JURISPRUDENTIAL SOURCES FOR ESTABLISHING STANDARDS OF THE DUTY OF CARE IN OFFSHORE IMMIGRATION DETENTION FACILITIES

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I INTRODUCTION

In 2012, the Australian Government, by arrangement with the Government of Papua-New Guinea, opened an offshore refugee-processing centre on Manus Island (the MIRPC). This is part of PNG, and is situated in the Admiralty group of islands. By Australian law refugees attempting to get to mainland Australia by boat and without a visa were categorised as "unauthorised maritime arrivals" and were accordingly sent to Manus Island or another offshore centre on Nauru.

The conditions of detention were constantly a source of criticism - politically, in the media, internationally, and amongst civil society. In May 2014 a class action was brought on behalf of detainees and former detainees at the MIRPC, alleging breach of the duty of care by the Commonwealth Government.

"Duty of care" is not a self-defining concept. Its details depend on the exact circumstances. In a detention situation, reasonable expectations need to be identified and standards established as a precursor to identifying whether the duty has been met or breached.

In the Australian context, it is not straightforward to identify what are reasonable standards. This is partly because of the well-known Australian position that international conventions or treaties to which the Commonwealth is a Party do not *ipso facto* become part of Australian domestic law. Thus, such documents as the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the UN Convention against Torture, the UN Convention on the Status of Refugees – to each of which Australia is a Party – do not directly define aspects of the standards going to make up a duty of care.

The article explores how to tease out reasonable standards. It is shown that in

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other areas relating to detention, Australia's embedded approach is that domestic standards should be "informed by international obligations." It is argued that this approach is integral to standard setting for immigration detention. The recent decision to ratify OPCAT (the Optional Protocol to the Convention against Torture) has fortified this policy and expectation.

Drawing upon Australian material - including internal Departmental guidelines, contract provisions, inspection reports possessing persuasive status – and also upon comparable developments in other jurisdictions - notably the UK – it is appropriate to construct the detailed standards that go to make up a "duty of care" regime. These are set out for the Manus Island context.

The Australian position that international obligations do not find their way into domestic law unless and until they are expressly legislated has thus not been an impermeable barrier against absorbing decent standards into offshore immigration detention practice.

The case itself was settled with payment of $70 million by the Commonwealth before these matters could be properly determined in Court.

II THE CLASS ACTION

In May 2014, a class action – *Kamasaee v. The Commonwealth and others* – commenced in the Supreme Court of Victoria. The action was brought on behalf of 1905 persons who had at one time or another been held, or were currently being held, at the Regional Processing Centre situated at Manus Island, Papua-New Guinea (hereafter MIRPC). The basis of the action was breach of the duty of care owed to detainees, such breach having caused various medical, physical and mental health problems to the detainees.

Thus, the action did not in itself challenge the legality or political legitimacy of the Commonwealth's border protection measures with regard to the detention of refugees ("unauthorised maritime arrivals"[1]). The question, fair and square, was whether the mode of carrying out that policy was in breach of prevailing standards of care.[2]

1 *Migration Act 1958* (Cth) s 189.

2 The action was later broadened to include an allegation of unlawful detention. This followed upon a decision of the Supreme Court of Papua-New Guinea that the detention was unlawful by PNG law. This decision was widely reported in the Australian media: see, e.g., 'PNG's Supreme Court Rules Detention of Asylum Seekers on Manus Island Is Illegal', *ABC News,* 27 April 2016." This aspect of the case is not discussed in this paper. The settlement eventually reached in the case did not address the issue of unlawful detention: see n 9, below.

The Commonwealth was the principal defendant. The two second defendants were the operators contracted from time to time to manage the MIRPC – G4S and Transfield.[3] The second defendants each counter-sued the Commonwealth.[4] The plaintiffs' action alleged that the Commonwealth had control or substantial control over the management of and operations at the MIRPC.[5] On that basis, it was argued that the duty of care primarily resided with the Commonwealth.

In the pleadings the Commonwealth referred to the legal and MOU arrangements made with the Government of PNG. The Commonwealth pleaded that it did not have control or substantial control over the management of and operations at the MIRPC. It was argued that the various administrative and legislative arrangements made by Australian legislation, by PNG legislation and by arrangements between Australia and PNG at Government level "did not impinge upon PNG sovereignty nor control of the MIRPC by PNG."[6] These arrangements included the appointment of a PNG Administrator and the presence in the close proximity of the MIRPC of contingents of the PNG Police Force and also the PNG Defence Force.

