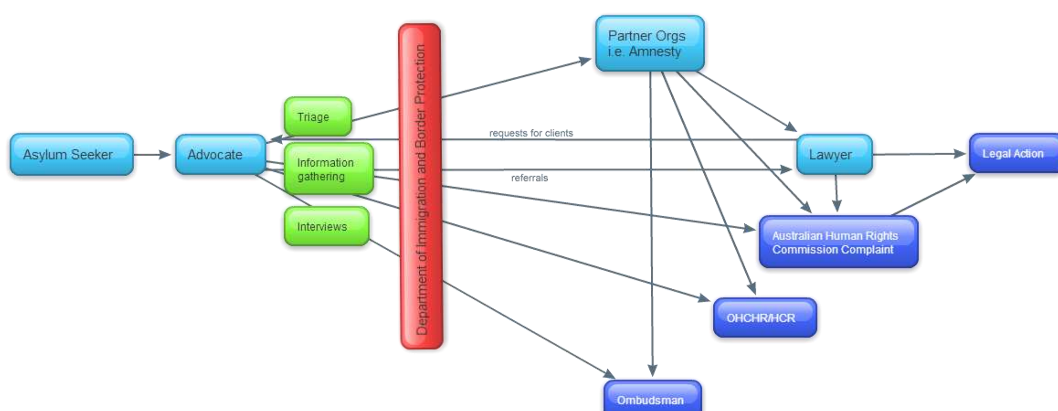
Where to start

Complaints mechanisms should be seen along an efficacy and efficiency continuum moving towards the goal of full redress of human rights violations, with binding legal action being the ultimate goal. Helping asylum seekers through complaints processes can be complex and time-consuming. While a normal Human Rights Commission complaint can be resolved within in a couple of months, complaints involving analysis and application of human rights law in a novel situation can take up to a year. Some UN complaints can take even longer.

In resolving legal and non-legal matters, community advocates are best placed to liaise with lawyers, service providers and oversight bodies. Community advocates often work on a volunteer basis and are able to spend an hour or two at short notice taking statements or organising for documents to be signed. As the Wickham Point detention centre is so remote, even a short visit can take up a large part of the day. Retainers, FOI requests and basic complaint processes can all be completed by volunteers without specialist training. This assistance can be crucial in ensuring lawyers have enough legal aid funding to take a matter to completion without exhausting their budget on administrative matters. To this end, DASSAN has set up a database to monitor ongoing legal actions and is working with national partner organisations to establish an Australia-wide pro bono register for lawyers willing to help asylum seekers.

This is when parallel action with international stakeholders (UN human rights monitors) can be powerful in drawing attention to a matter of grave concern. However these are often ineffective in bringing about a meaningful resolution of human rights violations, and it is more efficient to engage complementary advocates rather than lawyers to complete this process as a matter of resource management.

Figure 1: Civil society involvement in human rights monitoring



Before undertaking complaints procedures, it is important to think about whether and to what extent the complaint serves strategic goals for the individual or group, and what impact the complaint may have. As an example of an immediate challenge, we identified the goal of keeping asylum seekers in Australia long enough to find effective avenues to redress their health problems. On an evidence-based approach, two ways of keeping people in Australia were found to be effective: legal actions and formal complaints to the AHRC. DASSAN worked with lawyers and partner NGOs to put these strategies into practice, and so far we have directly prevented at least 35 transfers to Nauru and Manus Island, and put procedural blocks on 40 more.

It is imperative that advocates also consider bars to lodging complaints. At the international level, most complaints procedures require firstly an exhaustion or unavailability of domestic remedies. At the domestic level, neither the AHRC nor the Ombudsman will accept complaints that have not first been taken to the Department of Immigration for internal review. This first step is easily navigated and advocates can support asylum seekers to make robust representations to the Department themselves. Awareness (on the Government's part) that civil society is supporting internal complaints and applications for review can boost chances of success in DASSAN's experience.

The tiger with no teeth

Despite the Government's hard line response to international complaints ("any other government would succumb to the cry of human rights lawyers"), urgent appeals, letters of allegation and individual complaints to UN Special Procedures mandate holders are an effective way of publicising a systemic problem involving human rights. Each stage of the complaints process warrants media attention: the lodging of the complaint, the Government's response, and any eventual resolution. Each step also illuminates another part of the Department's secretive processes, enabling future complaints to be better targeted and better informed.