However, the Commonwealth "admitted that it funded the capital costs and recurrent operational costs of the MIRPC pursuant to agreements between [the Commonwealth] and PNG that were in place from time to time during the claim period, and assisted and provided support to PNG in the operation of the MIRPC."[7]

In addition, if it were established that PNG did indeed control the MIRPC, the Commonwealth pleaded that "the substantive elements of the claims of the Plaintiff … should be determined in accordance with the law of PNG."[8]

Because the case was settled at the last moment,[9] these issues were never formally resolved. However, the position taken by the Commonwealth prima facie possessed

3 These companies were each incorporated by Australian law and were present in Victoria for the purposes of litigation. Transfield has undergone corporate name changes through takeover and amalgamation since the case was commenced, but I shall for simplicity continue to refer to the company by its original corporate moniker.

4 The head contracts with G4S and Transfield required the provision of comprehensive "garrison services". The provision of these services involved sub-contracting specialist health service providers, security providers, welfare service providers, and caterers, and some of these parties were also joined in the action.

5 Statement of Claim, para 29.

6 Defence to the Statement of Claim, para 29(f).

7 Defence to the Statement of Claim, para 28(a)(i).

8 Defence to Statement of Claim, para 31.

9 The settlement was the subject of widespread media coverage in Australia: see, e.g., 'Government Settles Major Class Action Lawsuit with 1900 Manus Island Detainees', *News.com.au,* 14 June 2017. The Commonwealth paid $70 million damages plus legal costs estimated to be more than $20 million. This settlement related only to the duty of care aspect of the litigation. It was made without an admission of liability by the Commonwealth or by any of the other parties to the action. At the time of writing, the terms of the settlement had not yet been finally approved, as required, by the Supreme Court of Victoria, but have subsequently been approved.

little merit. Discovered materials clearly demonstrated what had been evident from the saturation media coverage that has occurred ever since the opening of the MIRPC: that there was absolute dominance by Australian politicians and officials as to every significant element of the management of the Centre.

These elements included: decisions as to who was sent there; decisions as to who would be transferred to another offshore detention centre; decisions as to whether temporary removal would be permitted for medical emergencies; decisions as to whether a new detention centre would be built; and decisions as to what structural and accommodation changes should be made to the existing structure.

Routine or day-to-day matters also fell to be decided by the Commonwealth or its Contractor. The numerous daily or weekly management meetings – "Departmental Weekly Review", "Infrastructure", "Operations", "Transferee Consultative", "Health Services" - were chaired either by Commonwealth DIBP personnel[10] or Contractor or sub-contractor personnel (G4S, Transfield, Wilson Security, IHMS, Salvation Army, etc). A PNG public servant, who nominally and in law was the Operational Manager,[11] was quite often not present at some of the key meetings, such as the Weekly Departmental Review, Operations and Infrastructure meetings. On such occasions his apologies were properly noted in the Minutes.

All reporting lines went up the Australian line, eventually finishing in Canberra. From the most trivial involving expenditure on kitchen equipment or recreational gear to the provision of appropriate amenities (converting western-style toilets into squat toilets) to those relating to self-respect of the detainees (a refusal to permit self-catering) to the most grave (deciding whether a seriously ill detainee would be evacuated to Australia for emergency treatment[12]), Canberra called the shots. The MIRPC was in every sense an Australian detention centre.[13] The detainees' lives and conditions were set by decisions made by Australian functionaries in

10 DIBP is the acronym for the Department of Immigration and Border protection. Over the last 15 years or so, the names of the Commonwealth Department responsible for managing immigration issues have changed quite often. References will be found in this paper to DIAC (the Department of Immigration and Citizenship, DIMIA (the Department of Immigration, Multicultural and Indigenous Affairs), DIMA (the Department of Immigration and Multicultural Affairs) and DIBP.

11 The PNG Migration Act provided for an "Administrator" to be appointed by the PNG Government in relation to MIRPC, and he in turn appointed an Operational Manager.

12 In one particular case, relating to Mr Hamid Khazaei, delays in Sydney with the health service providers' head office and then in Canberra with the responsible DIBP officers, contributed to the death of the detainee. At the time of writing, this case is under consideration by the Queensland Coroner.

13 The 1997 Immigration Detention Standards, adopted by DIMA and incorporated into the contract with the operators stated: "In its operation of the detention facilities the service provider will be under a duty of care in relation to the detainees. Ultimate responsibility for the detainees remains with DIMA." That is the legal starting point for these sorts of arrangement, and the situation at MIRPC should be seen in this context.

accordance with Australian priorities.[14]

III THE APPLICABLE LAW

On this basis, "Australian law" was applicable to the treatment of detainees within the MIRPC.[15] In broad terms, the detainees were owed a duty of care, just as detainees held in mainland immigration detention centres, prisons, closed psychiatric facilities or juvenile institutions are owed a duty of care by the detaining authorities.

However, the concept of duty of care is not self-defining as to detail. The content of such a duty – and thus the determination as to whether it has been breached – depends on the context. The expected standards must be reasonable in the particular context where breach is in question. The templates for such the expected standards going to make up such a duty in, for example, a hospital or on a building site are relatively straightforward and familiar; and the variations in detail depending upon the precise circumstances are easily absorbed into legal decision-making.

The same is true for mainland Australian prisons or juvenile detention centres. In such cases the evolving standards as to the reasonable regime conditions are affected not just by litigation but also by the insights of inspectorate agencies such as the Inspector of Custodial Services in Western Australia and New South Wales, the offices of the Ombudsman in other Australian States, visits by such bodies as the Australian Human Rights Commission, and inquiries by Parliamentary Committees.

The detailed content of the duty of care in a place such as Manus Island had never been explored. The situation was unique. G4S, surveying the facility immediately before taking on the management responsibility, found that it was "in a state of total disrepair".[16] A KPMG report commissioned by DIBP in 2014 referred to "the harsh natural environment, characterised by a hot and humid climate year round… These weather conditions have hastened the deterioration of buildings

14 The nearest modern equivalent is that of the detention centre at Abu Ghraib in Iraq. From the perspective of the USA, it was offshore. However, the clear evidence that it was a US facility from the point of view of management and control led to a conclusion that US law reached there. There were no less than 16 reports into the events at Abu Ghraib, and each proceeded on the basis that US law applied: see International Center for Transitional Justice, *Research Brief – Selected Examples of Defense, Intelligence and Justice Investigative Reports into Detention and Interrogation Practices* (November 2008).

15 Of course, if a detainee committed an offence against PNG criminal law, whether within the MIRPC or outside its confines, PNG criminal jurisdiction would apply.

16 In this paragraph, any factual statements in quotations are taken from the discovered documentation. The substance of the points made has, however, emerged during the saturation media coverage over the years of operation of MIRPC and also from reports made following site visits by Amnesty International, Human Rights Watch and the United Nations High Commissioner for Refugees.

and other infrastructure; for example, substantial accumulation of mould caused by high average rainfall on Manus."

Other evidence showed that the logistical problems of running such a place were immense and constant. Minutes of the various meetings regularly dealt with such matters as delayed supplies, water availability, waste management, rubbish disposal, power outages, air conditioning deficiencies, grey water spillages, drainage issues, outbreaks of gastric illnesses, cramped accommodation, and appalling problems with ablution facilities. The very location of the MIRPC underpinned and exacerbated these things.[17]

Add to that staffing problems, including the difficulties of training locally recruited staff to an acceptable standard, plus the hostility of the local population to having such a facility thrust upon them, and it can be said that there really was no precedent that would define the precise content of the duty of care.

The Australian Government evidently recognised that it would not be a straightforward task to deliver services to an acceptable standard. Each of the head contracts contained a clause along the following lines: "The primary objectives of this Contract are to:

> … provide transferees[18] with a standard and range of operational and maintenance services that is the best available in the circumstances, and utilising facilities and personnel on Manus Island (PNG), and that as far as possible (but recognising any unavoidable limitations deriving from the circumstances of Manus Island) is broadly compatible with services available within the Australian community…

The reference to "unavoidable limitations" reads like an "escape clause", an attempt to influence downwards the detailed content of the duty of care. However, it is elementary that a party cannot unilaterally decide that the duty of care should be less on account of a decision it has knowingly made to carry out an activity in a location where normal standards will be difficult to meet.[19] What constitutes reasonable standards is objective, not subjective.

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17 The nature of offshore detention facilities located in tropical zones within developing countries makes this kind of dysfunctionality almost inevitable. For example, the author and a colleague inspected Maafushi Prison, an offshore island facility in the Maldives, in 2006, and found comparable problems.