The UN Office of the High Commissioner for Human Rights (OHCHR) is increasingly interested in the human consequences of Australia's immigration detention program, and have requested information updates and complaints submissions on various themes including arbitrary detention, children in detention, and whether detention conditions amount to cruel, inhuman and degrading treatment or punishment.

Alerting the UN seems at times like a futile objective, however it can have a powerful symbolic effects. While the Government will reject any recommendations out of hand as a show of political bravado, in the long-term there can be positive changes. Although Attorney-General George Brandis snobbed[13] the UN Human Rights Committee's finding of 143 human rights violations against 47 indefinitely detained asylum seekers last year,[14] the government eventually implemented an

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[13] Trevor Grant, 'How will Abbott treat ASIO refugees?' *The New Matilda*, 8 September 2013, available at: https://newmatilda.com/2013/09/08/how-will-abbott-treat-asio-refugees

[14] UN Office of the High Commissioner for Human Rights, *Australia's treatment of 46 refugees 'cruel and degrading,' UN experts find*, OHCHR, 22 August 2013, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13648&LangID=E . Cases involved include CCPR/C/108/D/2094/2011 and CCPR/C/108/D/2136/2012, available at: http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Jurisprudence.aspx

independent review of negative security findings that has resulted in at least ten refugees being cleared to leave detention so far.[15]

On the other hand, there are circumstances where the government remains trenchant. In 2014 Humanitarian Research Partners referred evidence of the torture of two Iranian asylum seekers at the Manus Island detention centre to the Australian Federal Police (AFP). When the AFP refused to investigate, we forwarded the information to the UN Special Rapporteur on Torture, Juan Méndez. After the Government failed to adequately address the allegations, Mr Méndez tabled a finding that Australia had failed in its duty to protect the two men from torture and cruel, inhuman or degrading treatment or punishment.[16] The Government responded that it was "sick of being lectured by the UN,"[17] and no action has been taken to protect the men involved from reprisals or further abuse.[18] One of the men was tortured again in January 2015.

DASSAN has yet to hear of any definitive decisions regarding communications made about onshore detention, although we expect the first to be handed down before Australia's Universal Periodic Review in the Human Rights Council in the last quarter of this year.

Taking complaints to UN mandate holders is a long-term strategy that is more effective in reconciliation than preventing abuse. As such, it is not a primary strategy to assist asylum seekers but should still be viewed as an effective tool in informing public opinion and contributing to the human rights debate in Australia, as well as cataloguing violations in real time.

Conclusions

Civil society is here to help. Whether by experimentation with novel methods of preventing human rights violations or by supporting existing pathways, civil society can act as a focal point between formal complaint resolution mechanisms and the coalface of detention life. Good advocates will be a central hub rather than just a bridge between two pathways, opening spokes to all available pathways and connecting like actions so complainants, advocates and lawyers work collaboratively and are not duplicating efforts by re-inventing processes and working in isolation.

Until we have a binding bill of rights, DASSAN and partner NGOs foresee a greater role for civil society in taking complaints and bringing stakeholders together to come up with innovative ways to prevent abuses. This role for civil society is vital in alerting mainstream society as well as advocating for asylum seekers, and will have the added benefit of streamlining legal actions and making strategic litigation more efficient, thereby reducing the caseload on already strained courts and pro bono or publicly funded services.

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[15] Daniel Flitton, 'ASIO reverses finding refugees pose a threat,' *Sydney Morning Herald*, 11 January 2015, available at: http://www.smh.com.au/comment/asios-new-power-over-asylum-seekers-needs-proper-checks-and-balances-20140519-zrgur.html

[16] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment addendum: Observations on communications transmitted to Governments and replies received,* 28th Session, 6 March 2015, UN Doc A/HRC/28/68/Add.1, complaint JAL27/03/2014, Case No. AUS_1/2014 (paras 16-19).

[17] Lisa Cox, 'Asylum seeker torture report: United Nations special rapporteur Juan Mendez responds to Tony Abbott criticism' *Sydney Morning Herald*, 10 March 2015, available at: http://www.smh.com.au/federal-politics/political-news/asylum-seeker-torture-report-united-nations-special-rapporteur-juan-mendez-responds-to-tony-abbott-criticism-20150310-13zrwz.html

[18] Ben Pynt, 'Australia again justifies torture as a means to an end, this time by attacking the UN,' *The Guardian*, 11 March 2015, available at: http://www.theguardian.com/commentisfree/2015/mar/11/australia-again-justifies-torture-as-a-means-to-an-end-this-time-by-attacking-the-un?CMP=soc_568

Moving forward, it will be a combination of legal actions, complaints to domestic and international oversight bodies, and public pressure that will collectively have the power to change policy and opinion, and keeping media reliably informed. In the meantime, more funding and training opportunities are required to support Australia's nascent human rights NGOs to keep bridging the gap between needs and resolutions.