18 The word "transferees" was the preferred Government usage to describe persons detained at the MIRPC.

19 Ironically, if the case had gone to trial, the main import of this clause would probably have been to relieve G4S and Transfield (and thus their own sub-contractors) of any liability to the Commonwealth. Each of them, and particularly G4S, constantly notified DIBP of the difficulties and risks in providing services to an appropriate standard within the "unavoidable limitations" of the situation at Manus Island. G4S even explicitly warned the Commonwealth that decisions made in Canberra in late 2013 were likely to lead to a disturbance by detainees – something that actually occurred, with tragic consequences.

IV THE RELEVANCE OF INTERNATIONAL OBLIGATIONS IN RELATION TO THE STANDARDS FOR IMMIGRATION DETENTION

The "unavoidable limitations" clause referred to the standards being "as far as possible…broadly compatible with services available within the Australian community." This formulation picks up on the tone of several other documents pertinent to the way Australia purports to deal with conditions of detention generally and in relation to the human rights aspects.

As is well understood, international covenants or protocols to which Australia is a party do not of themselves become part of domestic law. They must be enacted into domestic law. It is that domestic law, rather than the international rule that it purports to adopt, that sets the relevant legal standard. So the quite detailed provisions of such instruments as the International Covenant on Civil and Political Rights, or the Convention on the Rights of the Child, or the United Nations Convention against Torture and other forms of Cruel, Inhumane and Degrading Treatment are not *per se* adopted into Australian law.[20]

However, such provisions are not nugatory. There would be little point in ratifying these provisions if they were to be completely ignored. Whilst it has not generally been the Australian way to enact these provisions into domestic law[21], nevertheless internal Australian guidelines have been developed that encapsulate the domestic position. The model followed by these domestic guidelines has been that, explicitly or sometimes implicitly, the international standards "inform the approach" that is adopted..

This has been the case with immigration detention. The 1997 Immigration Detention Standards[22] state that: "Australia's international obligations *inform the approach* to the delivery of the detention function." These Standards had been developed by DIMIA (the Department of Immigration and Multicultural Affairs[23]) and were incorporated into the contract with the then private operators, Australian Correctional Management (now GEO). Of course, this was in relation to on-shore detention.

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20 The UN Convention on the Status of Refugees (1951) primarily addresses the question of the legal status of refugees and the obligations of nations in relation to determining their status and, once that has been established, not returning them to the countries from which they have fled. The obligations of the receiving nation with regard to Welfare (Arts 20-3) are quite sparse, and would seem to have been predicated on the assumption that most refugees would be living in the open community.

21 The *Racial Discrimination Act* (C'th) is an exception.

22 These are set out in Appendix H of the Report of the Joint Standing Committee on Foreign Affairs (1997).

23 The Government Department then responsible for the management and administration of immigrant detention facilities.

The 2002 version of these Standards was likewise incorporated into the management contract. This version was more explicit: "Australia's international obligations, such as those relating to human rights, *inform the approach* to the delivery of the detention function."[24] By 2002 a decision had already been made, though had not yet been implemented on the ground, to hold detainees in an offshore centre – Christmas Island.[25]

The G4S contract for the management of the MIRPC contained the following clause: "The goal is to provide a safe and secure environment for transferees, service personnel, Departmental personnel and all the other people at the site, ensuring that each individual's human rights, dignity and well-being are preserved." This clause was submitted to DIBP as part of the contract negotiation process, and appears to have been accepted.

Picking up on the clear Australian policy that standards for immigration detention should be "*informed by international standards*", the Australian Human Rights Commission published in 2013 a comprehensive document, "*Human Rights Standards for Immigration Detention*."[26] This avowedly draws upon international human rights law and treaties, as well as interpretative documents such as United Nations commentaries to the relevant conventions.

Earlier, the Commission had published a thematic review of the particular situation of children in immigration detention, "*The Forgotten Children*."[27] This document also drew upon international human rights law and treaties, in particular the Convention on the Rights of the Child. The Commission's various site inspections of onshore centres, as well as Christmas Island, likewise used these standards as a reference point.

It would seem clear, therefore, that the content of the duty of care in the particular situation of immigration detention has indeed been "*informed by Australia's international obligations*", albeit in a circuitous manner rather than by direct legislation.

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24 Immigration Detention Standards, including Performance Measures, (Department of Immigration and Multicultural Affairs, 2002).

25 Christmas Island is part of Australia for administrative purposes. However, the Migration Amendment (Excision from Migration Zone) Act 2001 treated Christmas Island as not being part of Australia for the purposes of falling within the usual protections accorded to refugees landing in Australia. To all intents and purposes, the detention centre at Christmas Island was offshore.

26 (Australian Human Rights Commission, 2013).

27 *The Forgotten Children: National Inquiry into Children in Immigration Detention*, (Australian Human Rights Commission, 2014).

V OTHER TYPES OF DETENTION AND THE RELEVANCE OF INTERNATIONAL OBLIGATIONS TO AUSTRALIAN STANDARDS

The policy of "*informing Australian standards by international obligations*" can almost be said to be an embedded and traditional approach. This has been the case with regard to both adult and juvenile imprisonment.

The United Nations Standard Minimum Rules for the Treatment of Prisoners (1957)[28] have not been directly adopted by legislation into Australia. However, the Standard Guidelines for Corrections in Australia, promulgated by the Australian Correctional Ministers' and Administrators' Council in 1996, broadly cover all the main provisions of the Standard Minimum Rules. They have subsequently been revised several times, most recently in 2012.[29] All Australian jurisdictions subscribe to the content of these Guidelines.

Similarly, Australia has not directly legislated for adoption of the standards set out in the Convention of the Rights of the Child 1989 and the Rules for the Protection of Juveniles Deprived of their Liberty 1990. However, in 1999 the Australian Juvenile Justice Administrators agreed upon and published the AJJA Australian Standards for Juvenile Custodial Facilities. In broad terms, this document (revised most recently in 2009) reflects and has been *informed by these international standards*.

These two examples fortify the argument that the Australian Government has committed to the policy that the standards for immigration detention should be *informed by international standards*.

VI THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (OPCAT)

The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (to give it its full name) sets universal standards for how States should treat people. The Optional Protocol, which has been operational since 2006,[30] sets standards for conditions in "places where persons are deprived of their liberty." This notion is further defined as follows:

> "Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will, by order of any

28 The Rules were updated in 2015 and are now known as the Mandela Rules.

29 The Council has not yet considered the revisions and clarifications introduced in 2015 into the Mandela Rules.

30 It became operational once 20 signatories had ratified it.

> judicial, administrative other authority."[31]

This definition covers prisons, juvenile detention centres, closed psychiatric wards, police lock-ups and other less obvious forms of detention such as some aged care arrangements. It also, self-evidently, covers immigration detention centres, even if it is accepted that detention there is administrative rather than judicial or punitive.

Australia, already a ratifying signatory of the UN Convention against Torture, signed OPCAT in 2009. Signature would in itself indicate clearly that Australian practice and standards should be "*informed by international obligations*." The Government has now committed to ratification by the end of 2017,[32] strengthening that policy even more.

In practical terms, ratification commits the Government in two ways: first, to permit UN inspections of "places where persons are deprived of their liberty"; and second to establish a domestic network of agencies ("national preventive mechanisms", to use OPCAT language) to inspect such places.

These inspections will be against OPCAT standards. There has been considerable litigation in Europe fleshing out the notion of what is "inhuman or degrading,"[33] and these cases have some persuasive power in terms of identifying the content of the duty of care owed by the detaining authorities. In the context of immigration detention, the UN has already adopted the viewpoint that "migrant-related detention should not bear similarities to prison-like detention."[34] The standards should be superior; thus, the duty of care even broader. This is an important observation when detailed standards are being developed.

In that regard, it should be noted that the huge immigrant detention population[35] of the USA was initially held in conditions that were prison-like. A 2009 review carried out on behalf of the department of Homeland Security stated:

> "With only a few exceptions the facilities that the Immigration and Customs Agency (ICE) uses to detain aliens were originally built, and currently operate as, jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans and population

31 OPCAT, art 5(1).

32 On 15 December 2017, Australia formally ratified OPCAT: Attorney-General and Minister for Foreign Affairs (Media Release).

33 This is the formula of the European Convention on Human Rights, omitting the UN Convention's reference to "cruel" treatment. See generally D Van der Smit and S Snaeken, *Principles of European Prison Law and Policy - Penology and Human Rights* (Oxford University Press, 2009).