Civil society has the capacity to transfer these lessons across sectors to enforce human rights standards in all sorts of settings. All we need is dedication and money. And we've got plenty of both, right?

Case study: Preventing offshore transfers of asylum seekers

Between October 2014 and April 2015 there were regular fortnightly transfers of asylum seekers between the Wickham Point detention centre and offshore centres at Manus Island and Nauru. Every fortnight there would be a panic, as no one inside Wickham Point knew whether they would be next. The panic would spread between compounds and multiple suicide attempts would be made each second Thursday. We knew the goal was to prevent transfers, but we didn't know how.

Over a series of months, with varying degrees of success, DASSAN set about a strategy of preventing offshore returns involving doctors, lawyers and various complaints procedures in a multi-faceted evidence-based approach.

The first step was to gather information. Through our internal triage procedure, we identified which asylum seekers were at risk of transfer, how long they had been here, and whether the reason they came for could reasonably be considered 'spent' by the Department. We got it wrong a number of times by classifying certain people as 'low risk' who ended up being slated for transfer. We also got it right a number of times, and successfully intervened with direct advocacy to the Department, and indirect advocacy through detention monitors and complaints mechanisms.

Using the Freedom of Information (FOI) process and a number of iterations of IHMS (International Health and Medical Service – detention healthcare providers) document request forms, advocates would encourage asylum seekers to get copies of their documents to substantiate allegations of sub-standard care both in Australia and offshore as a matter of priority.

The next stage was to involve legal representatives and coordinate strategic litigation. While some actions were already underway, DASSAN has worked with lawyers and firms around the country to take test cases to the Federal and High Courts. Advocates have supported this process by screening potential applicants, taking basic information, facilitating legal interviews, having documents signed and seeking FOI releases.

While the black-letter law options were being explored and statements of claim prepared, advocates were preparing Australian Human Rights Commission (AHRC) complaints and taking action with UN Special Procedures mandate holders in Geneva. AHRC complaints are a formal process, and it has been possible to successfully advocate to prevent asylum seekers with complaints from being sent offshore until their complaints are finalised, buying valuable time to explore further legal avenues.

DASSAN advocates have assisted with the prevention of over 30 offshore transfers so far, with another 40 being shielded by formal complaints or legal action facilitated by volunteers.

Case study: Impact of civil society involvement

A single adult male, *S*, was transferred from a community setting in Sydney to detention at Wickham Point when his bridging visa expired in late 2014. From the moment he arrived at Wickham Point, his mental health started to decline and he became unable to properly care for himself. By the time advocates were alerted and gained access to him in February 2015, he had been on hunger strike for 42 days. The Department of Immigration had taken a singularly unhelpful position: his food and fluid refusal amounted to moral blackmail, and the Department would not give him a visa (or any special treatment) based on his 'disruptive behaviour'.

As a matter of priority, advocates established *S*'s major problems and demands, and made direct representations to the Department as to *S*'s mental health and vulnerability. Within 48 hours, *S* had been transferred to a dedicated mental health facility outside of Brisbane, and had voluntarily ended his protest action.

The crux of *S*'s problem was that he is subject to indefinite detention. Although *S* has been found not to be a refugee, his country of origin will not accept his involuntary return. *S* argues he is a refugee, and does not consent to voluntary removal. *S* had come to terms with the indefinite nature of his detention, however he felt isolated and punished by his detention placement in Darwin, and wanted to be moved to a detention facility in Sydney where he could continue to have meaningful contact with a sick family member.

While the main complaint (family separation) has not yet been resolved, the immediate problem causing *S* harm (his detention in Darwin) was dealt with. The Department has declared that Darwin 'remains the appropriate placement' for *S*, and advocates are working with lawyers in Melbourne and Sydney to identify meritorious legal appeals for *S* and others in his situation to deal with the longer-term problem of their indefinite detention, and to avoid his return to Darwin if possible.