34 UN Special Rapporteur on the Human Rights of Migrants, *Report to the General Assembly*, (4 August 2010) para 87.

35 The throughput is typically more than 300,000 annually. In 2012 the figure reached 477, 523.

> management strategies are based largely on command and control. Likewise, ICE adopted standards that are based on corrections law and promulgated by correctional organizations to guide the operation of jails and prisons."[36]

Responding to this report in 2013, ICE has introduced regimes that try to move away from the prison experience, by implementing "Performance-based National Detention Standards" (PBNDS):

> "PBNDS reflects the ICE's ongoing efforts to tailor the conditions of immigration detention to its unique purpose while maintaining a safe and secure environment for staff and detainees… PBNDS is crafted to improve medical and health services, increase access to legal services and religious opportunities, improve communication with detainees, … improve the processes for reporting and responding to complaints, and increase recreation and visitation."[37]

Thus, the differentiation between judicially-ordered prison detention and administratively-imposed immigration detention has worked its way into the notion of international obligations and standards. This has likewise been the case in the UK, as will be seen in the next Section. Australia's approach can be expected to be "informed by" this evolving international obligation. The detailed content of the duty of care should reflect this expectation.

VII THE UK EXPERIENCE

Like Australia, the UK has had to address the question of immigration detention standards, mindful of those same international obligations that it has accepted. The Detention Centre Rules 2001 are more explicit than Australia's 1997 and 2002 approach to be "*informed by international obligations*":

> "The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and their right to individual expression."[38]

In 2006, Her Majesty's Inspector of Prisons was given jurisdiction to inspect such

36 D Schriro, *Immigration Detention Overview and Recommendations* (Department of Homeland Security) 4.

37 'ICE Performance-Based National Detention Standards' in 2011 Operations Manual, (Department of Homeland Security, 2011) 1.

38 Para 3(1).

centres. The modus operandi of the Inspector in relation to all functions has been to develop a document of "Expectations" – what amenities and conditions should be found at the particular type of institution and how it should be managed. In the UK there is a mixed model of State-managed and privately managed immigration detention centres, and "Expectations" applies equally to each.

"*Expectations*" (2012) is a remarkable document, operationalising in great detail what standards the service providers should meet, and identifying the relevant international instrument(s) underpinning each particular expectation. There are four main categories: Safety, Respect, Activities and Preparation for Release.

"Safety" covers such matters as early days in detention, bullying, self-harm and suicide prevention, security, a rewards scheme, the use of force, punishment and isolation, legal rights, and casework (including individual management plans).

"Respect" picks up such matters as living conditions, staff-detainee relationships, faith and religion, complaints systems, privacy, health services, and detainee services generally.

"Activities" is summarised as the need for the detention centre to encourage activities and provide facilities to preserve and promote the mental and physical well being of detainees. Thus such matters as recreational facilities, educational opportunities, spiritual needs, availability of fitness equipment, and access to open air are spelt out.

"Preparation for release" may at first be thought not to be as relevant in the Australian context, where detention may be indefinite in duration. However, the notion encompasses such matters as links with the outside world (telephone, internet), access to social and official/legal visitors, safe keeping of private property, and possible permanent settlement (in Papua-New Guinea or some other country) following positive determination of refugee status.

"Expectations" thus encompasses virtually all the matters that should be covered in the standards of an immigration detention centre. These standards have been "road tested" by the UK Inspector in frequent inspections. "Expectations" is a robust and comprehensive standards document, informed directly by international obligations.

The Australian Immigration Detention Standards 1997 and 2002 refer to a similar range of issues: safety, respect, dignity, social interaction, activities, accommodation and living conditions, and so on. This has been done in less detail and without explicit cross-references to international standards. Yet both documents were clearly *informed by the international standards* and norms prevailing at the time, and in that regard are congruent with "Expectations".

The 2013 AHRC document, "*Human Rights Standards for Immigration Detention*", mirrors "Expectations" in that it explicitly anchors itself in and is *informed by international norms and standards*. In this way, it resembles that document in scope and spirit.

The two main service contracts, with G4S and Transfield, specify in Schedule 1 – "Statement of Work, Nature of the Services" - a range of obligations that overlap in many places with the standards set out in "Expectations" and the AHRC Standards. Similarly, the Regional Processing Centre Guidelines, specifically developed by DIBP for the management of the MIRPC, also draw upon and are *informed by these same international obligations*, though without specific references.[39]

These Guidelines contain 44 separate main sections. Two provisions - Service Provider, Code of Conduct, Employees and Service Provider, Code of Conduct, Organiser - are informed by international obligations. There are detailed requirements as to "an open and accountable organisation", the need for a supportive culture", the desirability of "promoting a healthy environment", the importance of enabling "complaints about conduct" to be dealt with fairly and expeditiously, and above all "the duty of care and case management" of the provider and the employees.

These Codes of Conduct have been explicitly incorporated by reference into the contracts between the Commonwealth Government and the providers.[40]

VIII DUTY OF CARE

In the light of the foregoing material, it would seem that the content of the duty of care, or the detailed standards and practices that should be followed in dealing with detainees, should properly be derived from the international obligations that Australia has accepted.

As has been shown, the Australian Government has in fact drafted many of its contractual and other documents in ways that are informed by those obligations. This has been the Australian way in relation to most such human rights obligations, as has been shown with prisons and juvenile detention centres.

Proceeding on this basis, I have identified 36 standards that seem to encapsulate overall and have particular relevance to how the MIRPC should have been managed. These are set out below.

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39 The MIRPC Contract Administrator of DIAC (now DIBP) formally approved these Guidelines on 11 June 2013.

40 Cl s 5.5.1 and 5.5.2 (G4S), and cl 5.5.1.a (Transfield)

A. STANDARDS RELATING TO SECURITY AND SAFETY

1. Detainees should feel safe and be safe on their reception into the Centre. They should be treated with respect upon their arrival, and be fully supported physically and psychologically during their early days in detention. They should be helped to understand the Centre's routines and how to access available services.

2. Detainees should, as far as possible, be protected from bullying by other detainees, and management procedures should be in place to prevent victimisation.

3. There should be no bullying or victimisation of detainees by staff and, if it does occur, there should be procedures in place to prevent it happening again.

4. The Centre should provide a safe environment that reduces the risk of self-harm or suicide, and vulnerable detainees should be treated in a way that supports them through crises.

5. Detainees should be protected from harm and neglect, and receive safe and effective care and support.

6. There should be no unnecessary restriction on freedom of movement within the immigration detention centre.

7. The elements of dynamic security should be in place.

8. There should be a rewards or incentives scheme, calibrated so as to encourage positive participation in the detention regime.

9. Force and disciplinary sanctions should be kept to the minimum necessary to achieve an orderly environment.

10. Discipline and Punishment Units should only be used for reasons of safety or security. They should not be unduly repressive, and they should only be used for the shortest possible period. Procedures should be in place for regular review of the situation of persons held in these Units.

11. There should be effective information flow about detainees' individual situations. Detainees should be assisted to understand why they are

detained, and what stage their cases have reached.

12. The Centre should be managed in such a way as to minimise the risk of harm to the mental health of detainees.

B. STANDARDS RELATING TO RESPECT

13. Detainees should live in a clean and decent environment that is in a good state of repair and fit for purpose.[41]

14. Detainees should be consulted about the proposed changes to the routines and amenities of the Centre.

15. Staff should not "over-use" their authority to gain compliance with the routines and rules.

16. Detainees should be able to wear their own clothing. If necessary, adequate clothing should be supplied to them at no cost. It should be appropriate for the climatic conditions. When necessary, it should be replaced.

17. Personal property should be carefully stored and accessible on request, and lost property should be fairly compensated

18. The amenities at the centre should be such as to ensure that detainees are able to keep themselves, their rooms and the communal areas clean.

19. Detainees should be treated with humanity and respect for human dignity at all times. Relationships between detainees and staff should be positive and courteous.

41 This Standard has in Australia been extensively defined. DIAC (the Department of immigration and Citizenship) existing facility fell short of the August 2008 developed *Standards for Design and Fit-out of Immigration and Detention Facilities* (August 2008). These were reflected in the Concept Design Report commissioned by DIBP (November 2013) to guide the construction of the proposed New Regional Processing Centre at Manus Island. This new construction never went ahead. The DIAC Standards do not explicitly draw upon international guidelines, for there are none that are directly applicable. However, they are consonant in tone with the International Committee of the Red Cross document, "*Water, Sanitation, Hygiene and Habitat in Prisons*", as well as with the broad thrust of the Immigration Detention Standards 2002. The UK "*Expectations*" draws upon provisions of the International Covenant on Civil and Political Rights as an anchor point for its own standards. The fact that a Concept Design was developed indicates that the DIBP was aware of the deficiencies in this key aspect of the MIRPC, which fell short of the August 2008 Standards.

20. Every detainee should have access to someone who can keep a particular eye on his case and welfare.

21. Staff should have training in, and show proper regard for, the cultural backgrounds of detainees and the uncertainty of their situations, particularly with regard to immigration issues.

22. There should be no discrimination (by staff against detainees, by detainees towards each other); equality (between groups of detainees and between religious groups) should be upheld; diversity should be respected; and the treatment of those with disabilities should be equitable.

23. Detainees should be enabled to practice their religion fully and in safety, and different religious faiths should be recognised and respected.

24. There should be a procedure for making complaints; there should be no adverse repercussions for doing so; and complaints should be dealt with fairly and responded to promptly, with either a resolution or a comprehensive explanation of future action.

25. Health services available to detainees should be resourced and structured so as to take full account of their likely health profile and needs.

26. Detainees who experience medical emergencies should have access to proper emergency treatment.

27. Detainees should have a varied, healthy and balanced diet which meets their individual needs, including religious, cultural or other special dietary requirements. Also, detainees' food and meals should be stored, prepared and served in line with religious, cultural and other special dietary requirements and prevailing safety and hygiene regulations.

28. There should be self-catering arrangements, where feasible.

C. STANDARDS RELATING TO ACTIVITIES

29. Detainees should have access to facilities and activities that meets the needs of the population.

30. Activities and facilities should provide physical and mental stimulation and alleviate boredom.

31. Detainees should have access to a range of classes, training and creative pursuits, including the teaching of English.

32. Fitness provision should be safe and meet the needs of all detainees.

D. STANDARDS RELATING TO PREPARATION FOR RELEASE

33. The regime should be managed on the basis that release will eventually occur, and during the period of detention detainees should be treated in ways that will optimise their chances of coping successfully with their post-release situation.

34. Detainees should, as far as practicable and subject to considerations of security and safety, be able to maintain contact with the outside world, whether by receiving visits or through mail services or electronic means.

E. STANDARDS RELATING TO ACCOUNTABILITY

35. Immigration detention centres should be subject to inspection by an autonomous agency, having full access to the site and to detainees and other persons working there. This agency should have the right to report their findings to an appropriate body such as Parliament.

36. The Government should itself have in place mechanisms for the active supervision and improvement of performance by the contractors or agencies that are managing the centre.

These standards reflect good practice that has become integrated into the duty of care to which Australia (implicitly) and the UK (explicitly) aspire, standards

informed (in the case of Australia), and driven (in the case of the UK), by international obligations.

IX WHAT AMOUNTS TO A BREACH OF THE DUTY OF CARE?

In assessing whether there has been a breach of the duty of care, a failure to meet any particular standard cannot be treated as *per se* amounting to a breach. The more detailed and numerous the aspects of an acceptable care regime, the less appropriate it is to treat any particular standard as definitive in determining whether the duty of care has been met or breached.

Having said that, some elements are qualitatively more important than others. For example, Standard 13 – a decent environment – is qualitatively more important than Standard 28 (self-catering). And Standard 25 (health services) is more important than Standard 31 (education classes). Likewise, Standard 3 (no bullying by staff) is more important than Standard 8 (rewards and incentives).

Of course, failure to meet any of these Standards impacts on the quality of life of detainees. But a decent environment and availability of good health services and no staff bullying go to the very essence of human dignity and survival in a situation where the ability of detainees to influence, let alone control, daily routines is so much diminished. The other matters, whilst important, are less essential.

To evaluate whether the duty of care has been met or breached, therefore, it is the overall regime that must be examined. The balance of the regime should be expected to broadly match the detailed Standards, or at least not fall far short of them, particularly with regard to those that go to the very essence of human dignity and survival.

X THE OUTCOME

The purpose of this article is not to evaluate the MIRPC regime as such but to identify a jurisprudential path towards developing standards by which that regime, and similar ones involving immigration detention (whether offshore or onshore), can be measured and duty of care obligations identified. Suffice to say that the class action, *Kamasaee v. The Commonwealth* was settled by payment of $70

million damages.[42]

The Australian position that international obligations do not find their way into domestic law unless and until they are expressly legislated is thus not an impermeable barrier against absorbing aspects of those obligations into domestic law. The duty of care owed to immigration detainees has been substantially influenced and informed by international obligations.

The MIRPC was physically a closed environment. However, the very fact that the Kamasaee case was commenced blew some fresh air through it, and should cast light upon the approach for any future litigation relating to conditions at refugee detention centres.

42 Above n 9.